OIL AND WATER: REGULATING THE BEHAVIOR OF MULTINATIONAL CORPORATIONS THROUGH LAW

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I. INTRODUCTION

Regulating the activities of multinational corporations, especially oil companies, represents a fundamental challenge to the international legal order, which is premised on the centrality of states.[1] The fact that the largest multinationals now dwarf the economies of many countries and frequently mobilize greater political influence is suggestive of their importance.[2] Nevertheless, far more consideration has gone into analyzing the international legal status of natural persons—especially in the context of international criminal law—than their juridical counterparts.[3]

This is, perhaps, to be expected. War criminals and *génocidaires* are more obviously deserving of and susceptible to international prosecution and punishment than corporations. More importantly, perhaps, there is a longer history of prosecuting and punishing them: The Nuremberg Trials are the iconic example of this, but these built in turn upon a longer history of individual responsibility at international law, most consistently with respect to pirates.[4] In addition, however,

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1. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57-58 (5th ed. 1998).

2. For example, Texaco operated for years in Ecuador with annual global earnings four times the size of Ecuador's GNP and with the active support of the U.S. government. Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56, 58 (1999). *See also id.* at 65 (noting that many developing countries face transnational corporations with revenues many times larger than their domestic economies).

3. *See* BROWNLIE, *supra* note 1, at 565.

4. *Id.* at 235-37.

such individuals tend to have fewer defenders in the governments of the wealthy countries that frequently drive transformations in the law. The result is that we now have a functioning International Criminal Court[5] that seems likely to have jurisdiction over a great many natural persons—for the time being excluding citizens of the United States, among others—but no comparable regulatory framework for corporations. Instead, six months after the Statute for the Court was adopted, U.N. Secretary-General Kofi Annan proposed the Global Compact, challenging business leaders to abide by principles on human rights, labor, and the environment that are essentially voluntary.[6]

This Article will survey attempts to fit corporations into the state-based international order in three discrete jurisdictions. First, and most obviously, it is appropriate to regulate the activities of a corporation through mechanisms in the jurisdiction within which it is actually operating. Sometimes this may not be possible, however. A state may be unable or unwilling to regulate the activities of an entity with an operating budget substantially greater than that of the country itself. Alternatively, the government itself may be perpetrating abuses in which a corporation is complicit. Second, therefore, attempts are sometimes made to pursue legal remedies in the home jurisdiction of a multinational corporation—especially when that jurisdiction is the United States. A third jurisdiction in which legal remedies may be pursued is that of international law as such, particularly through the emerging discourse of international criminal law.

The recent turn to voluntary codes of conduct, such as the Global Compact and the idea of corporate social responsibility, are an admission that efforts to regulate multinational corporations through such legal regimes have failed. Though there are reasons to be hopeful about the impact of these voluntary mechanisms, they shift the burden of compliance in large part from the legal division of a corporation to the marketing division.

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5. *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at 5, U.N. Doc. A/CONF.183/9 (1998).

6. *See* United Nations, *The Global Compact: Overview*, *at* http://www.unglobalcompact.org/Portal/Default.asp (Mar. 17, 2004).

This Article first will make some observations about international personality and international law in general before considering these three jurisdictions. Then it briefly will contrast the various legal avenues with the voluntary mechanisms that have come to dominate this area.

II. International Law and Multinational Corporations

A. *The State-Centric Nature of International Law*

In every legal system, certain entities are regarded as possessing rights and duties enforceable at law. The recognition of those entities as "legal persons" is itself determined by law, a tautology that is reinforced in international law by the centrality of states not merely to the form but also to the substance of its norms.[7] The practice and consent of states remains axiomatic to the concept of international law, and through the protection of territorial integrity and sovereign immunity states are its primary beneficiaries.[8] This is replicated in the institutions of international order: Only states are recognized as members of the United Nations; only states may bring contentious claims before the International Court of Justice.[9]

International law, especially in the last two decades or so, has seen far greater participation by non-state entities in the processes that lead to its development.[10] This has been true especially on issues that constrain state behavior, such as human rights and the environment; the Rome Statute that established the International Criminal Court, for example, was in large part the work of non-governmental organizations.[11] But an increase in participation is not the same as a transformation in the conception of personality. In part this depends on where one sets one's boundaries. Does personality depend on having the capacity to enforce rights? Or is it possible to

7. Brownlie, *supra* note 1, at 57.

8. *See, e.g.*, U.N. Charter art. 2, paras. 4, 7.

9. Statute of the International Court of Justice art. 34, para. 1. *Cf.* Mavrommatis Palestine Concessions (Greece v. United Kingdom), 1924 P.C.I.J. (ser. A) No. 2, at 10, 12 (Aug. 30) (allowing the Greek government to sue on behalf of a Greek national).

10. *See* P.J. Simmons, *Learning to Live with NGOs*, Foreign Pol'y, Fall 1998, at 82, 83-84.

11. *See, e.g.*, Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 Geo. Wash. Int'l L. Rev. 71 (2000); Simmons, *supra* note 10, at 82.

assert personality merely for the purpose of having rights enforced against an entity—responsibility without rights, as it were? The latter is probably what we mean when we contemplate including multinational corporations into the corpus of international law. By way of contrast, however, the inclusion of individuals generally has been on the basis that though humans may now have rights under international law, for the most part it is only states that have duties.[12]

This inconsistency is an example of a frequent contradiction in international law. Borrowing the terminology of the international relations scholars, such contradictions arise when international law attempts to use a realist foundation to pursue an idealist agenda.[13]

B. *The Problem of Multinational Corporations*

In 1995, the Commission on Global Governance began its final report with some observations about the challenges that globalization presented to the international order:

> When the United Nations system was created, nation-states, some of them imperial powers, were dominant. Faith in the ability of governments to protect citizens and improve their lives was strong . . . . Moreover, the state had few rivals. The world economy was not as closely integrated as it is today. The vast array of global firms and corporate alliances that has emerged was just beginning to develop. The huge global capital market, which today dwarfs even the largest national capital markets, was not foreseen.[14]

Where, then, do the multinational corporations fit in this schema?

In theory, multinationals should not raise special problems in the application of international law. Human rights and other obligations assumed by states require governments to ensure that actors operating within their territory, or

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12. *See* BROWNLIE, *supra* note 1, at 57-60 and 521-22.

13. Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 356 (2002) (discussing the tension between the realist terminology and idealist views of international law).

14. COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBOURHOOD 3 (1995).

otherwise subject to their jurisdiction, comply with those obligations, if necessary through the enactment of appropriate national legislation.[15]

In practice, however, governments—especially in the developing world—may not undertake measures necessary to ensure compliance by multinationals operating within their jurisdiction. This applies particularly to labor standards: Such measures tend to increase costs and therefore may lead to a reduction in investment, with capital perhaps being redirected to other countries with lower standards and therefore cheaper costs (this is referred to as the "race to the bottom").[16] Failure to regulate is perhaps the most commonly voiced concern, but companies also may be complicit in human rights violations by the government itself. Allegations of forced labor in Myanmar (Burma) in the context of Unocal's pipeline project there are merely one of the more high profile cases of this.[17]

There are two basic ways in which multinationals might be afforded some measure of international personality. The first is on the same basis that natural persons may assume qualified personality. Much as legal persons at domestic law may exercise many of the same rights and bear the same obligations as natural persons, it is arguable that this could be extended to international law. Since corporations have now been found guilty in domestic jurisdictions (including the United States) of manslaughter and even murder,[18] it might be argued that the international criminal obligations that apply to individuals could be extended to corporations. The jurisprudential foun-

15. *See* Jochnick, *supra* note 2, at 65-66.

16. *Cf.* Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 740, 754-56 (1999) (discussing the way in which divergent labor standards create a "race to the bottom" as countries with higher standards experience a deterioration in working conditions).

17. *See infra* text accompanying notes 63-76.

18. *See, e.g.*, People v. O'Neil, 550 N.E.2d 1090 (Ill. 1990) (convicting a former president of Film Recovery Systems, Inc., two officers of the corporation, the plant manager, and the plant foreman for the cyanide poisoning death of an employee at the plant); Granite Constr. Co. v. Superior Court, 197 Cal. Rptr. 3 (Cal. Ct. App. 1983) (holding that a corporation may be prosecuted for manslaughter due to death of seven construction workers at a plant site); People v. Deitsch, 470 N.Y.S.2d 158 (N.Y. App. Div. 1983) (reinstating an indictment for manslaughter, criminally negligent homicide, and reckless endangerment against individuals and the corporation for an employee's death after a warehouse fire).

dation for this qualified personality is that any legal person may accept that another entity possesses personality in relation to itself, though such personality operates only *in personam*.[19] Some support may be found for this approach in the application of economic sanctions. The 1993 Security Council resolution establishing a sanctions regime against UNITA in Angola is of interest for two reasons. First, it imposed an oil and arms embargo against a non-state entity—the rebel group UNITA.[20] Second, however, the Council called upon states "to bring proceedings against persons *and entities* violating the measures imposed by this resolution and to impose appropriate penalties[.]"[21]

Problems attendant to such an approach will be considered in Part III of this Article,[22] but it is arguable that multinational corporations are in any case unique and should be treated separately from individuals: Relations between the state and a foreign corporation that may dominate that state's economy are clearly distinct from relations between that state and aliens and their assets. The second approach to the question of the international legal personality of corporations therefore has been to establish a new category of personality—comparable, perhaps, to the treatment of international organizations.[23] Various attempts have been made to draw up guide-

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19. *See* BROWNLIE, *supra* note 1, at 66, 565-68, 584-87.

20. S.C. Res. 864, U.N. SCOR, 49th Sess., pt. 1 ¶ 19, U.N. Doc. S/INF/49 (1993).

21. *Id.* ¶ 21 (emphasis added).

22. *See infra* Part III.

23. International organizations (most obviously the United Nations) have been recognized as having international legal personality, but this personality is delimited by the nature of its origin in the consent of states:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice . . . . [T]he Court concludes that the *Members have endowed the Organization* with capacity to bring international claims when necessitated by the discharge of its functions.

Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 180 (Apr. 11) (emphasis added). However, it was further held that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone." *Id.* at 185.

lines governing the international conduct of these entities, including efforts by the OECD,[24] the ILO,[25] and the U.N. Commission on Transnational Corporations.[26] The 1987 Restatement of the Foreign Relations Law of the United States nevertheless concluded that, while the multinational corporation was an established feature of international life, it "has not yet achieved special status in international law[.]"[27]

This is probably still true, and yet international law has shown itself to be a little more flexible with regard to legal personality than a first encounter might suggest. In addition to the qualified personality accorded to individuals already mentioned, courts have on occasion recognized the legal personality of other bodies. The following quote is taken from a judgment in the 1930s:

> [I]t is enough to point out that the modern theory of the subjects of international law recognizes a number of collective units whose composition is independent of the nationality of their constituent members and whose scope transcends by virtue of their universal character the territorial confines of any single State. It must be admitted that only States can contribute to the formation of international law as an objective body of rules . . . . But it is impossible to deny to other international collective units a limited capacity of acting internationally within the ambit and the actual exercise of their own functions with the resulting international juridical personality and capacity which is its necessary and natural corollary.[28]

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24. Guidelines for Multinational Enterprises, DEP'T ST. BULL., July 19, 1976, at 84-87.

25. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422, 423-30.

26. Draft United Nations Code of Conduct on Transnational Corporations, 23 I.L.M. 627 (1984); *see also* United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations, 22 I.L.M. 177-206 (1983) (discussing the background and legislative basis for the United Nations Code of Conduct on Transnational Corporations).

27. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213(f) (1987).

28. Nanni v. Pace and the Sovereign Order of Malta, 8 ANNUAL DIGEST OF REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 1935-37, at 2, *reprinted in* D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 142 (5th ed. 1998).

The Court might have been talking about corporations, but it was in fact discussing the Sovereign Order of the Knights of Malta, first established during the Crusades as a nursing brotherhood and military organization directed against Muslims. The other "international collective units" to which it referred included, notably, the Holy See.[29]

The question of the international legal personality of multinationals remains, therefore, an open one. As we shall see, most of the attempts to regulate their behavior through law have taken place in domestic jurisdictions—either the local jurisdiction in which a wrong takes place or the home jurisdiction of a multinational—though there was a brief attempt to include them in the framework of the International Criminal Court.[30]

III. Avenues for Regulation

This third Part briefly will review the three discrete jurisdictions in which corporate accountability may be pursued. In the interests of simplicity, these will be referred to as the local jurisdiction, the home jurisdiction, and international jurisdiction.

A. *Local Jurisdiction*

As indicated earlier, the consequences of any wrong perpetrated by a multinational corporation generally will fall in a particular state. In such instances, the primary responsibility for pursuing remedies lies with the state in which the wrong occurs.[31] For example, the Inter-American Court of Human Rights has observed that a state violates the rights of its citizens "when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention."[32] This is an application of the general principle in human rights and other conventions that provides that

29. *Id.* at 123-24.

30. *See infra* text accompanying notes 114-116.

31. *See* Jochnick, *supra* note 2, at 65-66.

32. *Velásquez Rodríguez*, Case 7920, Inter-Am. C.H.R. 35, OEA/ser.L/V/III.19, doc. 13 (1988).

states parties undertake "to respect and to ensure" certain rights.[33]

In situations where a state is unable or unwilling to regulate such activities, however, or where the state itself is perpetrating the wrong with some measure of complicity on the part of a multinational, it might be appropriate to seek redress in other jurisdictions. The most obvious is to turn to the jurisdiction where the corporation has its base—and, importantly, its money.

B. *Home Jurisdiction*

If it can be established that a corporation or its officers have violated the laws of its home jurisdiction, such as by engaging in practices proscribed in that jurisdiction wherever they occur (as many countries prohibit certain war crimes, for example, wherever they occur), bringing an action there against the corporation might be an attractive avenue.[34] This Part briefly will consider one important barrier to such proceedings—the problem of *forum non conveniens*—and the most important means of avoiding it in the most important jurisdiction: the U.S. Alien Tort Claims Act.[35]

1. *Forum Non Conveniens*

Forum non conveniens is a principle in the conflict of laws whereby a forum—in other words, a court—technically entitled to exercise jurisdiction over a matter may forgo its jurisdiction in favor of another forum that could entertain the case more conveniently.[36]

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33. *See, e.g.*, International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 2, para. 1, 999 U.N.T.S. 171, 173 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .").

34. *See, e.g.*, Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 407-10 (2002).

35. 28 U.S.C. § 1350 (2001).

36. *Forum non conveniens* rules are embodied in federal practice for the most part in the transfer provisions of 28 U.S.C. § 1404(a) (2001).

The Bhopal case[37] provides an example of this doctrine in action. In 1984 in Bhopal, India, a pesticide plant run by Union Carbide India Limited, a subsidiary of U.S.-based Union Carbide, malfunctioned, and clouds of toxic gas were released, killing thousands and crippling many more.[38] India filed a civil suit before a federal court in the United States against the parent company, Union Carbide, arguing that it functioned in all material respects as the same enterprise as the Indian subsidiary and that conduct specifically connected to the cause of the Bhopal incident occurred in the United States.[39] The trial judge accepted Union Carbide's argument of *forum non conveniens*, however. The appropriate forum for the case, in Judge Keenan's view, was India.[40] Holding that U.S. citizens had limited "interest" in hearing such a case, he urged India's judges to "stand tall before the world" and use the litigation as an "opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system[.]"[41] Shortly after the U.S. proceedings were dismissed, the Indian Supreme Court brokered a U.S.$500 million settlement—relatively large by Indian standards, but almost certainly far less than what a U.S. civil jury might have awarded.[42]

This approach was followed in subsequent cases in the United States until the late-1990s.[43] Many such cases were against natural resource companies, notably oil companies but also mining companies.[44] The wrongs alleged have ranged from harm to the environment and harm to human health, to

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37. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir. 1987).

38. *Id.* at 844.

39. *Id.* at 855-56.

40. *Id.*

41. *Id.* at 865-67.

42. *See* Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 563, 588 (Asbjørn Eide et al. eds., 2001).

43. *See, e.g.*, Gonzalez v. Chrysler Corp., 301 F.3d 377, 381-84 (5th Cir. 2002); Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1529 (D. Minn. 1996); Ernst v. Ernst, 722 F. Supp. 61, 64-68 (S.D.N.Y. 1989).

44. *See, e.g.*, Torres v. S. Peru Copper Corp., 965 F. Supp. 899 (S.D. Tex. 1996). More recently the fashion in litigation has tended towards apparel and footwear companies, reflecting the somewhat arbitrary manner of case selection on the basis of popular opinion. *See, e.g.*, Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996).

corporate complicity in physical brutality (including forced labor, torture, and slavery). In the years 1994-1997, for example, three actions against Texaco for its actions in Ecuador were dismissed.[45] Texaco had long operated in the Amazon as a state unto itself—its annual global earnings at the time were four times the size of Ecuador's GNP.[46]

In Australia, motions to dismiss on the grounds of *forum non conveniens* have a substantially higher threshold. Australian companies must demonstrate that the use of the local jurisdiction is so unreasonable as to amount to harassment by the foreign plaintiff.[47] In the *Ok Tedi* case, for example, four groups of plaintiffs in Papua New Guinea brought actions against a major Australian mining company for alleged harms caused by toxic pollution from a copper mine.[48] (As in many other such cases, the matter was ultimately settled out of court.)[49] The United Kingdom has begun down a similar path.[50]

In the United States, the recent suit brought by 30,000 Ecuadorian Indians against ChevronTexaco Corporation in Ecuador's Oriente region may mark a turning point.[51] The issue had been moving through the U.S. courts for a decade and the present action was brought under an Ecuadorian law that requires mining companies to pay for the costs of cleaning up pollution caused by their operations.[52] The case is potentially important because it follows a decision in August 2002 by the U.S. Court of Appeals for the Second Circuit affirming the district court's holding that the case should be brought in

45. Sequihua v. Texaco, Inc., 847 F.Supp. 61, 65 (S.D. Tex. 1994); Aquinda v. Texaco, Inc., 945 F.Supp. 625, 628 (S.D.N.Y. 1996); Ashanga v. Texaco, S.D.N.Y. Dkt. No. 94 Civ. 9266 (Aug. 13, 1997).

46. Jochnick, *supra* note 2, at 58.

47. *See, e.g.*, Dow Jones & Co. v. Gutnick (2002) 194 A.L.R. 433; Voth v. Manildra Flour Mills Pty. Ltd. (1990) 171 C.L.R. 538.

48. Dagi v. Broken Hill Proprietary Co. [No 2] (1995) 1 V.R. 430.

49. *See* Peter Prince, *Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach is Better*, 47 INT'L & COMP. L.Q. 573, 595 (1998). The settlement included AUD$400 million for the construction of a tailings containment system as well as up to AUD$150 million for environmental damage. *Id.*

50. Lubbe v. Cape plc, 4 All E.R. 268, 275 (C.A. 2000).

51. *See* Jim Lobe, *Oil Giant Lawsuit Signals Power of Third World Courts*, IPS-INTER PRESS SERVICE, May 8, 2003 (LEXIS, News, All Library).

52. *Id.*

Ecuador and that any final ruling and financial penalty imposed would be enforceable in U.S. courts.[53] An earlier decision of the court of appeals had provided that the doctrine of *forum non conveniens* would not apply unless Texaco agreed to submit to the jurisdiction of Ecuadorian courts for the purposes of the action.[54] This was reaffirmed by the court of appeals.[55] This highly unusual decision was intended explicitly to avoid the doctrine of *forum non conveniens* being invoked in bad faith.[56]

2. *Alien Tort Claims Act*[57]

In the United States, such procedural hurdles are avoided when actions are brought under the Alien Tort Claims Act, which has become central to the recent history of such proceedings against multinational corporations.[58] Enacted in the first session of the U.S. Congress in 1789 (originally aimed at bringing pirates to justice), it authorizes civil lawsuits in U.S. courts by aliens for torts committed "in violation of the law of nations or a treaty of the United States[.]"[59] Rediscovered almost two centuries later in a case brought by Paraguayan citizens in the United States against a former Inspector General of Police in Paraguay,[60] this procedure is unique to the United States—which is ironic, given the U.S. position on the International Criminal Court and assertions of universal criminal jurisdiction by countries such as Belgium.[61] In many cases under the Alien Tort Claims Act the defendant is not represented and the case ends in a default judgment. Most of the legal proceedings concern jurisdictional matters and therefore proceed on the basis that the plaintiffs' allegations are true. Though remedies are rarely enforced, the procedure serves a

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53. Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).
54. Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998).
55. *Aguinda*, 303 F.3d at 477.
56. *Jota*, 157 F.3d at 159.
57. 28 U.S.C. § 1350 (2001).
58. *See* Alex Markels, *Showdown for a Tool in Rights Lawsuits*, N.Y. TIMES, June 15, 2003, at C11.
59. 28 U.S.C. § 1350 (2001).
60. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
61. *See, e.g.*, Lee A. Casey & David B. Rivkin, Jr., Editorial, *When International Justice Works*, WASH. POST, Dec. 29, 2003, at A17.

shaming function and has been used tactically by labor and human rights organizations.[62]

In 1997, a case was filed in federal district court in California on behalf of Burmese citizens who had allegedly suffered torture, assault, rape, loss of their homes and property, forced labor, and other human rights violations.[63] The plaintiffs in the case named the President and CEO of Unocal as defendants.[64] Unocal had entered into a joint venture with Total S.A., a French oil company, and the government of Myanmar to extract oil and build a pipeline in the Tennaserim region of Myanmar.[65] The United States District Court for the Central District of California held that it had subject matter jurisdiction over the Unocal corporation with respect to its pipeline operations in Myanmar.[66] The Court treated the legal person of Unocal as analogous to a natural person with respect to allegations of forced labor.[67]

In the decision, Judge Paez held that Unocal could be held liable for human rights violations under the Alien Tort Claims Act if the plaintiffs could prove that Unocal acted in concert with the government of Myanmar in carrying out these abuses. In addition, Unocal could be held independently liable for using forced labor whether or not it was in connection with state action: "Participation in the slave trade 'violates the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.' "[68] According to Judge Paez:

> Although there is no allegation that [the State Law and Order Restoration Council (SLORC)][69] is physically selling Burmese citizens to the private defend-

62. *See, e.g.*, HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1056 (2d ed. 2000).

63. Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997).

64. *Id.* at 883.

65. *Id.* at 884-85.

66. *Id.* at 892.

67. *Id.*

68. *Id.*, *citing* Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

69. SLORC, on the advice of two U.S. public relations firms (Jefferson Waterman International and Bain & Associates) changed its name to the less threatening State Peace and Development Council (SPDC) in 1997. *See* Patricia Tan, *Brand USA: Tarnished?*, BRANDCHANNEL.COM, Feb. 3, 2003, *at* http://www.brandchannel.com/features_effect.asp?pf_id=142 (Mar. 18, 2004).

> ants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, the private defendants have paid and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor. These allegations are sufficient to establish subject-matter jurisdiction under the [Alien Tort Claims Act].[70]

In 2000, a different judge granted Unocal summary judgment in its favor.[71] Though the Court held that individual liability for acts amounting to slavery or slave-trading was possible under the Alien Tort Claims Act,[72] and that there was evidence that Unocal knew about and benefited from forced labor in Myanmar, Unocal was not involved directly in the alleged abuses.[73] This appeared to raise the threshold significantly from that of the initial finding of subject matter jurisdiction. Based on a review of the German industrialist cases after the Second World War, the Court held that, in order to be liable, Unocal had to have taken active steps in cooperating with, or participating in, the forced labor activities; mere knowledge that someone else might commit abuses was insufficient.[74] The decision was overturned by the Court of Appeals for the Ninth Circuit in September 2002, which held that this was too high a standard to establish responsibility.[75] It was sufficient, the Court held, to show that the corporation knew about and benefited directly from the military's conduct.[76]

The 1997 district court opinion was the basis on which dozens of cases were filed in 1998-1999 against German, Austrian, and U.S. corporations, alleging that these companies, or related subsidiaries, had used and benefited from slave labor during the Second World War.[77] Once again the Alien Torts

70. *Unocal*, 963 F. Supp. at 892.
71. Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000).
72. *Id.* at 1307.
73. *Id.* at 1310.
74. *Id.*
75. Doe v. Unocal Corp., 2002 WL 31063976, at * 13 (9th Cir. 2002).
76. *Id.*
77. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 431-32 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 250 (D.N.J. 1999).

Claim Act was used as the basis for subject matter jurisdiction.[78] Most of these slave labor cases were dismissed, though not for want of subject matter jurisdiction.[79] A case against the Ford Motor Company was dismissed because relevant treaties between the Allied Powers and Germany required individual claims against corporations to be pursued exclusively through intergovernmental settlement; additional grounds for dismissal were the passage of time, nonjusticiability, and international comity.[80] On the same day, another federal district court judge (also in New Jersey) dismissed four other slave labor cases involving the German corporations Degussa and Siemens.[81] These actions, though in themselves unsuccessful, provide support for the argument that the use of slave labor by corporations is a violation of customary international law. In addition to providing weight to political settlements outside of the courts regarding forced labor during the Second World War, the cases suggest productive lines of argument in future cases involving forced labor.[82]

The Alien Torts Claims Act may become a more urgent concern for some corporations in the coming few years. In particular, Edward Fagan, a U.S. trial lawyer who helped win $1.25bn in the so-called "Nazi gold" lawsuit in 1998, commenced proceedings in 2002 against companies that are alleged to have aided and abetted South Africa's apartheid-era governments.[83] Separate class action suits have been filed that name ExxonMobil, Royal Dutch/Shell, BP, ChevronTexaco, and TotalFinaElf among their defendants.[84] More recent suits

78. *See, e.g.*, *Iwanowa*, 67 F. Supp. 2d at 438.

79. *See, e.g.*, *id.* at 491 (dismissing claims as time-barred, and also on grounds of nonjusticiability and international comity).

80. *Id.*

81. *Burger-Fischer*, 65 F. Supp. 2d at 250, 285.

82. For example, in National Coalition Government of the Union of Burma v. Unocal, Inc, 176 F.R.D. 329 (C.D. Cal. 1997), the plaintiffs argued that Unocal should be held liable for the alleged violations of international law committed by the controlling government of Burma (SLORC) in furtherance of a joint venture between SLORC and Unocal to extract natural gas from the Andaman Sea and transport it across Burma to Thailand.

83. *United States: Clean Up Your Act*, ENERGY COMPASS, Feb. 6, 2003, at 1; *see also* Nicol Degli Innocenti, *Shell Added to List of Companies Facing Apartheid Lawsuits*, FIN. TIMES, Aug. 3, 2002, at 8.

84. *United States: Clean Up Your Act*, *supra* note 83; *see also* Degli Innocenti, *supra* note 83.

have been launched against Talisman Energy, Inc., for allegedly abetting genocide by the Government of Sudan,[85] and Occidental Petroleum and its security contractor, AirScan Inc., for their alleged role in the bombing that killed 18 civilians in a Colombian village in December 1998.[86]

Corporations have adopted three broad strategies in response to such actions. First, they have fought the suits. (This sometimes distinguishes these cases from other Alien Tort Claims Act proceedings that are uncontested.)[87] Second, corporations have sought to lobby government to avoid particular proceedings. ExxonMobil, for example, succeeded in obtaining a State Department opinion that a suit against its activities in Indonesia's Aceh province harmed U.S. interests. The case was halted in its tracks.[88] Unocal is having a more difficult time obtaining such assistance in the case concerning its operations in Myanmar; this may go to trial later in 2004.[89] The third strategy that has been pursued is an attempt to get the Statute changed or repealed entirely.[90] With both chambers of Congress controlled by pro-business Republicans, this may have been initially regarded as a promising strategy. Ironically, however, forced laborers in Myanmar may have their cause of action preserved by the entirely separate wrongdoings in Enron, Worldcom, and other corporate scandals that questioned faith in the bona fides of American companies through 2002.[91]

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85. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

86. Jim Lobe, *U.S. Oil Firm Occidental Sued for 1998 Colombia Bombing*, IPS-INTER PRESS SERVICE, Apr. 25, 2003 (LEXIS, News, All Library).

87. *See* Markels, *supra* note 58.

88. *Al Qaeda: Boon to Business*, THE NATION, Sept. 30, 2002, at 7; Kenneth Roth, Editorial, *U.S. Hypocrisy in Indonesia*, INT'L HERALD TRIB., Aug. 14, 2002, at 4.

89. *United States: Clean Up Your Act*, *supra* note 83. The issue of whether the case will go to trial is currently pending before the United States Court of Appeals for the Ninth Circuit en banc. *See* Doe v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003).

90. The International Chamber of Commerce has been lobbying hard on this point. *See, e.g.*, *International Business Group Opposes US Human Rights Suits Under 1789 Law*, AGENCE FRANCE-PRESSE, Dec. 6, 2002 (LEXIS, News, All Library).

91. *Cf.* Patti Waldmeir, *An Abuse of Power*, FIN. TIMES, Mar. 13, 2003, at 12 ("In post-Enron, pre-war America, the morality of such cases appears decep-

A further, more extreme, avenue has been to use the local jurisdiction to deter such claims. When villagers in Papua New Guinea brought a negligence action against Australian mining giant BHP, the company colluded with the Papua New Guinean government to draft legislation that made bringing compensation claims against the mining project a crime.[92] The Victorian Supreme Court found BHP in contempt for its actions.[93]

C. *International Law*

A third jurisdiction in which remedies may be pursued is international law as such. As indicated earlier, some international crimes may be committed by individuals: for example, piracy (including aircraft hijacking), enslavement (including forced labor), genocide, war crimes, and crimes against humanity.[94] Other crimes may be committed only by states.[95] It has been accepted at least since the war crimes trials after the Second World War that individuals may be held accountable for acts undertaken through corporations.[96] A more controversial possibility is that corporations themselves may be held liable.

1. *Accountability of Individuals for Acts by Corporations*

The liability of individuals for acts committed through corporate entities was contemplated in the war crimes trials undertaken after the Second World War. British and U.S. military tribunals allowed trials against leading industrialists who controlled companies that manufactured and supplied Zyklon B gas, used in the mass extermination of inmates of concentration camps, including Auschwitz.[97] Those concerned were

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tively simple: companies that profit from foreign oppression, directly or indirectly, should bear some responsibility for it.").

92. Steve Sharp, *Ok Tedi Case Has Global Lessons*, SYDNEY MORN. HER., June 15, 1996, at 37; Ralph Nader, Editorial, *Still Stained by Ok Tedi Runoff*, AUSTL. FIN. REV., Sept. 24, 1996, at 19.

93. Sharp, *supra* note 92.

94. *See* BROWNLIE, *supra* note 1, at 565-68.

95. *See generally id.* at 435-78 (discussing the responsibilities and obligations of states).

96. *See, e.g.*, United Kingdom v. Tesch et al. ("The Zyklon B Case") 1 I.L.R. 93 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Hamburg 1946).

97. *Id.*

convicted of being accessories to war crimes based on their failure to respect the right to life of concentration camp inmates.[98]

Prosecutors also succeeded in obtaining convictions of five I.G. Farben executives, who were involved in the construction of the slave-labor factory at Auschwitz.[99] In addition, the USMT prosecuted industrialists from the Krupp Firm, including charges of war crimes and crimes against humanity with respect to plunder and spoliation of civilian property in occupied territories, as well as the deportation and use of prisoners of war and concentration camp inmates as forced laborers in Krupp factories in Germany.[100] Friedrich Flick, a leading industrialist who owned steel plants in Germany, was convicted of using slave labor because of his knowledge and approval of acts of his deputy.[101]

The ingredients of aiding and abetting were summarized by the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case:

> In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.[102]

98. *Id.* at 94.

99. United States v. Krauch ("The I.G. Farben Case"), 8 Trials of War Criminals Before the Nuernberg Military Tribunals 1187-92 (1997).

100. United States v. Krupp ("The Krupp Case"), 9 Trials of War Criminals Before the Nuernberg Military Tribunals 1-2 (1997).

101. United States v. Flick ("The Flick Case"), 6 Trials of War Criminals Before the Nuernberg Military Tribunals 1202 (1997).

102. Prosecutor v. Furundzija, IT-95-17/1-T, at ¶ 249 (Int'l Crim. Trib. for Fmr. Yugoslavia, Trial Chamber, Dec. 10, 1998).

Whether evidence proving the *actus reus* and *mens rea* in a particular case has been adduced will ultimately be a question of fact.[103]

2. *Accountability of Corporations Themselves*

A less tested area of international criminal law is the possibility of holding a legal person itself liable. In general, international criminal prosecution has tended to pursue the individual: As the Nuremberg Tribunal observed, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[104] The Court was referring to the danger of allowing individuals to hide behind the veil of the state, but the principle might be seen as applying equally to the corporate veil. Nevertheless, establishing the liability of a corporation itself may be appropriate, especially if the organizational structure made it difficult to establish the criminal responsibility of a particular individual.

Conceptual problems once seen as a bar to corporate criminal liability in domestic law now largely have been overcome. Traditional reservations arising from the nature of a corporate entity as being a creature of law with no physical existence[105] and the difficulty of establishing the requisite

103. *See id.* ¶ 245.

104. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (William S. Hein, 1995) (1947).

105. *See* Lennard's Carrying Co. v. Asiatic Petroleum Co., Law Reports 705, 713 (A.C. 1915). One leg of this bar to corporate responsibility specifically concerned the penalty that could be imposed following conviction. Clearly, a crime punishable only by imprisonment (or death) hardly could be attributed to a corporation without a substantial change to our conception of sentencing. Rex v. I.C.R. Haulage, Ltd., 1944 K.B. 551, 554. The absence of an alternative penalty to imprisonment is arguably still a bar to convicting a corporation of murder in some jurisdictions. *See, e.g.*, Chris Corns, *The Liability of Corporations for Homicide in Victoria*, 15 CRIM. L.J. 351, 354 (1991). A second consideration relates to certain crimes which are considered to be of such a nature that only a human could commit them (e.g., sexual offenses, bigamy, and, arguably, perjury); *See, e.g.*, Dean v. John Menzies (Holdings) Ltd., 1981 J.C. 23, 35 (1980) (Lord Stott).

mens rea to attribute criminal liability[106] have tended to be overcome as problems of proof rather than of philosophy.[107] There are, of course, numerous policy reasons why these largely theoretical objections should not prevent the conviction of a corporation for offences such as manslaughter or even murder.[108] The attribution of criminal liability to a corporation reveals the criminal law at its most utilitarian: Steeped in the logic of Law and Economics, it seeks an efficient means of deterrence from undesirable conduct.[109] Accepting this basic rationale for the development of the law, however, the application of these means must be consistent with such ends. One must, therefore, question the elevation of such a pragmatic resolution to the point where a fine dissipated throughout the corporate entity is seen as a just substitute for the incarceration of an individual. If company directors are able to reallocate liability during pre-trial negotiations onto a corporation, dispersing any penalty amongst the shareholders of the company, this not only diminishes the deterrent

106. For an overview of the English case law and its attempts to deal with the question of the corporate mind, see R. v. P & O European Ferries (Dover) Ltd., 93 Cr. App. R. 73, 74-83 (C.C.C. 1990).

107. *See, e.g.*, New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909) (holding that an agent's culpable mental state can be imputed or directly attributed to the corporation and that the prosecution must prove only that an illegal act was committed by an employee within the scope of employment, with an intent to benefit the corporation); People v. Reagan, 94 N.Y.2d 804 (App. Div. 1999) (holding that a corporation and its president were not criminally liable for workers' deaths where the plaintiffs could not prove that deaths were foreseeable). *See generally* William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648 (1994).

108. *See, e.g.*, Note, *Can a Corporation Commit Murder?*, 64 WASH. U. L.Q., 967, 976-82 (1986).

109. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 974 (2d ed. 1983) (1978). On the general principles of law and economics reasoning, see generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (5th ed. 1998). Given the commercial environment in which corporate entities exist, the principles of law and economics—premised as they are on the concept of man as "a rational maximizer of his self-interest"—may indeed be more applicable to corporations than they are to humans generally. *See id* at 4; Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 830-33 (1990).

effect of the punishment,[110] but ultimately may shift it onto those who may be entirely innocent.[111]

This remains a relatively undeveloped area of international law. The Nuremberg Charter allowed for the prosecution of "a group or organization[,]" allowing the Tribunal to declare it to be a "criminal organization[.]"[112] When the U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia, however, it did not include criminal organizations or legal persons within the *ratione personae* jurisdiction of its Statute.[113]

At the Rome negotiations for what became the International Criminal Court, the French delegation pushed for the inclusion of the criminal liability of "legal persons" or "juridical persons" on the basis that this would make it easier for victims of crimes to sue for restitution and compensation.[114] Differences in such forms of accountability across jurisdictions—where they existed at all—meant that consensus was impossible. It was felt by some to be "morally obtuse for States to insist on also the criminal responsibility of all entities other than themselves[.]"[115] The language was ultimately dropped from its square brackets by the Working Group.[116]

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110. *See, e.g.*, CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 135-38 (1993). Similar concerns arise when enforcement agencies negotiate *internal* disciplinary action in pre-trial settlements with corporate defendants. *Cf.* BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 1-2 (1993) (stating that the law does not ensure such internal investigations actually occur).

111. *See, e.g.*, David J. Reilly, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378, 403-04 (1988).

112. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 9, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 290 (1945).

113. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., ¶¶ 50-51, U.N. Doc. S/25704 (1993).

114. Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy S. Lee ed., 1999).

115. Albin Eser, *Individual Criminal Responsibility*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 779 (Antonio Cassese et al. eds., 2002).

116. Saland, *supra* note 114, at 199.

IV. CONCLUSION: THE LIMITS OF LAW

Days after the adoption of the Rome Statute of the International Criminal Court in July 1998, the *Financial Times* published an article warning "commercial lawyers" that the accomplice liability provisions in the treaty "could create international criminal liability for employees, officers and directors of corporations."[117] This might be technically true, but the failure of the International Criminal Court to include the liability of legal persons and the likely difficulties of establishing individual guilt on the part of their officers suggest that the breathless tone was a little over the top.

Six months later, at the 1999 Davos World Economic Forum, U.N. Secretary General Kofi Annan proposed the Global Compact.[118] This is not a regulatory instrument—it does not "police," enforce, or measure the behavior or actions of companies.[119] Rather, the Global Compact claims to rely on "public accountability, transparency and the enlightened self-interest of companies, labor and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based."[120] The emergence of such essentially voluntary codes of conduct is an admission that regulation of labor standards through governments and intergovernmental organizations has failed. It also reflects the obsession of many governments, especially those in the industrialized world, with deregulation. Rather than enacting legislation to compel multinationals to comply with particular standards, many governments have preferred voluntary undertakings on responsibility for labor standards.[121]

Such codes, then, are essentially marketing tools, but this is not necessarily a bad thing. Law in such cases usually is invoked as a tool of politics. The Alien Torts Claims Act has been useful, for example, in encouraging companies to contribute to the "voluntary" slave labor fund in Germany.[122] Ac-

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117. Maurice Nyberg, *At Risk from Complicity with Crime*, FIN. TIMES, July 28, 1998, at 15.

118. *See* United Nations, *The Global Compact: Overview*, *supra* note 6.

119. *Id.*

120. *Id.*

121. *See* Jochnick, *supra* note 2, at 67-68.

122. *See* Michael J. Bazyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 613-17 (1999); *see also* Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1.

tions against Unocal for its activities in Myanmar also were directed against the military government there, and have altered U.S. policy towards that military government.[123] In the absence of a global enforcement regime, such tactical litigation works most effectively when combined with broader norm-generating activities. A voluntarist regime may not seem to be an especially efficient means of advancing this cause, but it is worth remembering that the consensual basis of international law is not far removed from voluntarism.

The politics at work here may be strange—such as when labor unions and green activists lined up together in Seattle to protest about working conditions in the developing world (for very different reasons).[124] But they also can be powerful, as when NGOs essentially shut down the proposed Multilateral Agreement on Investment (MAI) in 1998[125]—not coincidentally the same year in which NGOs were instrumental in creating the International Criminal Court.[126] Counter-intuitively (for lawyers at least), law is most appropriately seen in this sphere as a means rather than simply an end.

123. *See* Jim Lobe, *U.S.-Burma: Sanctions Campaign Keeps Rolling*, IPS-Inter Press Service, May 15, 1997 (LEXIS, News, All Library).

124. *See* Elaine Bernard, Editorial, *The Battle in Seattle: What was that All About?*, Wash. Post, Dec. 5, 1999, at B1.

125. *See generally* Stephen J. Kobrin, *The MAI and the Clash of Globalizations*, Foreign Pol'y, Fall 1998, at 97 (discussing NGO opposition to the Multilateral Agreement on Investment).

126. William R. Pace & Jennifer Schense, *The Role of Non-Governmental Organizations*, *in* The Rome Statute of the International Criminal Court: A Commentary, *supra* note 115, at 105, *passim.*