

18. RECENT ILRF CASES TO ENFORCE HUMAN RIGHTS UNDER THE ATCA.

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A. Introduction

The International Labor Rights Fund (ILRF) has been working since its 1986 inception to develop mechanisms for enforcing labor rights in the global economy. Using traditional tools such as research, education, policy promotion, and advocacy can only make as much progress as governments, multinational companies, and other parties who have power in the global economy are to willing to agree to concede. Accordingly, the ILRF has tried to use administrative processes to enforce labor rights, particularly the Generalized System of Preferences Act (GSP). 19 U.S.C. §§ 2461-66 (1986). This is a created a process wherein “beneficiary developing countries” received duty free access to the US market, in exchange for specific conditions, including respect for “internationally recognized worker rights.” *Id.* § 2462 (a)(4). Compliance with the standard was based on a process whereby “any person” could petition the US Trade Representative to terminate trade benefits to of a beneficiary country for noncompliance with the standard. However, enforcement of GSP and other administrative processes is dependent upon the executive branch, and is almost always politicized as a result.

The ILRF has been actively searching for an enforcement tool that would provide a fair hearing to claims of labor rights violations by multinational firms. Recent cases under the

Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, now provide the most promising opportunity to bring justice to workers in the global economy. The language of the ATCA, dating back to 1789, provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The ATCA was revived from its dormancy by *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), a case based on a torture claim brought against a former official of the government of Paraguay. The court’s landmark decision launched a very effective tool to enforce human rights norms. Applying the plain language of the ATCA, the court held that an alien could sue in U.S. federal court for a “tort” that violates the “law of nations.” The court had no trouble finding that torture violated the law of nations, and avoided the necessity of ruling on whether a private party could be liable since the defendant had been a state actor when the violations occurred.

Since *Filartiga*, the ATCA has been used with increasing frequency to reach direct perpetrators of human rights abuses. In addition, numerous cases have been brought against corporate defendants that have aided and abetted, or otherwise participated in, human rights violations as part of business operations in partnership with repressive governments. In this respect, the ATCA offers to provide a significant new aspect to human rights law and reach private actors for human rights violations.

B. The ILRF’s Cases Under the ATCA.

This section will describe the factual basis for the four of five current ATCA cases the ILRF has initiated, and will provide an assessment of their status. Relevant documents may be found on ILRF’s website (www.laborrights.org). See *Litigation Update*, *supra*, for a discussion of the *Unocal* litigation.

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1. Exxon Mobil and Genocide, Murder and Torture in Aceh, Indonesia. – There have been credible reports dating back several years that Exxon Mobil Corporation, and its predecessor companies, Mobil Oil Corporation and Mobil Oil Indonesia (hereinafter collectively referred to as “Exxon Mobil”), hired one or more military units of the Indonesian national army, known as the Tentara Nasional Indonesia (“TNI”), to provide “security” for their gas extraction and liquification project in Aceh, Indonesia. As would be expected to happen with certainty, Exxon Mobil’s use of the same brutal troops that brought us East Timor as their sole security force has resulted in systematic torture, murder, rape, and acts of genocide against the local population of Achanese people. Exxon Mobil has never used its considerable power over its mercenary security force to demand that human rights violations against the local population be stopped. However, in March, 2001, when the civil conflict raging between Achanese separatists and the government threatened Exxon Mobil’s expatriate staff, the company immediately shut down the operation and demanded more security and a “guarantee” of safety for its employees. Never did Exxon Mobil include a demand that new security procedures also extend to local villagers. Quite the contrary, a demand for more security is certain to bring more troops and more human rights violations, apparently an acceptable consequence for Exxon Mobil.

On June 20, 2001, the ILRF filed an ATCA claim in the Federal District Court for the District of Columbia, No. 01-1357 CIV, on behalf of 11 villagers from Aceh who were victims of human rights abuses by Exxon Mobil’s TNI Unit 113. The general theory of the case is that Exxon Mobil knowingly employed brutal military troops to protect its operations, and the company aided and abetted the human rights violations through financial and other material support to the security forces. In addition, the security forces are either

employees or agents of Exxon Mobil, creating liability based on respondeat superior or vicarious liability.

Like Unocal, Exxon Mobil’s primary defense appears to be that the human rights violations may very well be occurring, but the company did not specifically intend this result, and therefore the company cannot be liable. Exxon Mobil asserted this position in its motion to dismiss. This position goes to the heart of whether we can use the ATCA to change the corporate mentality that somehow allows a company like Exxon Mobil to defend doing business with a known human rights violator by constructing some sort of Faustian wall which allows a company to accept the benefits of known human rights violations, and the profits of a project that requires the participation of the human rights violator, but is not responsible for the violations. Many of the private defendants in the Nuremberg cases were charged with using slave labor procured by the Nazi regime. They argued that although their companies benefitted from the slave labor, the companies were required to use the slave labor, and in many cases, did not affirmatively intend to use slaves. The Nuremberg Tribunal definitively established the principle that, absent a true necessity defense, the literal gun to the head requiring compliance, the defendants were liable for knowingly benefitting from the slave labor. Those who opportunistically increased production and profits based on the availability of slave labor provided by the Nazis were uniformly convicted.

The Ninth Circuit’s Unocal decision addresses directly whether Exxon Mobil can defend based on its claim that it was not directly involved in the human rights violations. Indeed, Exxon Mobil relied heavily upon Judge Lew’s grant of summary judgement in its motion to dismiss, and argued that the fact patterns were essentially identical. One presumes that the fact pattern remains identical, but now the legal conclusion has been reversed.

Exxon Mobil's motion to dismiss is still pending. The motion was argued on April 9, 2002. Following the argument, at Exxon Mobil's request, the court sought the views of the State Department on the litigation. In a remarkable effort to seize for the executive branch the right to veto litigation under federal statutes, William H. Taft IV, the State Department's Legal Advisor, submitted a letter claiming that the lawsuit would interfere in U.S. relations with the government of Indonesia. The letter further asserted that the litigation could interfere with U.S. investment in Indonesia, and explicitly asserted that it is a foreign policy objective of the U.S. government to advance the interests of U.S. businesses abroad. This blatant effort to abrogate the separation of powers doctrine will hopefully not be successful. The court has yet to issue an opinion on the pending motion to dismiss, but did permit the parties to brief the issue of the legal effect, if any, of the State Department's letter.

2. Coca-Cola and Anti-Union Death Squads in Colombia. – Colombia is a human rights basket case due to lawless activities of the right wing paramilitaries, as well as the leftist guerillas. The paramilitaries in Colombia are particularly well known for murdering, abducting and torturing trade union leaders. For the past 10 years, Colombia has lead the world in the number of murders of trade unionists. More than 52 trade union leaders have been killed so far this year, 128 were killed in the year 2000, and in the last 10 years, over 1,500 have been murdered. A much larger number have been subjected to torture, including regular threats of death, unlawful detention, and kidnapping. For years there has been comprehensive public reporting on the systematic human rights violations occurring in Colombia, including the specific targeting for murder and other human rights violations of trade union leaders and members.

Much of the violence against trade unionists in Colombia is directed at leaders of

unions at multinational firms, including the Coca-Cola company. One union representing workers at Coca-Cola, Sinaltrainal, has sustained heavy losses of leaders and members who were employed by the company. Since at least 1996, Sinaltrainal has been writing letters to Coca-Cola and to the U.S. Embassy in Bogota demanding that the targeting of trade union leaders at Coca-Cola bottling plants be stopped. Neither institution favored the union with a reply, and the Government of Colombia failed to take action to find and arrest the paramilitary commanders, who in some cases, were specifically identified by victims or other witnesses.

Having no other options and facing ongoing violence, Sinaltrainal requested ILRF and the United Steelworkers Union to file an ATCA case against Coca-Cola and its Colombian bottlers. The case was filed in the Federal District Court for the Southern District of Florida, No. 01-03208-CIV, on July 21, 2001. Plaintiffs are Sinaltrainal, and five individuals who have been murdered, tortured, and/or unlawfully detained. They are seeking to hold Coca-Cola, and two of its Colombian bottlers liable for using paramilitaries to engage in anti-union violence.

This case also presents the issue of corporate liability for acts of subsidiaries or agents. There is no question, based upon eyewitness testimony and records from investigations of the Government of Colombia, that, for example, Isidro Gil was murdered inside the Coca-Cola bottling plant in Carepa by paramilitaries that were invited into the plant by the manager of the plant. The day after Mr. Gil's murder, the paramilitaries returned to the plant to complete their task of destroying the trade union. The paramilitaries collected resignation letters of the remaining union members, after promising that those who refused to resign would meet the same fate as Isidro Gil. Coca-Cola's defense is not that the murder and terrorism did not occur. Rather, Coca Cola argues that it, the most international of

companies, cannot be liable in a U.S. federal court for what happened in Colombia. Coca-Cola also argues that it does not “own” and therefore does not control, the bottling plants in Colombia. Again, the case presents an opportunity to develop a standard under which a multinational company cannot have the best of both worlds by profiting from human rights violations but limiting liability to a local entity that is a mere facilitator for the parent company’s operations.

The court held oral argument in April, 2002, and no decision has been issued yet.

An additional feature of the Coca-Cola litigation is that it has served to focus a campaign seeking to get Coca-Cola to accept responsibility for violence in its bottling plants, wholly apart from any potential legal liability under the ATCA. The campaign is using factual information developed from the investigations connected to the litigation, as well as traditional human rights reports, to support specific demands to Coca-Cola to publically denounce the violence in Colombia, to make clear to the paramilitaries that such violence is not in Coca-Cola’s interest, to cease all formal or informal working relationships between paramilitary forces and managers of the bottling plants, to agree to a specific provision that prohibits Coca-Cola bottling plants from participating in violent activities, and permit trade unions representing Coca-Cola workers to monitor compliance with the provision. The major participants in the campaign in the U.S. are the International Brotherhood of Teamsters, the United Steelworkers Union, the International Food and Commercial Workers Union, the U.S. Labor Education Project, and the ILRF. In addition, the Canadian Labour Congress, has recently joined. Information about the campaign is available at www.Cokewatch.org. The campaign provides a hopeful model of cooperation to change corporate behavior that supports or tolerates human rights violations.

3. Del Monte’s Death Squads in Guatemala – Fresh Del Monte Produce (Del Monte) is one of the world’s largest producers of fresh fruit products. In Guatemala, Del Monte is a successor to the notorious United Fruit Company, and it owns and operates several banana plantations there. 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 tense 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 there would be a walk out the next day of the remaining workers. The evening before the planned work stoppage, Del Monte employees organized a violent group of local thugs and abducted the five key leaders of SITRABI. They were taken to their own 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. Two of the leaders were forced with guns to their heads to make an announcement on the plantation radio system that the work stoppage was canceled. Then, they signed personalized resignation letters that had been prepared by Del Monte employees. Eventually, after further torture, they were told they could leave, but were assured that they would be killed if they ever returned to the plantation area.

The five leaders escaped to Guatemala City, and filed criminal charges against their attackers. The U.S. embassy encouraged this as a test case of the post-peace accords justice system. Regrettably, the legal system reverted to form and the attackers were found guilty of lesser crimes. They were permitted to walk out of the court after paying nominal fines. As all concerned were convinced that the five SITRABI leaders would be killed in retaliation for bringing charges against Del Monte’s thugs, the U.S. embassy arranged for work visas and

the five leaders and their families relocated to the U.S., and Del Monte bought the plane tickets. Shortly thereafter, the ILRF filed an ATCA case on behalf of the five former SITRABI leaders seeking damages from Del Monte for torture and unlawful detention. The case, No. 01-3399-CIV, was filed in the Federal District Court for the Southern District of Miami.

The Del Monte case is somewhat unique in that there should be no question of the parent company's legal liability because Del Monte is structured to ensure that the parent retains control and ownership of local operations. Del Monte adds to the development of the law because the case directly raises issues of using otherwise actionable violence in violation of the law of nations to suppress trade union rights. Thus, the plaintiffs are seeking to hold Del Monte liable for violations of the fundamental rights to associate, organize and bargain collectively, rights that are central to trade unionism.

The court has yet to schedule an argument. After permitting initial discovery and setting a trial date for March 10, 2003, the court stayed further discovery pending a decision on Del Monte's motion to dismiss. The briefing was completed in July, 2002, and the parties are awaiting a decision.

4. DynCorp's Air Strikes Against Ecuadoran Farmers – The controversial "Plan Colombia" includes a cruel throwback concocted by what must have been frustrated commanders of the war in Vietnam – the US government contracted with DynCorp to spray fumigants on coca plants in Colombia to eradicate a major source of the cocaine exported to the U.S. The plan is inherently flawed. There are serious, well documented concerns that the spray is harmful to humans and livestock, and that it kills legitimate food crops in the area, such as corn and yucca. Further, even if it did destroy coca plants, the small

farmers who relied upon the sale of their coca crop are left with no livelihood, often driving them to join the guerillas to have access to food. Wholly apart from these major effects documented in the target area of Colombia, DynCorp is also spraying farmers on the Ecuadoran side of the border with the same effects. In this new era of heightened concern about terrorism, a group of at least 10,000 Ecuadoran subsistence farmers, who have no dispute with the U.S. government and who do not cultivate illegal drug crops, are being subjected to sustained, deadly aerial assaults financed by the U.S. government through DynCorp.

A group of villagers who are all suffering serious health effects from the fumigant, and one couple whose child died from exposure to the poison, initiated a class action lawsuit against DynCorp charging the company with wrongfully spraying them with a poison that, whatever the justification of Plan Colombia, was not supposed to hit Ecuadorans. The ATCA case charges DynCorp with murder, wrongful death, crimes against humanity, and numerous other property crimes. The case was filed in Federal District Court for the District of Columbia, No. 1:01CV01908, moments before the terrorist attacks on New York and Washington, D.C.

While the case does not present traditional issues of labor rights violations in the global economy, it is an extremely important opportunity to clarify what constitutes terrorism, and whether one country's objections, however well meaning, can ever justify violating the human rights of innocent civilians. Filed on September 11, 2001, just moments before the federal courts were closed due to the terrorist attacks on New York and Washington, D.C., the case is more than a symbol of the other side of the coin -- indeed, the other side of the world. The U.S. cannot maintain its pose of righteous indignation if it allows its own forces and resources to be used against noncombatant civilians.

Dyncorp filed a motion to dismiss in January, 2002, raising the political question doctrine as its primary defense. The issues were fully briefed by April, 2002, and the case remains pending the court's decision on the motion.

5. The Assassination of Union Leaders at Drummond Coal

– In March, 2002, the ILRF filed another case addressing the ongoing violence against trade union leaders in Colombia. This case, against Drummond Coal, an Alabama corporation that purchased a large mining operation in Colombia, involves the serial assassination of trade union leaders representing the workers at Drummond's Colombian mine. The workers are represented by an well-established union, Plaintiff SINTRAMIENERGETICA. The leaders of the union, in early 2001, 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 the FARC, the leftist guerrillas. On March 12, 2001, in the midst of the negotiations, two of the union leaders, President Valmore Lacarno Rodriguez, and Vice President Victor Hugo Orcasita Amaya, were pulled off a company bus by paramilitaries who said in front of all of the workers on the bus, "these two have a problem with Drummond." Lacarno was shot in the head in front of the other workers. Orcasita was taken away in a car, and his dead body, which showed clear evidence that he had been tortured was found later that day. The union was paralyzed without its two leaders, and for a time no one would take over the leadership posts out of fear that they too would be killed. Finally, in September, 2001, Gustavo Soler Mora stepped up to assume the Presidency. He renewed negotiations with Drummond, and expressly

sought to bargain for better security arrangements for the workers. On October 5, 2001, within weeks of becoming President, he too was pulled off a bus and murdered by paramilitaries.

The ILRF represents the surviving family members of the three murdered trade union leaders. The case was filed in the Federal District Court for the Northern District of Alabama (CV-02-BE-0665-W). Drummond filed a motion to dismiss, and the issues have been briefed. The court heard argument in September, 2002, and the parties are awaiting a decision.

Conclusion.

The ATCA cases brought by the ILRF and others highlight the crisis of enforcement of human rights standards. Absent the prospect of a viable ATCA case, there would be no recourse for the victims of international human rights violations. These companies are confident that the host governments will not enforce local laws because the governments are themselves participants in the human rights violations. This frames the reality of the global economy. Governments that continue to violate human rights, or that are willing to overlook violations by private parties in order to encourage investment, and private investors willing to work with and support those rogue governments, are the beneficiaries of a global economy that trusts no one on economic matters, but relies essentially upon voluntary compliance with human rights standards.

Until there is some globally applicable mechanism to address labor and human rights violations, victories in the ATCA cases will do much to remedy current violations and deter future violations.