

**MECHANISMS FOR IMPROVING ACCESS TO
JUSTICE FOR VICTIMS OF HUMAN RIGHTS
ABUSES BY CORPORATIONS**

Submission to the U.N. Special Representative to the
Secretary General on the Issue of Human Rights and
Transnational Corporations and Other Business
Enterprises



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This paper focuses on access to justice for victims of corporate human rights abuses. It is dedicated to those for whom such access is lacking, countless victims around the world, and especially to those who continue to strive for justice despite the obstacles before them.

Providing justice to victims of corporate abuses is a major part of ERI's own work, and so this paper builds upon many other projects over the years. There are countless lawyers, activists, professors, law students and volunteers whose work in collaboration with ERI on these projects has provided the foundation for this paper. In particular, this paper draws on our experiences in the *Unocal*, *Chevron*, *Shell*, and *Chiquita* litigation, and we especially thank our co-counsel in those cases.

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About EarthRights International

EarthRights International (ERI) is a non-government, non-profit organization combining the power of law and the power of people to protect earth rights. Earth rights are those rights that demonstrate the connection between human well-being and a sound environment, and include the right to a healthy environment, the right to speak out and act to protect the environment, and the right to participate in development decisions. ERI is at the forefront of efforts to link the human rights and environmental movements.

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I. Introduction.

Last year, the Human Rights Council extended the mandate of the Special Representative to the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Mr. John Ruggie, to July 2008.¹ Before that time, the SRSG is expected to make his final views and recommendations, completing the mandate set forth in resolution 2005/69 of the Commission on Human Rights. This paper is intended to assist the SRSG in making his final report to the Council.

In his latest report, as well as his 2006 Interim Report, the SRSG drew attention to the inability of some governments “to take effective action” regarding corporate-related human rights abuses, as well as the “weak governance” that characterizes many countries where such abuses most often occur.² In this paper, EarthRights International (ERI) highlights the lack of access to justice stemming from the inability of a number of host countries to address corporate-related human rights abuses within their own jurisdictions. ERI encourages the SRSG in his final report to

¹ See Human Rights Council, Report to the General Assembly on the Fifth Session of the Council: Human Rights Council, 5th Session, 11-18 June 2007 (Aug. 7, 2007), A/HRC/5/21.

² Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts (Feb. 19, 2007), A/HRC/4/35 at para. 82, available at <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> (SRSG February 19, 2007 Report); Promotion and Protection of Human Rights, Interim Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, (Feb. 22, 2006), E/CN.4/2006/97 at para 27 & 29, available at <http://www.business-humanrights.org/Documents/Ruggie-HRC-2006>.

explicitly recognize the positive contributions of transnational litigation under the U.S. Alien Tort Statute (ATS) to addressing that problem by expanding access to justice for many victims of human rights abuses. Further, ERI encourages the SRSG to recommend the adoption of uniform principles of corporate obligations with respect to human rights, both to assist the consistent development of national and transnational litigation and as a potential first step toward a multilateral treaty. Codifying corporate obligations could help ameliorate the problem of national variation with regard to corporate accountability standards which Mr. Ruggie raised in his 2007 report.³

II. Background to this paper.

In furtherance of our own mission to promote corporate accountability for human rights abuses and as a member of the ESCR-Net Corporate Accountability Working Group, ERI has been following the work of the SRSG since the beginning of his mandate two and a half years ago. In 2005, ERI submitted a report to the SRSG on earth rights abuses perpetrated by corporations in Burma, and contributed to a Joint NGO Report on Human Rights and Extractive Industry.⁴ ERI presented an Asian Civil Society Statement, signed by 21 NGOs, to the SRSG at a regional

³SRSG February 19, 2007 Report at para. 27-29 & 34.

⁴ Submission to the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Earth Rights Abuses by Corporations in Burma, Collective Summary and Recommendations, EarthRights International (Nov. 10, 2005), available at http://www.earthrights.org/files/Reports/eri_submission.pdf; Joint NGO Report on Human Rights and the Extractive Industry and Consultations with UN Special Representative on Human Rights and Business, International Network for Economic, Social, & Cultural Rights (Dec. 9, 2005), available at http://www.escr-net.org/GeneralDocs/Rprt_Consult_Extract.pdf.

consultation in Bangkok in June of 2006,⁵ and submitted a report on corporate aiding and abetting liability in July 2006.⁶ Late last year, ERI endorsed the Joint Open Letter to UN Special Representative on Business and Human Rights.⁷

Following up on the SRSG's 2007 report, ERI felt that it would be beneficial to draw on its own significant experience litigating cases under the ATS to provide insight to the SRSG on how this kind of transnational litigation is helping to promote corporate accountability and how, in turn, the efforts of the SRSG and the U.N. could strengthen this approach and further enhance access to justice. ERI's experience began in 1996 with the groundbreaking case *Doe v. Unocal*, and has continued in subsequent years with *Bowoto v. Chevron*, *Wiwa v. Royal Dutch Shell Petroleum*, and *Doe v. Chiquita*, as well as numerous other cases in which ERI has filed *amicus curiae* briefs to advise the courts.

III. Transnational litigation under the U.S. Alien Tort Statute has increased access to justice for victims of human rights abuses by corporations.

Cases under the U.S. Alien Tort Statute have played a limited but important role in redressing the problem, noted by the SRSG, of

⁵ Asian Civil Society Statement to the UN Special Representative on Transnational Business and Human Rights at the Asia Regional Consultation (Jun. 27, 2006), available at <http://www.earthrights.org/content/view/345/41>.

⁶ The International Law Standard for Corporate Aiding and Abetting Liability, Presented to the UN Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises (Jul. 11, 2006), available at http://www.earthrights.org/legaldocs/the_international_law_standard_for_corporate_aiding_and_abetting_liability.html.

⁷ Oct. 10, 2007, available at http://www.escr-net.org/usr_doc/OpenLetter_Ruggie_FinalEndorsements.pdf.

some governments' inability to provide access to justice for human rights abuses in which corporations are involved. Under the doctrine of *forum non conveniens*, a U.S. court will only allow litigation of a transnational case if no "adequate alternative forum exists," or if there are other reasons that the case should be litigated in the United States.⁸ The doctrine applies in ATS cases as in any other.⁹ This means that, in general, ATS cases can be litigated in U.S. courts only in the absence of a viable mechanism for justice in the victims' home country.¹⁰ Moreover, most ATS corporate cases are brought against U.S. corporations, in the defendants' home forum where their corporate headquarters are located. Thus, by and large, ATS cases have been filed in an appropriate venue and, indeed, the only one available to victims of egregious human rights abuses.

The following ATS cases therefore demonstrate that, when access to justice is lacking in the home country, transnational litigation can provide a much-needed, although admittedly limited, accountability regime. For example, in *Doe v. Unocal*, villagers from Burma (Myanmar), who had been subjected to forced labor,

⁸ *Wiwa v. Royal Dutch Shell Petroleum Co.*, 226 F.3d 88, 100 (2nd Cir. 2000), citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947). The determination that an adequate alternative forum exists does not end the inquiry. If the court does find that there is an adequate alternative forum, the court must balance relevant factors of public and private interest to determine whether those tilt in favor of the foreign forum. *Id.*

⁹ See e.g., *Aguinda v. Texaco Inc.*, 303 F.3d 470 (2nd Cir. 2002) (dismissed on *forum non conveniens* grounds because an adequate alternative forum for plaintiffs' claims existed in Ecuador.)

¹⁰ As noted, the doctrine permits certain cases to be litigated in the US even where there is an adequate foreign forum. Critically, however, in most ATS cases, *forum non conveniens* is not even raised by defendants, precisely because the foreign forum is manifestly inadequate.

forced portering, torture, rape and murder in support of the Yadana Natural Gas Pipeline in eastern Burma, brought suit in U.S. courts against Unocal, a U.S. corporation involved in the project.¹¹ In Burma, access to justice is notoriously unavailable for victims of abuses. As exhibited by the crackdown on protesters marching against the repressive military regime late last year, the Burmese junta does not tolerate opposition to government policies.¹² Those policies include favorable conditions for foreign investment and the pervasive use of slave labor. According to the International Labour Organization (ILO), Burma continues to regularly employ forced labor and forced portering in support of major development projects across the country.¹³ Security in the form of increased military buildup around such projects often facilitates the use of forced laborers and porters.¹⁴ Despite promises to the contrary, victims who report such abuses to the ILO continue to face the threat of reprisal.¹⁵

¹¹ *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Ca. 1997); appealed in *Doe v. Unocal Corp.*, 395 F.3d 932 (2002); vacated by *Doe v. Unocal Corp.*, 395 F.3d 978 (2003). The case was later settled, see http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v_unocal.html.

¹² BBC News, “Burma Toll at Least 31, UN says,” Dec. 7, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7133239.stm>.

¹³ Developments concerning the question of the observance of the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29) (Nov. 2006), G.B.297/8/1 at pgs. 8 & 10, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/gb-8-1.pdf>.

¹⁴ For more information see the Burma Project at www.earthrights.org/burma.

¹⁵ Developments concerning the question of the observance of the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29) (Nov. 2006), G.B.297/8/1 at pg. 10, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/gb-8-1.pdf>.

There is no independent judiciary in Burma, nor do Burmese laws provide for access to justice for victims of corporate human rights abuses. Moreover, anyone bringing such a complaint would be in danger of the same reprisals that temper reporting to the ILO.¹⁶ Indeed, the plaintiffs in *Doe v. Unocal* proceeded under “John Doe” pseudonyms, hiding their identities for fear of reprisal. The victims of Unocal’s project had no venue in which to seek redress from Unocal for its complicity in project abuses other than Unocal’s own home forum. Ultimately, the victims were able to obtain a measure of justice in the United States, when Unocal settled the ATS and companion state court cases prior to a state court trial.¹⁷

Nigeria poses similar hurdles for victims of human rights abuses, including those in which multinational oil companies are complicit. In *Wiwa v. Royal Dutch Shell*,¹⁸ victims sued a UK-Dutch corporation in U.S. courts, alleging that Shell was complicit in the Nigerian government’s torture and execution of Ogoni leaders opposing and speaking out against environmental destruction from Shell’s oil operations in the Niger Delta. Several activists were executed after a sham military trial, while others were detained and tortured.¹⁹ Nigeria, like Burma, was under military rule at the time of these abuses and when the lawsuit was filed. The case perfectly illustrates the problem of lack of access to justice; certainly the military junta that executed the plaintiffs

¹⁶ *Doe v. Unocal Corp.*, 963 F. Supp. 880, 897 (1997).

¹⁷ See www.earthrights.org/legal/unocal.

¹⁸ 226 F.3d 88 (2000).

¹⁹ *Id.* at 92-93.

would not permit the victims to seek redress for Shell's role in the killings.

Another Nigeria case, *Bowoto v. Chevron*, further highlights the climate in which victims of major development projects are forced to operate. The case, filed against a U.S. corporation in U.S. courts, alleges that Chevron aided and abetted the Nigerian military and police in abuses connected with Chevron's oil operations in the Niger Delta.²⁰ Incidents included the shooting of peaceful protestors on the company's oil platform and the destruction of two villages by soldiers directed and paid by the company.²¹ As with the *Wiwa* case, Nigeria was under military rule at the time of these incidents, and while a civilian government took power shortly after the *Bowoto* litigation was filed, lingering corruption and the lack of an independent judiciary capable of handling a case prevented victims from seeking access to justice in Nigeria.²²

Several cases from Colombia similarly illustrate the lack of access to justice for Colombian victims of corporate abuses. *Estate of Rodriguez v. Drummond*,²³ *Mujica v. Occidental Petroleum*,²⁴ and

²⁰ No. 99-CV-2506 (N.D. Cal.). See *Bowoto v. Chevron*, Eighth Amended Complaint for Damages and Equitable Relief (Sep. 21, 2006) at para. 1-2, available at <http://www.earthrights.org/files/Legal%20Docs/Chevron/Chev.fedcomplaint11.07.pdf>.

²¹ *Id.*

²² *Id.* at para. 101.

²³ 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

²⁴ 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

Sinaltrainal v. Coca-Cola,²⁵ all involve allegations of corporate complicity in military or paramilitary abuses in furtherance of large-scale development and/or manufacturing projects. Victims were unable to obtain justice in Colombia because of fears of reprisal as well as the corruption, failure to act, and occasional complicity or direct actions of the Colombian government, as well as the absence of an independent judiciary.²⁶

Victims in *Rodriquez* sought protection and help from the Colombian government, which was not forthcoming. As a result, several union leaders were murdered by paramilitaries.²⁷ In *Mujica*, two persons faced retaliation—arrest and murder—after seeking justice in Colombia.²⁸ Plaintiffs alleged that the human rights abuses in *Sinaltrainal* were committed in furtherance of a systematic campaign of intimidation towards labor union members. Victims further alleged that both paramilitaries and government security forces acted together with the Coca-Cola bottling plant to

²⁵ 256 F. Supp 2d 1345 (S.D. Fla. 2003).

²⁶ See *Estate of Rodriquez v. Drummond Co.*, Complaint for Equitable Relief and Damages (Mar. 2002) at para. 4-5, available at <http://www.iradvocates.org/DrumComplaintFINAL1.pdf>; *Mujica v. Occidental Petroleum Corp.*, Complaint for Damages, Injunctive, and Declaratory Relief (Apr. 23, 2003) at para. 2 & 27-28, available at <http://www.iradvocates.org/OXY%20COMPLAINT.pdf>; *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp 3d 1345, 1353 (S.D. Fla. 2003); *Doe v. Chiquita*, Class Action Complaint for Damages (Jul. 18, 2007) at para. 1 & 70-72, available at http://www.earthrights.org/cbi_final_complaint.signed.pdf.

²⁷ *Estate of Rodriquez v. Drummond Co.*, Complaint for Equitable Relief and Damages (Mar. 2002) at para. 4-5, available at <http://www.iradvocates.org/DrumComplaintFINAL1.pdf>.

²⁸ *Mujica v. Occidental Petroleum Corp.*, Complaint for Damages, Injunctive, and Declaratory Relief (Apr. 23, 2003) at para. 2 & 27-28, available at <http://www.iradvocates.org/OXY%20COMPLAINT.pdf>.

carry out the campaign.²⁹ Most recently, *Doe v. Chiquita* was filed in U.S. courts in 2007 by victims of paramilitary violence allegedly aided by the U.S. banana company.³⁰ The plaintiffs could not seek justice in Colombia, again fearing reprisals.³¹

Victims of human rights abuses in Sudan, finding no prospect for justice in that country, have also turned to U.S. courts. In *Presbyterian Church of Sudan v. Talisman Energy*, victims of a governmental campaign of bombing and violence in and around Talisman's oil concession filed suit in U.S. courts, alleging that Talisman aided the Sudanese government in war crimes and genocide.³² Given the government's notorious record of human rights abuses and its involvement in the abuses at issue in the *Talisman* litigation, no one would seriously contend that Sudan would provide access to justice for the victims' claims.³³

Other cases brought to U.S. courts over the past several years further illustrate the lack of justice available in many host countries. In 2001 victims from Indonesia filed suit in *Doe v. Exxon Mobil*, alleging that the company had aided the Indonesian government in a prolonged genocidal campaign in Aceh province.³⁴ Victims faced the lack of an independent judiciary and

²⁹ 256 F. Supp. 2d 1353.

³⁰ No. 07-CV-03406 (D.N.J.).

³¹ *Doe v. Chiquita*, Class Action Complaint for Damages (Jul. 18, 2007) at para. 1 & 70-72, available at http://www.earthrights.org/cbi_final_complaint.signed.pdf.

³² 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

³³ *Id.* at 335-336.

³⁴ 473 F. 3d 345 (D.C. Cir. 2007).

threat of reprisals by Indonesian military authorities.³⁵ In *Sarei v. Rio Tinto*, filed in 2002, victims from the island of Bougainville brought suit in U.S. courts against the Rio Tinto mining company for alleged human rights violations that occurred as a result of the corporation's collusion with the Papua New Guinea military.³⁶ As in the cases above, the plaintiffs could not sue in Papua New Guinea because the laws and legal system were not adequate to provide justice for their claims, in part because they were challenging abuses by the Papua New Guinea military itself.³⁷

The above cases illustrate that transnational litigation—in particular, Alien Tort Statute litigation in U.S. courts—can provide a limited solution to the problem of lack of access to justice that the SRSR has identified. All of the cases were brought to U.S. courts because of corruption, likelihood of reprisals, or a close relationship with the corporation involved in the victims' home countries. In each case, U.S. courts were able to provide access to a legal forum that victims did not find in their home countries, providing at least the chance for accountability. And, despite the fact that the doctrine of *forum non conveniens* is available in ATS cases, none of these cases were dismissed on those grounds—indeed, in many, the defendants did not even raise the issue, since it was self-evident that country in which the abuses occurred would not provide an adequate forum.

³⁵ *Doe v. Exxon Mobil*, First Amended Complaint for Equitable Relief and Damages (Jan. 20, 2006) at para. 3, available at <http://www.iradvocates.org/Exxon%20First%20Amended%20Complaint%20Jan%202006.pdf>.

³⁶ 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

³⁷ *Id.* at 1166-1171.

ERI believes that the above examples illustrate that transnational litigation can be a powerful tool to help remedy one of the major problems identified by the SRSG, the lack of access to justice in many countries. For this reason, the SRSG should encourage the further development of transnational litigation to improve corporate accountability regimes.

IV. Codification of corporate obligations for human rights abuses could help alleviate problems of national variation in the application of corporate accountability standards and improve access to justice.

In his report, the SRSG expressed broad concern that “companies cannot be certain where claims will be brought against them or what precise standards they may be held to because no two national jurisdictions have identical evidentiary and other procedural rules.”³⁸ The SRSG expressed particular concern regarding national variations in “modes of attributing corporate liability,” “attributing liability within transnational corporate structures,” and the “scope and content of corporate legal responsibilities regarding human rights.”³⁹ The SRSG concluded that these “variations in national practice” entail that the use of such litigation is “not an ideal solution for anyone.”⁴⁰ ERI respectfully submits that this concern is overstated and that the SRSG can assist in ameliorating any problem by the promotion of uniform standards.

³⁸ SRSG February 19, 2007 Report, at para. 27.

³⁹ *Id.* at para. 28-29 & 33.

⁴⁰ *Id.* at para. 84.

The problem of variation and unpredictability is overstated for two reasons. First, variation in “evidentiary” and “procedural rules” are a necessary feature of enforcement of legal norms through national justice systems, which is how nearly all legal problems, even those that implicate international law, are solved. Different countries have always had slightly different legal systems and varying procedures, but as long as the *substantive* law that is applied is generally consistent, companies and other actors can predict their obligations fairly well.

Second, in terms of the substantive legal obligations of companies, international law recognizes certain complicity principles. No company, therefore, can credibly claim ignorance as to whether, for example, aiding and abetting or participating in a joint criminal enterprise committing torture, genocide or war crimes is prohibited behavior. Indeed, the standards that have been applied thus far, at least in ATS litigation, have been remarkably consistent. U.S. courts have only applied well-accepted norms of conduct and complicity standards in ATS cases. As the SRSG has recognized, the majority of ATS cases filed against corporations have involved the application of complicity standards drawn from accepted international precedents. These standards are universally recognized and there is nothing unusual about applying them to legal persons such as corporations in addition to natural persons.⁴¹

While the problem of national variation is overstated, different nations do approach legal issues in different ways. For this reason, ERI submits that codification of the substantive standards of conduct, and of standards of complicity, in respect to companies

⁴¹ See EarthRights International, *The International Law Standard for Corporate Aiding and Abetting Liability*, Presented to the U.N. Special Representative to the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, Jul. 2006, available at http://www.earthrights.org/files/aiding_and_abetting_paper.pdf.

and human rights should be a priority of the SRSG and the Human Rights Council, as such codification would only help to decrease any national variations in application. Even in the form of a declaration of principles, such codification would provide assistance to national courts in ensuring that uniform standards are used in cases involving corporate accountability for human rights abuses. The ultimate goal of a multilateral treaty would further serve to provide uniformity in this area, alleviating the problem identified by the SRSG.⁴²

Thus in considering his final views and recommendations, ERI encourages the SRSG to support the codification of corporate obligations with respect to human rights. Codifying existing and agreed upon obligations would provide an easy point of reference for all jurisdictions applying human rights obligations to corporate conduct.

Uniformity in application of corporate accountability standards would not only increase the certainty of corporations regarding to which precise standards they make expect to be held, but could also increase fora for access to justice for victims of abuses. By setting forth clear international obligations to which states may aspire when developing their own domestic laws on corporate accountability for human rights abuses, such codification could increase the application of corporate accountability standards in the corporation's home country and increase available fora for victims. In some countries, access to justice is absent not by design but by neglect, and the articulation of the relevant legal principles could reassure courts and judges that the adjudication of corporate responsibility for human rights is an appropriate and feasible activity.

⁴² There is nothing unusual about codifying national and customary international law standards into a multilateral treaty, as was done with the Torture Convention.

While a declaration of principles and standards would help to alleviate any inconsistency in national practice as well as potentially expand the fora available for national and transnational litigation, gaps will inevitably remain. A non-binding document would certainly assist courts, but it would not guarantee that their decisions would be uniform, as some courts may disagree with the principles asserted. Furthermore, victims of abuses perpetrated by companies may still have no prospects for justice in either their own country or the companies' home country. These problems will only be addressed when a multilateral treaty is implemented, creating binding standards for national litigation as well as enforcement mechanisms accessible to victims, in order to ensure that its provisions are fully implemented.

V. Conclusion.

As he enters the final year of his mandate, ERI seeks to remind the SRSG of the benefits to victims that transnational litigation under the U.S. Alien Tort Statute has afforded by providing a forum for access to justice especially when such access is lacking elsewhere. ERI encourages the SRSG to focus part of his final views and recommendations on creating additional fora where victims of human rights abuses associated with corporations may seek justice. To this end, ERI further encourages the SRSG to support the codification of corporate obligations with respect to human rights, as a step toward the eventual implementation of a multilateral treaty, and to continue to work to increase access to justice for victims of abuses.



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