

UNOCAL AND THE DEMISE OF CORPORATE NEUTRALITY

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INTRODUCTION

Recent developments in international human rights jurisprudence and the conduct of transnational corporations indicate a changing view of corporate responsibility for human rights norms. Corporations are voluntarily embracing human rights principles as company policy,¹ domestic courts in the United States are enforcing *jus cogens*² and other norms in cases brought under the Alien Tort Claims Act (ATCA),³ and the United Nations Human Rights Commission is considering the formation of a template for international scrutiny of corporate practices that parallels the model for states.⁴ These trends are modest and at times hotly contested, yet they constitute a fruitful basis for activism. Moreover, these developments trigger a change in corporate accountability, which discredit previous corporate recourse to neutrality arguments sounding in cultural relativism, economic determinism, and non-intervention in domestic affairs. Corporate concession to voluntarism is a concession to the invalidity of corporate neutrality and creates an obligation to proactively ensure human rights protections.

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1. See generally What is the Global Compact?, http://www.unglobalcompact.org/content/AboutTheGC/Overview_About.htm?iViewId=253 (last visited Sept. 9, 2005).

2. "Latin meaning 'compelling law.' This 'higher law' may not be violated by any country." Legal-Explanations, <http://www.legal-explanations.com/definitions/jus-cogens.htm> (last visited Oct. 31, 2005).

3. See generally *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), cert. granted, sub nom. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

4. See U.N. Comm'n on Human Rights, Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at <http://www.umn.edu/humanrts/links/norms-Aug2003.html> [hereinafter *Norms*].

Critics argue that voluntarism is no more than a public relations ploy aimed at promoting a positive public image and lacks sincere commitment to alter corporate conduct to conform to human rights norms.⁵ However, this criticism jumps to an easy conclusion and fails to appreciate the function of voluntarism or recognize the indispensable role it plays. When corporations voluntarily take a stand they open the door for human rights advocates to use the corporations' own policies and rhetoric to prod the corporations into compliance or ultimately, against them for impeachment purposes. Moreover, voluntarism acts as a vehicle for corporate executives who genuinely wish to conform to international law. It provides an intellectual response to corporate neutrality and acts as a link in the evolution of corporate accountability. Voluntarism, though largely ineffectual in a vacuum, enables the progression to more binding norms and acts in concert with the intellectual and political justification of accountability. On the heels of corporate voluntarism, illustrated by the U.N. *Global Compact*,⁶ the *U.S./U.K. Voluntary Principles on Security and Human Rights*,⁷ and individual, internal corporate human rights declarations and policies, come more binding norms and international oversight in the form of the United Nation's *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.⁸ Moreover, recent developments in the ATCA case of *John Doe v. Unocal*⁹ and the *Sosa v. Alvarez-Machain*¹⁰ matter have given new momentum to the call for binding corporate accountability for human rights abuses.

This article will survey some recent issues in international business accountability that reveal an apparent shift toward a new sensitivity to human rights issues including new developments for the establishment of a set of binding norms, the advantages and disadvantages of voluntarism, some implications of the recent settlement of the Unocal case, and the continuing corporate battle against the ATCA. Addi-

5. See generally Terry Collingsworth, "Corporate Social Responsibility," *Unmasked*, 16 ST. THOMAS L. REV. 669 (2004).

6. See generally Global Compact, <http://www.unglobalcompact.org> (last visited Oct. 20, 2005).

7. See U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Fact Sheet: Voluntary Principles on Security and Human Rights (Feb. 20, 2001), <http://www.state.gov/g/drl/rls/2931.htm> (last visited Oct. 16, 2005).

8. *Norms*, *supra* note 4.

9. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed on motion for summary judgment*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005).

10. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

tionally, this article will show the value of corporate voluntarism for subsequent impeachment purposes and will be at once contextual, descriptive, analytical, and participatory by exploring the significance of the Unocal settlement in the context of the asynchronous dichotomy extant in the corporate accountability debate between voluntarism and binding norms. Simultaneously, this article seeks to actively participate by impeaching the dubious claims to human rights adherence made by Unocal and significant portions of the international business community on the basis of their claims made in the *Alvarez-Machain* case and to generally contribute to the reformation of the practices of transnational corporations.

VOLUNTARISM VS. BINDING NORMS

December 2004 saw a landmark settlement in the case of *John Doe v. Unocal Corporation*.¹¹ The complaint had been filed by a group of non-governmental organizations (NGOs) and private attorneys¹² on behalf of fourteen Burmese villagers more than eight years earlier and sounded in the ATCA.¹³ The complaint alleged that in the course of constructing the Yadana gas pipeline through Burma/Myanmar the defendant corporation partnered with the brutal military regime in power (SLORC)¹⁴ and conspired to cause human rights violations “including coerced labor, the forced removal of vil-

11. 963 F. Supp. at 880.

12. 395 F.3d at 936. Plaintiffs’ counsel included representatives of EarthRights International (ERI), 395 F.3d at 936, a non-profit NGO dedicated to the defense of human rights and environmental rights, EarthRights International, <http://www.earthrights.org/about/mission.shtml> (last visited Oct. 30, 2005), the International Labor Rights Fund, 395 F.3d at 936, “an advocacy organization dedicated to . . . just and humane treatment for workers worldwide,” International Labor Rights Fund, <http://www.laborrights.org/about/index.html> (last visited Oct. 30, 2005), and the Center for Constitutional Rights, 395 F.3d at 936, “a non-profit legal and educational organization dedicated to . . . advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights.” Ctr. for Constitutional Rights, http://www.ccr-ny.org/v2/about/mission_vision.asp (last visited Oct. 30, 2005). Private firms and attorneys included Bostwick & Hoffman, Hadsell & Stormer, Judith Brown Chomsky, and Julie Shapiro. 395 F.3d at 936.

13. 395 F.3d at 943. In addition to 28 U.S.C. § 1350 (2000) (Alien Tort Claims Act and Torture Victim Protection Act), the complaint also cited jurisdiction under 28 U.S.C. § 1331 (2000) (federal question jurisdiction); 28 U.S.C. § 1367 (2000) (supplemental jurisdiction); and 18 U.S.C. § 1964(c) (2000) (Racketeer Influenced and Corrupt Organizations Act). 395 F.3d at 943.

14. 395 F.3d at 937-38. SLORC is the abbreviation for the State Law and Order Restoration Council. *Id.* at 937.

lagers, murder, rape, and other torture”¹⁵ Among the specific counts were allegations that they burned down two houses, seized the villagers’ household possessions, kicked a nursing mother with her infant into a fire (ultimately causing the baby’s death),¹⁶ forced villager relocation, forced villager labor or extorted bribes in lieu of labor, beat an 18-year-old villager (who subsequently died of his injuries) beyond recognition,¹⁷ confiscated property and livestock (including chickens, cows, pigs and harvested grains), required the payment of a fee in order for villagers to farm their own land, and later imposed restrictions on villager movements preventing them from harvesting their crops.¹⁸ Additionally, village officials were allegedly abducted, bound in the center of the village, and punished through the use of water torture for failure to provide sufficient labor.¹⁹ Some of those forced to labor were literally beaten to death.²⁰ Multiple women suffered rape or attempted rape,²¹ and pregnant women and children were forced to endure hard labor if the men were dead or unable to work.²² During 1996, “SLORC soldiers . . . tied a noose around the neck of [one village’s leader], killed at least eight people, and tortured one youth.”²³

According to Unocal’s stated human rights policy, *Human Rights and Unocal: A Discussion Paper*,²⁴ as “[a]n American company that is more than a century old, Unocal is proud of its global reputation . . . we take to heart our commitment ‘to improve the lives of people wherever we work[,]’”²⁵ and “[o]ur goal at Unocal is to operate as an ‘island of integrity’ wherever we do business.”²⁶ Unocal says that it

15. Ctr. for Constitutional Rights, *Docket: Doe v. Unocal, Synopsis*, Jan. 31, 2005, http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45.

16. Third Amended Complaint for Damages and Injunctive and Declaratory Relief paras. 50-66, *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed on motion for summary judgment*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh’g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005) (No. CV 96-6959-RAP (BQRx)).

17. *Id.* paras. 67-77. John Doe IX was required to pay approximately 70% of his income to SLORC in extorted fees, including forced labor fees. *Id.* para. 138.

18. *Id.* paras. 83-92.

19. *Id.* para. 89(e).

20. *Id.* para. 89(c).

21. *Id.* paras. 93-95.

22. *Id.* para. 101.

23. *Id.* para. 118.

24. Unocal Corp., *Human Rights and Unocal: A Discussion Paper*, <http://www.unocal.com/responsibility/humanrights/index.htm> (last visited Sept. 9, 2005) (subsequently removed from Unocal website, *see infra* note 158).

25. *Id.* (follow “Our Position” hyperlink).

26. *Id.* (follow “Next Steps” hyperlink).

“ha[s] seen time and again how [its] presence has improved the quality of life for people”²⁷ The *Discussion Paper* further contends that “Unocal supports the Universal Declaration of Human Rights[,]”²⁸ which explicitly prohibits the behavior alleged in the complaint.²⁹ The credibility of Unocal’s claims is cast in doubt in light of the recent settlement of the Burma/Myanmar case.

While the terms of the settlement are confidential, plaintiffs contend, “the settlement in principle will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.”³⁰ Unocal states that it “reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle.”³¹ This ATCA action represents the first case of its kind to survive two motions for summary judgment, the first via appeal to the Ninth Circuit in 2002,³² and the second in September 2004 despite amicus briefs filed by U.S. government lawyers.³³ These victories undoubtedly led to the settlement three months later.³⁴ Plaintiffs’ attorneys (from the Center for Constitutional Rights) stated that the “Ninth Circuit decision is a remarkable victory not just for the plaintiffs involved, but for the effort to hold corporations responsible for their participation in atrocities abroad and at home in the name of shareholder profits.”³⁵

27. *Id.* (follow “Business and Human Rights” hyperlink).

28. *Id.* (follow “Universal Declaration of Human Rights” hyperlink).

29. The Universal Declaration Of Human Rights establishes as a common standard, inter alia, the right to life (Article 3), the prohibition against slavery or servitude (Article 4), freedom from torture and cruel, inhuman, and degrading treatment (Article 5), equal protection under the law (Article 7), freedom from arbitrary arrest or detention (Article 9), “freedom of movement . . . within the borders of each [country]” (Article 13(1)), right to own property and not be arbitrarily deprived of that property (Article 17), “the right to work, to free choice of employment, to just and favourable” working conditions (Article 23(1)), “the right to just and favourable remuneration” (Article 23(3)), and the entitlement of special consideration for motherhood and childhood (Article 25(2)). Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>.

30. Press Release, Ctr. for Constitutional Rights, Settlement Reached in Principle in Unocal Human Rights Lawsuit, http://www.ccr-ny.org/v2/print_page.asp?ObjID=Lr02CI89YT&Content=483.

31. *Id.*

32. *Doe v. Unocal Corp.*, 395 F.3d 932, 962 (9th Cir. 2002), *vacated, reh’g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005).

33. Ctr. for Constitutional Rights, *supra* note 15.

34. *Id.*

35. *Id.*

Perhaps the most remarkable lesson from the Unocal settlement is the discrepancy between the corporation's human rights policy and the atrocities over which it has arguably assumed some liability, at least by implication. The apparent failure of Unocal's human rights policy is that it is a product of corporate voluntarism, grounded in self-imposed, non-binding norms.³⁶ This case also does not appear to be singular as there are numerous examples of other transnational corporations who are also allegedly complicit in the commission of atrocities abroad³⁷ (in apparent violation of their own corporate human

36. It should be noted that Unocal did not develop its discussion paper until after the atrocities alleged in the complaint, *see* Unocal Corp., <http://www.unocal.com> (last visited Oct. 5, 2005), but the language in the document of being "proud of its [100 year] global reputation[.]" its assertion that it has *seen* "how [its] presence has improved the quality of life. . . ." and "[t]he main difference between our activities in other countries decades ago and in Myanmar now, is that Myanmar has become highly politicized, *even though our approach has remained the same.*" Unocal Corp., *supra* note 24 (emphasis added), all claim a historic continuity of commitment to accepted human rights norms and that the discussion paper was merely a rendering of a policy put in place long before the atrocities in Burma/Myanmar.

37. Some other allegations of corporate complicity in human rights atrocities include, *inter alia*, the activities of Royal Dutch/Shell oil group who allegedly conspired to commit the extra-judicial execution of environmental and community leaders Ken Saro-Wiwa and John Kpuinen by hanging, the torture and unlawful detention of other individuals, and the shooting of a woman peacefully protesting the destruction of her crops, in an attempt to suppress the Ogoni peoples' opposition to the defendants' long history of environmental and human rights abuses in the Ogoni region of Nigeria, pursuant to their efforts to build a pipeline. *See* *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002). Another example is the alleged intimidation of union leaders in Guatemala by Fresh Del Monte Produce, Inc., which took the form of torture, kidnapping, unlawful detention, crimes against humanity, denial of the right to associate and organize and extra-judicial killing. *See* *Villeda v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. Dec. 12, 2003). Further examples include the systematic violations of human rights, including summary execution, torture and cruel, inhuman and degrading treatment, to suppress peaceful protests against Chevron's environmental practices in Parabe, Opia, and Ikenyan, Nigeria, *see* *Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004), the unauthorized spraying of toxic herbicides by DynCorp in an effort to eradicate cocaine and heroin crops in Ecuador, which resulted in medical problems including congenital birth defects, permanent skin irritations, blisters, death, loss of subsistence crops and livestock, as well as torture, crimes against humanity, genocide, and extra-judicial killing, Class Action Complaint for Equitable Relief and Damages at 5-11, 16-18, 24-26, *Arias v. DynCorp.*, No. 1:01CV01908 (RWR) (D.D.C. 2001), *available at* <http://www.laborrights.org/projects/corporate/dyncorp/dyncorcomplaint.doc>, and alleged extra-judicial killing, torture, and crimes against humanity against villagers from Aceh, Indonesia at the hands of Indonesian military who, although responsible for the massacres in East Timor, were hired by Exxon Mobil to provide security for its natural gas facilities, and who perpetrated these human rights abuses on Exxon Mobil compounds after Exxon Mobil had specific knowledge of the atrocities committed by its security forces, *see* Complaint for Equitable Relief Damages at 12-25, 27-31, *Doe v. Exxon Mobil Corp.*, No. 01CV01357 (D.D.C. 2001), *available at* <http://www.laborrights.org/projects/corporate/exxon/exxoncomplaint.pdf>. Still more examples include the targeting and extermination of trade union leaders with the consent of managers in Coca-Cola bottling plants in Columbia by paramilitaries, *see* *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), the extra-judicial killing of trade union leaders by paramilitaries allegedly hired by Drummond Company Inc. in Columbia, *see* *Estate of Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d

rights policies).³⁸ The Unocal atrocities were, arguably, illustrative of the continuing failure of voluntarism, yet voluntarism was ultimately vindicated by the settlement,³⁹ at least to the extent that it was useful to impeach Unocal with its own statements.⁴⁰ Nonetheless, the *Unocal* case pointedly displays the need to move toward more binding norms of international corporate responsibility.

In an address to the World Economic Forum on January 28, 2001, U.N. Secretary-General Kofi Annan asked, "how do you explain ... why the global system of rules ... is tougher in protecting intellectual property rights than in protecting fundamental human rights?"⁴¹ He described corporate responsibility as the refusal to finance warlords and other massive human rights violators (with governmental or quasi-governmental authority), the distribution of medicines for endemic diseases, the resolution of armed conflicts, the building of necessary infrastructure, and the improvement of local market economies, as well as debt relief, development assistance, and the opening of markets in the industrialized states to developing nations.⁴² Kofi Annan advocated making human rights policy an integral element of the business model for transnational corporations doing business in the developing world but was silent on the issue of imposing enforceable

1250 (N.D. Ala. 2003), corporate complicity in apartheid in South Africa, see *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), alleged illegal testing of drugs on children in Kano, Nigeria, see *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118 (WHP), 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2002), and environmental and human rights abuses in Papua New Guinea, see *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

38. See generally *Chevron-Human Rights*, http://www.chevron.com/social_responsibility/human_rights/ (last visited Oct. 30, 2005); *ExxonMobil*, <http://www.exxonmobil.com/corporate/files/corporate/CCR2002communities.pdf> (last visited Oct. 30, 2005); *Shell-Our Approach to Human Rights*, http://www.shell.com/home/Framework?siteId=royalen&FC2=&FC3=/royalen/html/iwgen/environment_and_society/key_issues_and_topics/issue_s/human_rights/our_approach_to_human_rights.html (last visited Oct. 30, 2005).

39. The Unocal settlement may encourage other companies to settle their ATCA cases and to take sincere steps to abide by human rights norms abroad. However, because of "very high standard[s] of legal and factual proof[.]" only six out of approximately forty comparable cases filed since 1996 have survived an initial motion to dismiss. Interview by Amy Goodman with Sandra Coliver, Executive Director, Center for Justice and Accountability, on-air with *Democracy Now!* (Dec. 16, 2004), available at <http://www.democracynow.org> (enter Sandra Coliver under "search for" archives; then click on "Unocal Settles Landmark Human Rights Case with Burmese Villagers" hyperlink).

40. Unocal's code of good conduct was an important feature of the ATCA litigation and "came back to haunt that company when it was sued for human rights violations." Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103, 112 n.66 (2004).

41. Kofi Annan, U.N. Sec'y-Gen., In Address to the World Economic Forum, Secretary-General Says Globalization Must Work for All (Jan. 28, 2001), <http://www.unis.unvienna.org/unis/pressrels/2001/sg2772.html>.

42. *Id.*

binding norms.⁴³ In short, he was discussing voluntarism. Corporate responsibility for business activities under public international law necessarily discloses a dichotomy between voluntarism and binding corporate accountability.

In responding to the call for corporate accountability for human rights violations, some industry representatives opine that the “the chief mission of businesses . . . is to create wealth and generate profits for [their] shareholders”⁴⁴ and that the maintenance of human rights is a function (and responsibility) of government.⁴⁵ Opponents of corporate responsibility argue that it would be improper for corporations to impose their western values on other states, that transnational corporate influence will spur domestic economic development and give rise to a middle class who will demand human rights without the necessity of direct corporate intervention, that human rights is a political question, and that business should not interfere with domestic politics.⁴⁶ Thus, critics argue cultural relativism, economic determinism, and non-intervention in domestic affairs. On the other hand, proponents of the applicability of human rights norms argue that doing business in the developing world already imposes “western” cultural ideals, such as capitalism, and that economic determinism takes too long and typically does not work, as the profits usually do not trickle down in order to create a middle class.⁴⁷ Finally, reluctance to interfere in domestic

43. *See id.*

44. Pierre Sane, *Why Human Rights Should Matter to the Business World*, EARTH TIMES NEWS, Jan. 8, 2001, <http://www.globalpolicy.org/reform/2001/0108ps.htm>.

45. *Id.*

46. *Id.*

47. Economic determinism has been criticized as simplistic, flawed, and lacking empirical support. In his book, *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations*, author S. Prakash Sethi argues, [Multinational Corporations] and the governments of industrially advanced countries have asserted, albeit gratuitously, that the greater expansion of international trade and economic growth will lead to a fostering of democratic institutions and improvement in the human rights records of developing countries where authoritarian and totalitarian regimes currently hold sway. Such assertions are made almost as truisms. Yet they are actually untenable.

S. PRAKASH SETHI, *SETTING GLOBAL STANDARDS, GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS* 6 (John Wiley & Sons, Inc. 2003). Sethi adds, “Globalization and the dominant role of MNCs do not provide any mechanisms to enhance a country’s economic infrastructure and instead push lower its already meager fiscal resources . . .” *Id.* at 9. Timothy Smith, President of Social Investment Forum and former Executive Director of Interfaith Center on Corporate Responsibility, asserts,

[S]weatshops and human rights abuses are not an inevitable price of economic growth in poorer countries or of profits for transnational corporations. Instead, they destroy democratic values and harm free enterprise. Multinational corporations cannot earn public trust without comprehensive independent external moni-

policy is a baseless reason as corporations routinely interfere in order to influence domestic policy as it relates to their ability to conduct business.⁴⁸

All three theories relied upon by traditional opponents are anti-theoretical not only to binding norms but to the concept of voluntarism. Corporations that publicly embrace voluntarism can no longer advocate these traditional arguments because they lay bare the hypocrisy of corporate neutrality. The *Global Compact* states that “[b]usinesses should support and respect the protection of internationally proclaimed human rights” (Principle 1) and they should “make sure that they are not complicit in human rights abuses” (Principle 2).⁴⁹ These norms, voluntarily (and publicly) accepted by many of the world’s corporate leaders,⁵⁰ pointedly contradict core assertions of cultural relativism, economic determinism, and non-intervention. Principle 1 proclaims the international applicability, and therefore universality of human rights, which, by definition, repudiates cultural relativism.⁵¹

toring and compliance verification of voluntary codes of conduct, as well as public disclosure of their findings.

Timothy Smith, President, Social Investment Forum, Praise for Setting Global Standards, http://www.wiley.com/WileyCDA/WileyTitle/productCD-0471414557_descCd-description (last visited Sept. 6, 2005).

Long-held judgments about the development process, as well as the work-horse formal models of economic growth suggest that the poorer countries should tend to grow more rapidly than richer countries and therefore should close the proportionate income gap over time. The main reason for expecting economic convergence is that the poorer countries can import capital and modern technologies from the wealthier countries, and thereby reap the “advantage of backwardness.” Yet in recent decades, there has been no overall tendency for the poorer countries to catch up or converge with the richer countries.

SETHI, *supra* at 5 (quoting Jeffrey Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1-118 (1995)). Moreover, in 2003 Sethi further observed,

Globalization and economic growth have had adverse side effects. Distribution of gains from international trade and investment has been highly skewed in favor of those who control the capital and against those who contribute human labor, especially in the developing countries. According to the World Bank, the disparity between rich and poor countries has grown 10 times wider during the past 30 years.

SETHI, *supra* at 5.

48. Sane, *supra* note 44.

49. Global Compact, The Ten Principles, <http://www.unglobalcompact.org/content/AboutTheGC/TheNinePrinciples/thenine.htm> (last visited Oct. 7, 2005).

50. As of October 30, 2005, more than 2,000 corporations worldwide had joined the Global Compact since its launch date of July 26, 2000. Global Compact, The Next Stages of Development, <http://www.unglobalcompact.org> (follow “About the GC” hyperlink; then follow “The GC: Next Stages of Development” hyperlink) (last visited Oct. 30, 2005).

51. In its discussion paper, Unocal claimed to adhere to the Universal Declaration of Human Rights, Unocal Corp., *supra* note 24 (follow “Universal Declaration of Human Rights” hyperlink), but the Universal Declaration proclaims its universality “as a common standard of achievement for all peoples and all nations, . . . [and] to secure their universal and effective recognition and observance,” Universal Declaration of Human Rights, *supra* note

Nor is it plausible to maintain that going into business with nations that systematically engage in massive human rights abuses, and consequently enriching and empowering these ruthless regimes, “support[s] and respect[s] the protection of internationally proclaimed human rights.”⁵² Finally, non-intervention is antithetical to Principle 2, which implies the responsibility of boycotting all host nations with reputations for human rights violations. This position is further supported by the *U.S.-U.K. Voluntary Principles on Security and Human Rights*, which call upon corporations to conduct risk assessments and to “consider the available human rights records of public security forces, paramilitaries, local and national law enforcement . . .”⁵³ and state that, “[c]ompanies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights.”⁵⁴ This creates a duty on the part of the corporation to either boycott the host nation or intervene as it relates to human rights protection and is thereby antithetical to non-interventionism.

The *Voluntary Principles on Security and Human Rights* further stipulate that “individuals credibly implicated in human rights abuses should not provide security services for [c]ompanies.”⁵⁵ Yet, although Exxon and Unocal are signatories to these principles, both are alleged to have violated them. Exxon allegedly hired veteran Indonesian military personnel who were responsible for the massive human rights abuses, including mass murder in East Timor, as security of their natural gas facility in Aceh, Indonesia.⁵⁶ Unocal partnered with SLORC, whose reputation for violence, forced labor, and abundant human rights abuses were well documented prior to Unocal’s participation in the pipeline project.⁵⁷

29. In this clear and unambiguous language, the Declaration repudiates any notions that human rights are malleable from one culture to the next and refutes any legitimacy for corporate reliance on cultural relativism with respect to human rights norms.

52. The Ten Principles, *supra* note 49.

53. U.S. Dep’t of State, *supra* note 7.

54. *Id.*

55. *Id.*

56. Complaint for Equitable Relief Damages, *supra* note 37, at 12-17.

57. See ILO, FORCED LABOUR IN MYANMAR (BURMA) REPORT OF THE COMMISSION OF INQUIRY APPOINTED UNDER ARTICLE 26 OF THE CONSTITUTION OF THE ILO TO EXAMINE THE OBSERVANCE BY MYANMAR OF THE FORCED LABOUR CONVENTION, 1930 (No. 29) (1998), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>. The ILO found “abundant evidence . . . showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military . . .” *Id.* para. 528. Additionally, before acquiring an interest in the project, Unocal hired a risk assessment group, which stated, “[t]hroughout Burma the government habitually makes use of forced labour to construct roads.” *Doe v. Unocal Corp.*, 395 F.3d 932, 940 (9th Cir. 2002), *vacated, reh’g*

The Unocal Corporation continues to rely on economic determinism as a panacea for corporate misconduct by insisting that the economic development it allegedly brings to host nations produces economic opportunity and thereby develops liberalization of government policy. In a news release, Unocal discussed the Yadana project in Burma/Myanmar, and while “not defend[ing] the actions and policies of . . . Myanmar,” stated “[t]he Yadana project, which has brought significant benefits in health care, education, and economic opportunity to more than 45,000 people living in the pipeline area, is a step in the right direction.”⁵⁸ Conversely, in 1995, Human Rights Watch “informed Unocal that forced labor was ‘so pervasive’ in [Myanmar] that [it could not] condone any investment that would enrich the [country’s] current regime.”⁵⁹ Thus, Human Rights Watch argues that the practical effect of economic determinism not only precludes economic opportunity, but also enriches and strengthens the regimes committing the atrocities. Unocal still clings to outmoded paradigms of corporate responsibility that are in binary opposition to the fundamental principles of voluntarism to which it also claims to subscribe. Unocal continues to attach primacy to political and ethical neutrality as described in its *Discussion Paper*: “Unocal . . . has a legal and ethical obligation to remain politically neutral.”⁶⁰ Unocal employs the excuse of political neutrality to avoid the human rights obligations it purports to support in its corporate ethics policy, but embraces active intervention in domestic economic issues by partnering with a host nation in the furtherance of corporate profits. Therefore, it relies on the refrain of corporate neutrality or actively engages in intervention depending upon its perceived self-interest.

The glaring contradictions extant in the posturing of corporations like Unocal and Exxon that try to simultaneously subscribe to the opposing ideologies of neutrality and voluntarism cause many to question the benefit of voluntarism and call for the imposition of binding

granted en banc, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005). In addition, Unocal Vice-President of International Affairs Stephen Lipman, stated under oath that SLORC would operate beyond their control and “go [] to excess.” *Id.* at 940-41. Finally, the U.S. Department of State’s *Country Reports on Human Rights Practices for 1991* states, “[t]he military Government [in Myanmar] routinely employs corvee labor on its myriad building projects’ and that ‘[t]he Burmese army has for decades conscripted civilian males to serve as porters.’” *Id.* at 940 n.6 (quoting U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991 796-97 (1992)).

58. Unocal Corp., *The Story You Haven’t Heard About . . . the Yadana Project in Myanmar*, <http://www.unocal.com/myanmar> (last visited Nov. 17, 2005).

59. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1299 (C.D. Cal. 2000).

60. Unocal Corp., *supra* note 24.

norms. Indeed many theorists claim that, “[i]n the absence of a framework of legal accountability, voluntary approaches will often be ineffective and will remain contested.”⁶¹ Legal accountability can come in the form of direct or indirect obligations and soft and hard law. Like many other human rights instruments, Article 2(1) of the International Covenant on Civil and Political Rights calls upon state parties “to respect and . . . ensure . . . the rights recognized in the Covenant . . .”⁶² and therefore obligates governments to protect the rights of those in their territories against third parties, including corporations.⁶³ This norm is indirectly placed on businesses as it stems from international obligation and flows through national governments.⁶⁴ The direct obligation flows from international law and is operative when governments “are unable or unwilling to [afford protection] themselves.”⁶⁵ It is this second scenario that produces the controversy. International norms do not specifically target nations that have concisely defined adherence to human rights and efficient internal regulatory structures, but rather those states without adequate legal and regulatory safeguards or which suffer widespread corruption. Corporate voluntarism alone is not enough. In some cases, voluntary norms can be easy to implement “because they are adapted to the circumstances of particular industries or firms.”⁶⁶ However, where corporations have no indirect obligations and there is a significant profit motive to ignore human rights norms, voluntarism may be viewed as counter-productive and costly. Ethical problems are usually decided on the basis of profitability,⁶⁷ and “[w]hile we may expect a corporation to behave ethically when it costs nothing, we should realistically expect the corporation to maximise its profits when behaving ethically will reduce profits, even when that means exploiting sweat-

61. INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM, HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES, SUMMARY (2002), available at www.ichrp.org (follow “Publications” hyperlink; then follow “Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies—Summary of Findings”).

62. International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171. Article 2(1) of the International Covenant on Civil and Political Rights relates, “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 . . .” *Id.* (emphasis added).

63. INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 61.

64. *Id.*

65. *Id.*

66. *Id.*

67. See David P. Forsythe, *The Political Economy of Human Rights: Transnational Corporations* (Human Rights Working Papers, Paper No. 14, 2001), <http://www.du.edu/humanrights/workingpapers/papers/14-forsythe-03-01.pdf> (last visited Oct. 9, 2005).

shop labour”⁶⁸ Moreover, corporations can be particularly susceptible when the state is committing the gravamen of the human rights violations, allowing corporations to wash their hands of the atrocities and rely upon the refrain of non-interference,⁶⁹ even though the massive violations are perpetrated in order to enhance corporate profit.⁷⁰ In these cases, “a legal framework provides powerful tools and incentives for improvement” and in cases where voluntarism is working, “anchoring these in a legal framework is likely to enhance their effectiveness.”⁷¹

The rewards of implementing binding international norms on transnational corporations are manifest. Not only are these corporations in the best position to influence relevant state policy and practice in the countries where human rights are at greatest risk,⁷² they can enjoy some pecuniary benefit as well, since companies that practice voluntarism are placed on an equal footing with those who do not.⁷³ Under a strict cost-benefit analysis, corporations must weigh the benefits of the establishment of a clear bright line minimum standard as against uncertainty of obligation and the potential public relations benefits inherent in such enlightened practices.⁷⁴ Moreover, uncer-

68. Engle, *supra* note 40, at 105. *Accord* Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 117 (2002).

69. The Ninth Circuit’s *Unocal* opinion responds to the issue of non-interference, at least for American companies and concerning the most serious human rights violations, and invalidates this approach by using an “aiding and abetting” standard. *Doe v. Unocal Corp.*, 395 F.3d 932, 950 (9th Cir. 2002). In establishing the standard, the Court relied upon a slight modification of the *Furundzija* standard used by the International Criminal Tribunal for the former Yugoslavia, and articulates, “we may impose aiding and abetting liability for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime” *Id.* at 951.

70. Some examples include the *Unocal* case, in which the human rights violations were caused by the military arm of SLORC, *Wiwa v. Royal Dutch Petroleum*, in which the Nigerian army inflicted the massive human rights suffering of the Ogoni peoples and *Bowoto v. Chevron*, in which the Nigerian army brought about the suffering of those protesting Chevron’s intolerable environmental practices. *See supra* note 37.

71. INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 61.

72. Transnational corporations frequently have superior bargaining power over smaller nations as they offer economic development and a ready market for natural resources upon which the poorer nations depend. *See generally* *Unocal Corp.*, *supra* note 24. This bargaining power with partner nations allows corporations to influence their activities and could, if asserted properly, act as a tremendous resource for remediating poor human rights practices in all countries with which the corporations do business. This capability is alluded to in *Unocal’s Discussion Paper*, which states, “the nature of our business . . . creates long-term relationships with host country leaders and other key decision makers,” and “[o]ften, . . . Unocal is able to raise concerns about human rights issues and privately present our views.” *Unocal Corp.*, *supra* note 24.

73. *See* INT’L COUNCIL ON HUMAN RIGHTS POLICY *supra* note 61.

74. *See id.*

tainty can lead to unfair competitive advantages, alien tort claims risks, uncertainty regarding budgeting requirements for foreign projects, investor flight, and the risk of substantial loss of good faith amongst consumers.⁷⁵ Encouraging human rights initiatives also builds “a stable and peaceful society in which [transnational corporations] can prosper and attract the best and the brightest employees.”⁷⁶

The advantage of implementing an international legal structure, which imposes binding norms and corporate responsibility, is not overlooked by the United Nations. The Sub-Commission on Human Rights established a working group in 1998 to examine the activities of transnational corporations (Resolution 1998/8).⁷⁷ Ultimately, this resulted in the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (Resolution 2003/16).⁷⁸ This document asserts that corporations and those connected with them have human rights obligations and responsibilities.⁷⁹ It calls for non-discriminatory treatment, security of persons including, inter alia, refraining from engaging in or “benefit[ing] from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced . . . labour, hostage-taking”⁸⁰ It provides rights for the workers including those who are nationals of developing states and ensures them an adequate standard of living.⁸¹ It prohibits corporations from soliciting or receiving bribes⁸² and references con-

75. See generally *id.*

76. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 902 (2003).

77. Resolution 1998/8 of the Sub-Commission on the Promotion and Protection of Human Rights “established, for a three-year period, a sessional working group of the Sub-Commission, composed of five of its members, to examine the working methods and activities of transnational corporations” to “draft Norms . . . on the responsibilities of transnational corporations and other business enterprises with regard to human rights” U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, Working Group, *Draft Resolution: Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, paras. 1-2, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (prepared by Alfonso Martinez, Guisse, Kartashkin, Park, and Weissbrodt).

78. *Id.* para. 3; see also *Norms, supra* note 4.

79. *Norms, supra* note 4, paras. 3-4.

80. *Id.* § C(3). Section D(5) states, “Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.” *Id.* § D(5).

81. *Id.* § D. Section D(8) states, “Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.” *Id.* § D(8).

82. *Id.* § E(11). Section E(11) states,

sumer protection and the protection of the environment in accordance with national standards and those under international agreements and principles.⁸³

These norms have been lauded as “a landmark step in holding businesses accountable for their human rights abuses”⁸⁴ However, the norms must be binding and the provisions implemented in order to achieve the benefits for both the developing nations and the corporations.⁸⁵ Resolution 2003/16 goes beyond voluntarism⁸⁶ as it incorporates implementation provisions, such as unilateral monitoring, NGO involvement, state scrutiny, and provisions for adequate reparations.⁸⁷ These provisions arguably go farther than other multilateral

Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

Id.

83. *Id.* §§ F(13), G(14). Section G(14) states, “Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment . . . in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights” *Id.* § G(14).

84. Weissbrodt & Kruger, *supra* note 76, at 901.

85. The U.N. Commission on Human Rights has indicated that the draft norms (Resolution 2003/16) adopted by the Sub-Commission, *see Norms, supra* note 4, currently have “no legal standing” but their status should be made more clear in the final report for the March 2005 meeting. *UN Examines Human Rights Responsibilities of Transnational Corporations*, EURACTIV, Nov. 5, 2004, <http://www.globalpolicy.org/reform/business/2004/1105humanrights.htm>.

86. *See generally* Troy Rule, Comment, *Using “Norms” to Change International Law: UN Human Rights Laws Sneaking in Through the Back Door?*, 5 CHI. J. INT’L L. 325 (2004). Norms are obligatory and signal the end of voluntarism. *Id.* at 328. Norms are a valuable tool for broadening corporate human rights obligations and expanding legal obligations, Melinda Ching, Amnesty Int’l, Oral Statement at 55th Session of the Sub-Comm’n on the Promotion and Prot. of Human Rights: Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (Aug. 8, 2003), <http://web.amnesty.org/library/index/ENGPOL300122003>, which would impose much more extensive obligations on corporations than existing human rights treaties, Timothy E. Deal, Senior Vice President, U.S. Council for Int’l Business, Address at the Frank Hawkins Kenan Inst. of Private Enter. Seminar: “Are Human Rights the Business of Business?” (Dec. 10, 2003), <http://www.uscib.org/index.asp?DocumentID=2794>.

87. *Norms, supra* note 4, § H. Section H(15) recommends that transnational corporations “adopt, disseminate and implement internal rules . . . in compliance with the Norms.” *Id.* § H(15). It also suggests the implementation of periodic compliance reports and “appl[ication] and incorporat[ion] [of] these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation” *Id.*

guidelines,⁸⁸ such as the United Nations' *Global Compact*,⁸⁹ the Office of Economic Co-Operation and Development's (OECD) *Guidelines for Multinational Corporations*,⁹⁰ the International Labor Organization's (ILO) *Tripartite Declaration of Principles Concerning Multinational Corporations*,⁹¹ the ILO's *Labour Conventions and Recommendations*,⁹² and the United States Department of State's and United

Section H(16) recommends that transnational corporations be subject to periodic monitoring by the U.N. and other relevant bodies and that the monitoring shall be transparent with input from stakeholders including NGOs and that transnational corporations shall conduct their own human rights impact studies. *Id.* § H(16). Paragraph 17 calls upon States to "reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations . . ." *Id.* § H(17). Paragraph 18 calls for reparations for those "adversely affected by failures to comply with these Norms" including civil and criminal sanctions. *Id.* § H(18).

88. Weissbrodt & Kruger, *supra* note 76, at 913.

89. *Id.* "The Global Compact is a voluntary international corporate citizenship network initiated to . . . advance responsible corporate citizenship and universal social and environmental principles to meet the challenges of globalization." United Nations Global Compact, Corporate Citizenship in the World Economy, human rights, labour, environment, anti-corruption, <http://www.un.org/Depts/ptd/global.htm> (last visited Sept. 1, 2005). The Global Compact promotes ten general principles sounding in Human Rights, Labour, Environment and Anti-Corruption. The Ten Principles, *supra* note 49.

90. Weissbrodt & Kruger, *supra* note 76, at 913. The OECD guidelines were adopted in 1976 for the purpose of encouraging positive contributions to the economic, social and environmental well-being in the territories where transnational corporations conduct business. U.N. Dep't of Econ. & Soc. Affairs, Div. for Sustainable Dev., Initiative: OECD Guidelines on Multinational Enterprises, http://www.un.org/esa/sustdev/mgroups/viaprofiles_OECD_Guidelines.html (last visited Sept. 1, 2005). The guidelines are voluntary and therefore explicitly non-adversarial. *Id.*

91. Weissbrodt & Kruger, *supra* note 76, at 913. The Tripartite Declaration of Principles was designed, *inter alia*, to "encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise . . ." ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, para. 2 (1977), available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> (last visited Sept. 1, 2005).

92. See generally ILO, *ILO Declarations, International Labour Conventions and Recommendations* (2001), <http://www.ilo.org/public/english/comp/civil/standards/ilodcr.htm> (last visited Sept. 1, 2005). The ILO was established by the Treaty of Versailles in 1919 for the promotion of the rights and welfare of workers. *Id.* (Referring to Treaty of Peace Between the Allied and Associate Powers and Germany, and Protocol, pt. XIII, June 28, 1919, S. Doc. 49, 1 Bevans 43 (Treaty of Versailles)). From 1919 to 2000 the ILO adopted 183 Conventions and 191 Recommendations, including eight fundamental conventions: Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55 (Forced Labour Convention); Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), July 9, 1948, 68 U.N.T.S. 17; Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, (No. 98) 1949 96 U.N.T.S. 257 (Right to Organise and Collective Bargaining Convention); Convention Concerning Equal Remuneration for Men and Women Workers for Equal Value (No. 100), June 29, 1951, 165 U.N.T.S. 303 (Equal Remuneration Convention); Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, S. TREATY DOC. 88-11, 320 U.N.T.S. 291; Convention Concerning Discrimination in Respect of Employment and (No. 111), June 25, 1958, 362 U.N.T.S. 31 (Discrimination (Employment and Occupation) Con-

Kingdom's Foreign and Commonwealth Office's *U.S.-U.K. Voluntary Principles on Security and Human Rights*.⁹³ However, Resolution 2003/16 is still not memorialized in treaty or enshrined in international customary law.⁹⁴ It reflects a guideline for conduct, which goes beyond voluntarism but is nonetheless "soft law."⁹⁵ Soft law "starts in the form of recommendations and over a period of time may be viewed as interpreting treaties and helping to establish custom or may serve as the basis for the later drafting of treaties."⁹⁶ Thus, the current enforceability of the norms is steeped in ambiguity but is on the fast track for developing into binding international law. The current application of the Resolution can be seen, *inter alia*, for Alien Tort Claims actions, as a framework for NGO press releases concerning corporate responsibility, and as a context for corporate public relations.⁹⁷

Some advocates of Resolution 2003/16 argue that efforts to encourage corporate voluntarism should be discontinued in favor of pursuing an agenda calling for more binding norms on corporate behavior.⁹⁸ In a letter to Secretary-General Kofi Annan, Michael Posner of

vention); Convention Concerning the Minimum Age for Admission to Employment (No. 138), June 26, 1973, 1015 U.N.T.S. 297 (Minimum Age Convention); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), June 17, 1999, S. TREATY DOC. 106-5, 38 I.L.M. 1207 (Worst Forms of Child Labour Convention). ILO, *supra*.

93. See generally Human Rights First, Corporate Accountability, U.S.-U.K. Voluntary Principles on Security and Human Rights, http://www.humanrightsfirst.org/workersrights/wrother/wr_other.htm. The U.S.-U.K. Voluntary Principles on Security and Human Rights were established in 2000 with the cooperation of "oil, mining and energy companies, [along] with human rights, labor and corporate responsibility groups," to establish voluntary principles and to provide practical guidance for implementation of corporate security practices in enterprises conducted abroad. *Id.*

94. Weissbrodt & Kruger, *supra* note 76, at 913-14.

95. *Id.* While Resolution 2003/16 is "soft law," there can be no denying that ATCA has filled the gap of enforceability, at least in the United States, and may serve to deter corporate misconduct with an effectiveness heretofore unseen. See generally 28 U.S.C. § 1350 (2000) (Alien Tort Claims Act and Torture Victim Protection Act). To this extent the ATCA serves as hard law. See generally Weissbrodt & Kruger, *supra* note 76, at 914.

96. Weissbrodt & Kruger, *supra* note 76, at 914.

97. See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed on motion for summary judgment*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *supra* notes 23, 37. By complying with the norms laid out in Resolution 2003/16, corporate public relations departments possess the template with which they can advertise individual corporate responsibility and adherence to human rights norms to promote a more humane public image and encourage greater consumer loyalty. See generally Letter from Michael Posner, Human Rights First, to Kofi A. Annan, U.N. Sec'y-Gen. (June 4, 2004), available at http://www.humanrightsfirst.org/workers_rights/wr_other/wr_other.htm (follow "Human Rights First Raises Concerns About the UN Global Compact (06/11/04)" hyperlink under "Related Material").

98. See Posner, *supra* note 97.

Human Rights First (formerly Lawyers Committee for Human Rights) expressed concerns over the fortuity of the U.N. *Global Compact* as he feared the forum's integrity was compromised as a marketing tool for some corporations who have seriously violated its basic principles,⁹⁹ that "the Global Compact [should] adopt . . . a more results-oriented" structure by adherence of its members to Resolution 2003/16,¹⁰⁰ and noted with disappointment that some corporate *Global Compact* members have mounted "unfounded attacks against the U.N. Norms."¹⁰¹ This critique poignantly charges that corporate voluntarism alone is ineffective.

In response, U.N. representatives heading up the *Global Compact*¹⁰² indicate that they have introduced a set of integrity measures,¹⁰³ but nonetheless acknowledge that "[t]he Global Compact is neither a regulatory mechanism nor a seal of approval for the performance of those participating in it."¹⁰⁴ Clearly, initiatives, such as the *Global Compact*, alone will not solve the problem of corporate complicity in human rights transgressions, but will serve to diminish the problem. In support of this proposition, the U.N. representatives cite a "study by the consulting firm McKinsey & Company . . . [which] found that, in several important respects, the Global Compact has already been a significant force for positive change."¹⁰⁵

Yet, some critics go farther and suggest that Resolution 2003/16 is also inadequate and observe that it does not address the issue of the wage disparity between the developing and the industrialized states. "[T]he concept of fair compensation [is] clearly ambiguous."¹⁰⁶ The

99. *Id.* at 1.

100. *Id.* at 3.

101. *Id.*

102. These representatives were John Ruggie, Special Advisor to the Secretary-General on the Global Compact, and George Kell, Executive Head of the Global Compact, Office of the Secretary-General. Letter from John Ruggie, Special Advisor to the Sec'y-Gen on the Global Compact and Georg Kell, Executive Head of the Global Compact, Office of Sec'y-Gen, to Michael Posner, Executive Dir. of Human Rights First (June 22, 2004), available at http://www.humanrightsfirst.org/workers_rights/pdf/un_response_ruggie_kell_062204.pdf.

103. *Id.*; see also United Nations Global Compact, Global Compact Integrity Measures (2004), http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_content/AboutTheGC/HowToParticipate/integrity_measures.pdf.

104. Ruggie & Kell, *supra* note 102.

105. *Id.*

106. *The UN Sub-Commission on the Promotion and Protection of Human Rights has Drafted Norms that Signal a Possible Advent of Compulsory CSR but Continue to Legitimize a Structure that Generates Sheer Inequality Between North and South*, CORP. SOC. RESP. & HUM. RTS. (Jus Semper Global Alliance, Living Wages North and South), Sept. 2003, at 2, available at <http://www.jussemper.org/Resources/Corporate%20Activity/Resources/CSRandHRnorms.pdf>.

international standard leaves open for interpretation what constitutes an adequate standard of living and reinforces two standards: one for the south (developing nations) and another for the north (industrialized nations).¹⁰⁷ Critics contend that, "what these Norms must address is the dramatic exploitation of Southern workers that multinationals practice on a daily basis as endorsed in the criteria of prevailing national conditions"¹⁰⁸

The impatience expressed by these criticisms is understandable; however, the only way to effect real change is incrementally, through consensus building. If the Resolution required equality of wages between workers in developing states and industrialized ones, then it would not be taken seriously and nothing could be accomplished. This conclusion is not meant to diminish the problem of inadequate remuneration for workers in developing states, but to acknowledge that this goal can only be achieved pragmatically. Critics of voluntarism and of Resolution 2003/16 fail to recognize the necessity of compromise. Voluntarism is an exercise in consensus building, plays an indispensable role in exposing illegitimate rationalizations sounding in corporate neutrality, and acts as a bridge from corporate autonomy to binding norms. By persuading corporations to voluntarily assume some responsibility, the road is paved for initiatives such as Resolution 2003/16 and ultimately more binding rules and more egalitarian practices.

THE VALUE OF IMPEACHMENT

One key advantage of corporate voluntarism overlooked by its critics is its utility as an impeachment tool, both in the context of public relations and for the purposes of legal actions. Trial attorneys have long known of the powerful impact of prior inconsistent statements and most contemporary lawsuits rely on the deposition or request for admissions from adverse parties to use for subsequent impeachment. The issuance of corporate human rights policies and acquiescence to international initiatives, like the *Global Compact*, pledges the corporations to adhere to certain standards of behavior and puts them on the record vis-à-vis their responsibility for human rights norms. If these corporations violate human rights, then the use of the company policy to impeach them, either in a public relations forum or in a lawsuit, can have a devastating impact. The impeachment can be directed at spe-

107. *Id.* at 2-3.

108. *Id.* at 2.

cific assertions by the defense or the general veracity of certain corporate leaders complicit in the atrocities alleged. The function of corporate voluntarism for impeaching the intellectual basis of corporate neutrality has been discussed above, but it also serves to impeach specific behavior of corporations, as well as to circumvent their arguments against the imposition of more binding norms.

An example of the value of voluntarism for impeaching specific corporate conduct can be readily seen in the *Unocal* case¹⁰⁹ and the issue of forced labor. In its *Discussion Paper*, Unocal asserted that, “[o]ur critics have accused us of using forced labor in building the pipeline across Myanmar to the Thai border. These accusations are absolutely false.”¹¹⁰ The human rights documents Unocal claims to adopt, including the Global Sullivan Principles, prohibit “unacceptable worker treatment such as the exploitation of children, physical punishment, female abuse, *involuntary servitude*, or other forms of abuse.”¹¹¹ Article 4 of the *Universal Declaration of Human Rights* prohibits servitude¹¹² and principle 4 of the *Global Compact* calls for “the elimination of all forms of forced and compulsory labour.”¹¹³ Not surprisingly, forced labor also is in violation of the Unocal Code of Conduct mandating “freedom from forced labor.”¹¹⁴ Yet, despite these voluntary norms, the Ninth Circuit found that, “Unocal’s weak protestations notwithstanding, there is little doubt that the record contains substantial evidence creating a material question of fact as to whether forced labor was used in connection with the construction of

109. Unocal’s examples of corporate voluntarism on its corporate website include its reference to the Global Compact and the Universal Declaration of Human Rights, as well as its claimed adherence to the Global Sullivan Principles, the *U.S.-U.K. Voluntary Principles on Security and Human Rights*, the ILO’s “fundamental rights at work,” the *Unocal Code of Conduct*, and its own *Discussion Paper*. Unocal Corp., Unocal Code of Conduct: Business Ethics: Human Rights, Labor and Community Issues (Mar. 2003), http://www.unocal.com/ucl_code_of_conduct/ethics/labor.htm. See generally Universal Declaration of Human Rights, *supra* note 29; ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Session, Geneva (June 1998), available at http://www.ilo.org/dyn/dclaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT; U.S. Dep’t of State, *supra* note 7; The Ten Principles, *supra* note 49; Leon H. Sullivan, Leon H. Sullivan Foundation, *The Global Sullivan Principles* (Feb. 1, 1999), <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp>.

110. Unocal Corp., *supra* note 24 (follow “Human Rights and Economic Engagement” hyperlink).

111. Sullivan, *supra* note 109 (emphasis added); see also ILO, *supra* note 109; U.S. Dep’t of State, *supra* note 7.

112. Universal Declaration of Human Rights, *supra* note 29.

113. The Ten Principles, *supra* note 49.

114. Unocal Code of Conduct, *supra* note 109.

the pipeline.”¹¹⁵ Moreover, the Ninth Circuit found, “[t]he evidence also supports the conclusion that Unocal gave practical assistance to the Myanmar Military in subjecting Plaintiffs to forced labor.”¹¹⁶

While the *Discussion Paper* absolutely denied the use of forced labor,¹¹⁷ the president of Unocal had previously made a statement to human rights organizations in 1995 conceding that the “Myanmar Military might be using forced labor . . .” and stating that, “[p]eople are threatening physical damage to the pipeline,’ that ‘if you threaten the pipeline there’s gonna [sic] be more military,’ and that ‘[i]f forced labor goes hand and glove with the military yes there will be more forced labor.”¹¹⁸

Additionally, the *Discussion Paper* claims, “[n]o credible source has ever called our attention to evidence that any forced labor was used on the project.”¹¹⁹ Yet, years before, in 1995, “Unocal Representative Robinson confirmed to Unocal President Imle that the Myanmar Military might be committing human rights violations in connection with the Project.”¹²⁰ Robinson stated that he was in possession of information “from human rights organizations ‘which depicted in more detail than I have seen before the increased encroachment of [the Myanmar military’s] activities into the villages of the pipeline area.’”¹²¹ Furthermore, that same year Amnesty International informed Unocal that the Myanmar military might use forced labor based upon representations made by a Myanmar official.¹²² Additionally, on December 11, 1995, a private consultant, John Haseman,¹²³ hired by Unocal reported that “the Myanmar Military was . . . using forced labor and committing other human rights violations in connection with the [pipeline]” and stated that,

[M]y conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation without compensation of families from land near/along the

115. *Doe v. Unocal Corp.*, 395 F.3d 932, 952 (9th Cir. 2002), *reh’g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005).

116. 395 F.3d at 952.

117. *Unocal Corp.*, *supra* note 24 (follow “Human Rights and Economic Engagement” hyperlink).

118. 395 F.3d at 941.

119. *Unocal Corp.*, *supra* note 24 (follow “Human Rights and Economic Engagement” hyperlink).

120. 395 F.3d at 941.

121. *Id.*

122. *Id.*

123. *Id.* John Haseman was “a former military attaché at the U.S. Embassy in Rangoon . . .” *Id.*

pipeline route; *forced labor* to work on infrastructure projects supporting the pipeline . . . ; and imprisonment and/or execution by the army of those opposing such actions Unocal, by seeming to have accepted [the Myanmar Military]'s version of events, appears at best naïve and at worst a willing partner in the situation.¹²⁴

While it is noted that the impeachment material in the *Discussion Paper* was actually written after the prior inconsistent statements, it makes no difference to the impeachment value of the *Discussion Paper* since the chronology of the inconsistent statements is irrelevant.

Indeed, Unocal's subsequent feigned adherence to various human rights principles is also impeached by Haseman's prior statements, indicated above, which were cited and relied upon by the Ninth Circuit in the motion for summary judgment. Haseman's allegations impeach Unocal's claim of compliance to:

1. The *Global Compact* (Principle 1—"[b]usinesses should support and respect the protection of internationally proclaimed human rights; and" Principle 2—"make sure that they are not complicit in human rights abuses;"¹²⁵ and Principle 4—"the elimination of all forms of forced and compulsory labour;" and Principle 5—"the effective abolition of child labour");¹²⁶

2. The *Global Sullivan Principles* (Obligation to "[e]xpress our support for universal human rights and, particularly, those of our employees, the communities within which we operate, and parties with whom we do business . . . [c]ompensate our employees to enable them to meet at least their basic needs and provide the opportunity to improve their skill and capability in order to raise their social and economic opportunities . . . [p]rovide a safe and healthy workplace . . . [p]romote the application of these principles by those with whom we do business.");¹²⁷

3. The *Universal Declaration of Human Rights*;¹²⁸ and

4. The *U.S./U.K. Voluntary Principles on Security and Human Rights* (Identification of security risks: designed "to minimize risk and to assess whether [c]ompany actions may heighten [them];"¹²⁹ Human

124. *Id.* at 942 (emphasis added).

125. The Ten Principles, *supra* note 49. The Ninth Circuit found that "a reasonable fact-finder could conclude that Unocal's alleged conduct met the actus reus requirement of aiding and abetting [forced labor] as we define it today," *Unocal*, 395 F.3d at 952, and that, "[t]he evidence further supports the conclusion that Unocal gave 'encouragement' to the Myanmar Military in subjecting Plaintiffs to forced labor." *Id.* at 952 n.29.

126. The Ten Principles, *supra* note 49.

127. Sullivan, *supra* note 109.

128. See *supra* note 29.

129. U.S. Dep't of State, *supra* note 7.

rights records: requiring an assessment of the human rights records and reputations, including past abuses and allegations of “public security forces, paramilitaries, local and national law enforcement”;¹³⁰ Interactions between companies and public security: insuring that companies have an interest and role in government action in the protection of human rights;¹³¹ Deployment and Conduct: “[t]he primary role of public security should be to maintain the rule of law, including safeguarding human rights”¹³² and refraining from using security forces implicated in human rights abuses.).¹³³

Additionally, other assertions of the Unocal Corporation are clearly self-serving and disingenuous, such as its claim in the *Discussion Paper* that it brought human rights experts to Burma/Myanmar who found no human rights abuses.¹³⁴ However, these claims meld into hypocrisy upon discovery that the experts were not brought in until 1998, two years after the action was filed.¹³⁵ These declarations are also soundly refuted by findings, made by Unocal’s prior experts, Robinson, Haseman,¹³⁶ and others¹³⁷ indicated above, which were made during the relevant period alleged in the Complaint.¹³⁸ Thus, the defendants were attempting to use subsequent remedial action to refute prior misconduct and depended on mischaracterization to deceive the misinformed. This ill-conceived technique provided ample impeachment material for opposing counsel in the course of the litigation. It also ultimately backfired as a public relations gaffe in light of the settlement, in which a feeble defense of Unocal’s human rights record in the mutually agreed upon press release¹³⁹ has resulted in greater impeachment of Unocal’s credibility.

Unfortunately, while voluntarism has been embraced by the global corporate community, the movement to reform corporate practices through binding norms has met with spirited, but foreseeable, re-

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Unocal Corp., *supra* note 24 (follow “Human Rights and Economic Engagement” hyperlink).

135. *Id.*; see also *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed on motion for summary judgment*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh’g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005).

136. See *Unocal*, 395 F.3d at 939-42. See also *supra* note 123 and accompanying text.

137. See *supra* note 57 and accompanying text.

138. See *Unocal*, 963 F. Supp. at 883-86.

139. See *Unocal Corp.*, *supra* note 24.

sistance. In addition to the attacks mounted by many *Global Compact* corporations against Resolution 2003/16, indicated above,¹⁴⁰ the organized business community has taken the initiative in combating the ATCA. This posture contradicts the voluntary human rights norms many of these corporations have undertaken and serves to impeach their commitment. In the case of *Sosa v. Alvarez-Machain*, many of the world's leading business organizations¹⁴¹ filed an amicus brief urging the Supreme Court to nullify the ATCA.¹⁴² The brief argues that the statute "increasingly interferes with foreign investment and foreign relations."¹⁴³ In response, human rights advocates argue that the statute does not impact foreign investment or relations, as it only creates an action for the most egregious conduct¹⁴⁴ since,

under current law, the ATCA applies only to slavery, torture, extrajudicial killing, genocide, war crimes, crimes against humanity, and arbitrary detention. With that objectively verifiable clarification, we are left with the U.S. business community's naked position that in order to compete in the global economy, they need to be free from the constraints of the ATCA, which prevents them from using slaves and torturing workers!¹⁴⁵

Business models that depend on these practices are per se indefensible as violating international law, accepted codes of moral conduct and the corporation's own corporate human rights policy.

In an amicus brief in support of Respondent in the *Sosa v. Alvarez-Machain* case, attorney Terrence P. Collingsworth argued the inapplicability of the profit motive to justify the nullification of ATCA. Collingsworth asserted that, "Congress has determined that certain egregious conduct simply cannot be the basis for profitability," despite the alleged "competitive disadvantage" the ATCA would place on

140. See Posner, *supra* note 97.

141. These organizations include the National Foreign Trade Council, USA *Engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, the International Chamber of Commerce, the Organization for International Investment, the Business Roundtable, the American Petroleum Institute and the U.S.-ASEAN Business Council. Brief for the National Foreign Trade Council et al. as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 162760. These organizations "represent a substantial proportion of all entities doing business in the United States and internationally, and, . . . are also major players in the global economy" *Id.* at 3.

142. See *id.*

143. *Id.* at 5 (alteration in original). The brief also raises jurisdictional, separation of powers, and failure to provide for a cause of action issues. *Id.* at 13-23.

144. For a legal history of causes under ATCA, see generally Collingsworth, *supra* note 5, at 678-82.

145. Press Release from Terry Collingsworth, Int'l Labor Rights Fund, US Companies Ask Supreme Court to Nullify ATCA, (Mar. 3, 2004), available at http://www.labor-rights.org/press/amicus_ilrf_0304.htm.

U.S.-based companies.¹⁴⁶ He cites as examples three corporations, Exxon Mobil, Unocal, and Coca-Cola, and effectively impeaches their roles as leaders in opposition to the ATCA based upon their voluntary commitment to human rights organizations and charters.¹⁴⁷

After identifying Exxon Mobil as a stakeholder in the amicus curiae brief in support of Petitioner,¹⁴⁸ Collingsworth uses Exxon Mobil's Corporate Citizenship Report¹⁴⁹ and its membership in the *U.S./U.K. Voluntary Principles on Security and Human Rights* to impeach its position in the *Sosa v. Alvarez-Machain* case.¹⁵⁰ Likewise, Collingsworth impeaches Unocal's position by citing its own Code of Conduct, membership in *U.S./U.K. Voluntary Principles on Security and Human Rights*, as well as its reference to the U.N. *Global Compact*,¹⁵¹ and provides the same treatment to Coca-Cola via their Code of Business Conduct.¹⁵² Collingsworth concludes that none of "the hundreds of companies that make up the Business Amici [and who] publically [sic] extol their commitment to human rights . . . can assert even indirectly that the ATCA's very limited application to extreme forms of human rights violations will subject them to any economic impact."¹⁵³

This approach captures the efficacy of using voluntary corporate pledges for impeachment purposes and, contrary to assertions made by Collingsworth,¹⁵⁴ validates the role of corporate voluntarism. These corporations and many more¹⁵⁵ were impeached by their prior exhorta-

146. *Id.* See generally *infra* note 165.

147. Brief of Amici Curiae Corporate Social Responsibility Amici in Support of Respondent at 24-29, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 398964 [hereinafter ILRF Brief].

148. *Id.* at 24.

149. *Id.* at 25. See also EXXON MOBILE, CORPORATE CITIZENSHIP REPORT 28 (2002), http://www.exxonmobil.com/corporate/files/corporate/CCR2002_commitment.pdf.

150. ILRF Brief, *supra* note 147, at 25.

151. *Id.* at 26-27.

152. *Id.* at 28.

153. *Id.* at 28-29.

154. Collingsworth articulates what he considers to be the failure of voluntarism and observes,

The collective attack on the ATCA by the U.S. business community clarifies that any progress made in 'corporate social responsibility' is simply on paper. U.S. companies embrace social responsibility as a public relations exercise but have yet to make a commitment to any binding standards. That the ATCA applies only to slavery, torture, extra-judicial killing, genocide, war crimes, crimes against humanity and arbitrary detention, and the business community is threatened by its application, exposes the extreme hypocrisy—and lack of trustworthiness—of this business community.

Collingsworth, *supra* note 5, at 686.

155. See *supra* note 141.

tions, not only in *Sosa v. Alvarez-Machain*, but also in the context of press releases, public statements, and condemnations.¹⁵⁶ Collingsworth masterfully uses the fruits of voluntarism in his amicus brief in *Sosa v. Alvarez-Machain* to impeach Exxon-Mobil, Unocal, and Coca-Cola. Without their voluntary claims he would not have been able to impeach them, thus depriving him of an important weapon in his arsenal. Additionally, Collingsworth observed that the same corporations engaged in voluntarism brought suit through national and international commerce organizations, rather than in their own names, in order to preserve their anonymity.¹⁵⁷ This reluctance to state their stance against the ATCA publicly bespeaks recognition of their untenable and contradictory position and the negative impact it can have on their public image and poignantly reveals the value of having them “on the record” in the first place.¹⁵⁸

Critics who call for abandoning efforts to encourage corporate voluntarism as a vehicle for promoting human rights reveal a fundamental misconception of how human rights work is done. It is not a silver bullet that instantly conforms human behavior to its mandates; instead it is designed to encourage adherence by relentlessly building consensus, driving home the benefits of human rights compliance, and exposing volatile behavior with varying degrees of publicity in an effort to inexorably bring about compliance. Moreover, the first step is to obtain a commitment from the target entity, usually a state. This initial commitment is almost always voluntary and mirrors the foundational principles of all of the major international human rights treaties. Corporate voluntarism is modeled after this system and constitutes the first indispensable step in the human rights model. It was never meant

156. See ILRF Brief, *supra* note 147, at 23-30; see also Collingsworth, *supra* note 145.

157. See ILRF Brief, *supra* note 147, at 24.

158. There is some evidence that many corporations, especially those in the oil and natural gas extraction industry, foresaw the logical direction of voluntarism and resisted embracing human rights norms. Of over 2000 companies belonging to the Global Compact no U.S. oil or natural gas extraction company, except for Amerada Hess Corporation, is a member. Global Compact, <http://unglobalcompact.org> (follow “Search Participants” hyperlink) (last visited Oct. 17, 2005). Unocal delayed entering into the *U.S./U.K. Voluntary Principles on Security and Human Rights* until long after the suit was filed and the *Voluntary Principles* were established, “maintain[ing] that its own individual corporate code of conduct, as well as ‘Yadana project specific codes,’ which were used during the construction of the pipeline, [were] sufficient.” Sarah M. Hall, *Multinational Corporations’ Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT’L L. REV. 401, 429 (2002). This delay suggests that at least some companies were dragged scratching and clawing into the voluntary schemata and resisted accepting voluntary norms because they recognized the inherent danger to their corporate culture. In less than one year after the announcement of its ATCA settlement, UNOCAL has opted to remove the *Discussion Paper* from its website, arguably to avoid further impeachment.

to be a total solution and is designed to work in conjunction with more binding norms; they are not mutually exclusive. "Here, as in human rights conventions, 'hard' law guarantees minimum standards, and voluntary codes (or conventions) encourage higher standards."¹⁵⁹ Another principle goal of human rights initiatives is to encourage states to codify the norms agreed to in their domestic legislation. The ATCA serves this purpose, at least in a limited way, by providing a domestic cause of action for violation of the more basic norms of corporate behavior abroad.

Unfortunately, the business community is not alone in its attacks on the ATCA, as organs of the U.S. government have revealed their opposition to the statute. In the *Unocal* case, government lawyers filed a brief in support of the defendants' motion to dismiss.¹⁶⁰ In *Sosa v. Alvarez-Machain*, the government, as respondent, advocated, inter alia, for the inapplicability of the ATCA, claiming it fails to provide a cause of action.¹⁶¹ In the case of *Doe v. Exxon Mobil*, William H. Taft IV,¹⁶² the Legal Adviser for the U.S. State Department, responded to a request for information by the trial judge and stated, "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States . . ."¹⁶³ This posture has come under attack by human rights advocates as they characterize the government's position as "need[ing] to have the flexibility to tolerate the commission of human rights abuses by corporations in order to promote their foreign policy [of encouraging robust investment]."¹⁶⁴ Therefore, the government's arguments largely mirror those of the business community and are equally invalid. Instead of attacking the ATCA, business leaders and U.S. government officials should encourage adoption of alien tort

159. Engle, *supra* note 40, at 121.

160. Brief for the United States of America as Amicus Curiae Supporting Petitioner, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628), <http://www.unocal.com/myanmar/suit-fed.htm> (follow "U.S. Government" hyperlink).

161. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

162. William H. Taft IV was also co-author of the government's brief in *Sosa v. Alvarez-Machain*. Brief for the United States Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), <http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf>.

163. Letter from William H. Taft IV, Legal Advisor, U.S. Dep't of State, to Judge Louis F. Oberdorfer, (Trial Judge for *Doe v. ExxonMobil*, Case No. 01-CV-1357 (D.D.C.) (July 29, 2002)), <http://laborrights.org> (follow "News and Press" hyperlink; then follow "State Department Opinion Regarding ExxonMobil Litigation (PDF)" hyperlink).

164. Coliver, *supra* note 39.

statutes in other countries in order to level the playing field¹⁶⁵ and, through solidarity amongst transnational corporations, compel host nations to abide by internationally accepted human rights norms.

Transnational corporations are among the most powerful and influential non-state actors on the global stage. Many corporations are wealthier than some countries or groups of countries. By virtue of this power, they must be bound by a minimum core standard of conduct and have the responsibility for requiring this level of conduct from their partners. The atrocities revealed in the *Unocal* case give powerful testimony to this proposition. Yet, this goal cannot be accomplished by voluntarism alone; nor is the imposition of unrealistic treaty obligations practical under the status quo. Resolution 2003/16 is soft law, but it provides for greater accountability and the promise of more binding norms in the future. The ATCA is a powerful tool for human rights advocates, but is limited in scope and applicability.¹⁶⁶ Voluntarism needs to be encouraged as a resource for corporate leaders who evince a sincere wish to abide by human rights norms, but is insufficient alone. A legal framework of binding norms is necessary to compliment voluntarism. This legal framework is not only necessary for the observation of human rights, but also for the benefit of corporations. As Kofi Annan stated, “[t]he unequal distribution of benefits, and the imbalances in global rule-making, which characterize globalization today, inevitably will produce backlash and protectionism.”¹⁶⁷

CONCLUSION

The recent *Unocal* settlement is of great significance, as much because of its timing as its implications for corporate accountability. This development, which comes on the heels of unprecedented corporate voluntarism, helps to establish a responsibility for human rights obligations conceded by corporate enterprises and pushes forward the

165. While there is no foreign counterpart to the ATCA, domestic jurisdiction has been asserted by some European courts in cases alleging violations of human rights occurring internationally. Collingsworth, *supra* note 5, at 672. These cases include the attempts of Spain, Belgium, and Switzerland to prosecute Pinochet, a U.K. cause of action against British asbestos makers operating in South Africa, and French and Belgian causes of action against Unocal's French-based corporate partner (TotalFinaElf) in Burma/Myanmar. *Id.* at 672 & n.17.

166. The Supreme Court held against Alvarez-Machain finding that the conduct complained of, i.e. arbitrary detention of less than 24 hours, was insufficient to create a cause of action under the ATCA and therefore refused to expand the jurisdiction of the statute, but nonetheless declined to reduce its jurisdiction or grant the business community's request to nullify the ATCA. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

167. Annan, *supra* note 41.

evolution of corporate accountability through more binding norms. It also serves to deter other corporations from engaging in human rights violations abroad. "Under the new ATCA jurisprudence developed in Unocal, [multinational corporations] would be well-advised to consider foreign host governments' practices in the context of international law, specifically the eight acts that U.S. courts have recognized as violations of international law that are actionable under the ATCA."¹⁶⁸

Unocal's adoption of a human rights policy puts it "on the record," thereby cementing its responsibility. The *Unocal* case aptly illustrates this principle as the corporation is bound to its voluntary commitment and impeached by its transgressions. In its decision, the Ninth Circuit dismissed Unocal's Motion for Summary Judgment and found sufficient evidence of Unocal's complicity in massive human rights violations to proceed to trial.¹⁶⁹ While reeling from the gravity of such atrocities, proponents for change must acknowledge that the ultimate responsibility for the abuse rests with the corporate leadership,¹⁷⁰ and that executives are vulnerable to bad publicity. Human rights organizations must be prepared to match the corporate public relations spin with sufficient information to inform shareholders and others in order to aid them in changing dishonest and malevolent corporate practices.¹⁷¹

The utility of using a corporation's human rights policies to impeach its own practices makes the value of corporate voluntarism apparent. In the larger context of lawsuits and public relations, the impeachment value of voluntarism is threefold. Corporations can be

168. Hall, *supra* note 158, at 421. See also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991).

169. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *submission withdrawn*, 403 F.3d 708 (9th Cir. 2005).

170. The decision in the Ninth Circuit reflects the culpability of the Unocal leadership, who during depositions, claimed to not even know if the Myanmar Military was providing security for the pipeline. *Id.* at 938. In depositions, both President Imle and CEO Beach claimed that they did not know if the Myanmar Military had a "contractual obligation" to provide security for Unocal and Beach further elaborated that he didn't know of "any support whatsoever of the military . . . either physical or monetary." *Id.* These self-serving and disingenuous assertions made under oath reveal the depths to which some corporate leaders will stoop by making obviously untrue denials of fact on the record. In its opinion, the Ninth Circuit articulated evidence contradicting these claims including, inter alia, a briefing book detailing the role of the Myanmar Military and prior reports by Robinson. *Id.* at 938-39. Additionally, President Imle admitted to the use of conscripted porters in depositions and publicly, but subsequently denied any human rights violations in a statement to the City of New York pursuant to a proposed New York City select purchasing law. *Id.* at 942.

171. See Engle, *supra* note 40, for a complete discussion of the benefits and techniques related to marketplace and shareholder (human rights) activism.

impeached for relying upon corporate neutrality arguments, such as cultural relativism, economic determinism, and non-intervention in domestic affairs, as inconsistent and contradictory to the universal human rights principles they have voluntarily adopted. Corporations can be impeached by their conduct when it runs afoul of human rights principles, and when they argue against binding norms, which they claim to already be following already, by citing economic impact. Though criticized by some, voluntarism is not merely an operation of corporate propaganda that is self-serving and non-binding; it binds corporations by their own admissions, serves to impeach their behavior and argument, and, whether intended or not, creates an atmosphere and infrastructure of rules that in the long run eschews the commission of atrocities. “[C]odes [of conduct] can be used to embarrass and shame the corporation . . . [i]f a corporation has expressly stated that it will respect human rights, even in a voluntary and nonbinding code of conduct, it will have greater difficulty defending itself credibly in court when it does not do so.”¹⁷² Moreover, voluntarism prescribes proactive corporate responsibility and establishes a new intellectual grounding, a polemic that places primacy on human rights and welcomes corporate accountability.

By embracing corporate voluntarism, corporations are, sometimes unwittingly, laying the foundation for more binding norms. Their formidable opposition to Resolution 2003/16 and the ATCA is intellectually bankrupt as inconsistent with the human rights norms they espouse and claim to follow. Once responsibility is accepted, through voluntary or compulsory means, jurisdiction is established. Once established, jurisdiction empowers the human rights bodies to scrutinize corporate behavior. Resolution 2003/16 calls for a new set of principles designed to subtly prod corporations to live up to the broad-based claims¹⁷³ made in their corporate human rights policies or extant in the principles of the U. N. *Global Compact*.¹⁷⁴ This human rights jurisdiction follows the traditional template of self-reporting, transparency, international scrutiny and oversight, analysis of self-reported conduct and third party reports by the relevant U.N. body, and the pursuit of a friendly, and confidential, settlement of discrepancies. Additionally, this jurisdiction may lead to the adoption and application of closer scrutiny of transnational corporations’ conduct by regional human rights organizations, such as organs within the Organization of Ameri-

172. *Id.* at 112.

173. *See Norms, supra* note 4.

174. *See The Ten Principles, supra* note 49.

can States (OAS). These initiatives can lead to more stringent sanctions with various levels of negative publicity, and resultant bad faith, designed primarily to halt on-going and future violations and not to serve as retribution for past conduct.

Indeed, the corporate opposition to the ATCA and Resolution 2003/16 seriously calls into question the sincerity of the corporate commitment to human rights. It suggests that corporations are only committed to human rights on paper and will only live up to their commitments if doing so will not diminish profits or result in the loss of foreign partners or customers. This position, in conjunction with corporate voluntarism, begs the following question: If corporations are really abiding by their human rights commitments, then what do they have to fear from international scrutiny and a slightly more effective enforcement scheme, which admittedly relies upon soft law norms? If corporations are not engaging in human rights violations, then they have nothing to fear, and their opposition is meritless. As Collingsworth observes, "Unless these companies are misrepresenting their compliance with their own standards, their assertion that the ATCA is a hindrance to their economic competitiveness is simply incredible."¹⁷⁵

However, despite current questions of sincerity, corporate accountability has moved beyond the primitive jurisprudence of nihilism or corporate neutrality. This progress can be credited, at least in part, to voluntarism. By embracing voluntarism, corporations have made, perhaps unknowingly, a genuine commitment to human rights and thereby have rejected antithetical arguments sounding in corporate neutrality, such as cultural relativism, economic determinism, and non-intervention. They have abandoned the veil of neutrality and have begun an inexorable process that will eventually lead to binding corporate norms and international accountability.

175. Collingsworth, *supra* note 5, at 671.

