Translating Unocal
The Liability of Transnational Corporations for Human Rights Violations

Benoit Frydman[1] & Ludovic Hennebel[2]

1. How can transnational corporations be held accountable for human rights abuses committed abroad? This is the question that many human rights lawyers, both practitioners and scholars, try to solve by seeking the best avenues for legal recourse. Given the inadequacy of relevant and effective international mechanisms, they turn to domestic legal systems. As a consequence, human rights violations that occur overseas, especially in states unable or unwilling to enforce human rights within their territories, may be brought before a European or American domestic judge. In the United States, the primary legal course of action is civil human rights litigation. In Europe, the focus is primarily on criminal prosecution. This means that a human rights abuser perpetrating violations abroad may well be sued in the U.S. but prosecuted in Europe, and sometimes both at the same time. *Civil* human rights litigation in the U.S. is "translated" into *criminal* human rights litigation in Europe, as shown already by Stephens in a 2002 paper. In this context, translation "refers to the process by which a common concept – accountability for human rights abuses – is expressed in the legal 'language' of each domestic legal system".[3] Rather than a rigid mechanical extrapolation of legal procedures from one system to another, effective "translation" requires that a common issue is dealt with through procedures and legal tools appropriate to both legal systems.

2. This article aims at further exploring that comparative legal translation by examining a representative transnational human rights case: the Unocal-Total case regarding human rights abuses perpetrated in Burma. Unocal, a California-based energy company, was sued in the U.S., while Total (as a corporation and/or through its managers) was prosecuted in France and Belgium. Behind these separate legal proceedings lies a shared story of human rights violations committed by the Burmese army with the alleged complicity of both Unocal and Total. In other words, the same events which took place in Burma generated parallel litigations in America and in Europe. What can we learn from that case? What were the legal avenues followed in these proceedings? What were the procedural hurdles? What were the outcomes of these actions? And what conclusions can be drawn from these observations related to the future of transnational human rights

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[1] Benoit Frydman is pofessor of law at the University of Brussels and director of the Perelman Center for Legal Philosophy of the Law School of the University of Brussels.

[2] Ludovic Hennebel is Research Prof. and global research fellow at the National Fund for Scientific Research affiliated with the Perelman Center at the Law School of the University of Brussels. To contact the authors, send an email to Ludo.Hennebel@ulb.ac.be

[3] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 4 (2002).

litigation? These are the questions that will be dealt with below. Far from being theoretical, the paper aims at evaluating the concrete benefits of the European and American ways of dealing with such human rights cases. Through this analysis, the article intends to offer a better understanding of the transnational human rights litigation strategies against TNCs. In most of these cases, litigators may select the most appropriate forum in the global context to achieve their goals and satisfy their demand for justice.

3. The Unocal case in the United States sheds light on the human rights violations committed in Burma. Scholars have commented extensively on the Unocal litigation in the United States and it was seen as a key illustration of the emergence of transnational human rights litigation against TNCs. However, the "global case" comprising the Unocal litigation in the U.S. as well as the litigation in Belgium and France, and the legal comparison of these proceedings and outcomes, was not tackled as such by scholarly publications. Part I of the article briefly recites the facts surrounding the human rights abuses committed in Burma in connection with the operations lead by Unocal and Total. Part II underlines what is at stake in such human rights cases and explains why litigators ultimately bring their cases before domestic tribunals. Part III deals with the American proceedings and discusses the outcomes of the lawsuits. Part IV scrutinizes the European "translation" and explains in greater detail the proceedings and the outcomes of these litigations. Finally, part V compares the American and European proceedings, confronts the advantages and hurdles they each present for litigators, and draws some conclusions related to the transnational human rights litigation movement against TNCs.

Part I – The facts

4. In the wake of its coup d'état in 1962, the Burmese military junta nationalized all foreign interests in the hydrocarbon sector and entrusted its petroleum production to the government-owned corporation Myanmar Oil and Gas Enterprise (MOGE). Burmese policies, following a rigid strategy of nationalizing the petroleum industry, systematically pushed foreign operators aside. In 1988, however, the Burmese government reversed its policies. Bills regarding foreign investments were enacted and the government decided to attract capital and foreign operators to exploit its hydrocarbon deposits. This change in policy may be largely explained by the discovery of the Yadana gas field in 1980. The deposit, located in the Andaman Sea, 60 km off the Burmese coast, is estimated to contain 150 billion m^3, potentially representing considerable wealth for Burma over a 30-year period. The infrastructure to exploit the deposit required a tremendous investment, costing at least one billion dollars. In addition, its construction presented significant technical challenges. In 1991, a Thai petroleum company submitted a loan application request to the World Bank to finance feasibility studies. The Bank rejected the request, arguing that, like all other international organizations, it did not recognize the Rangoon regime, and therefore could not adopt a favorable view of the project since the profits generated would be to their benefit.[4] Shut out from

[4] *See* INVESTOR RESPONSIBILITY RESEARCH CENTER, UNOCAL CORPORATE ACTIVITY IN BURMA 7 (1994), *cited in* BEATRICE LAROCHE & ANNE-CHRISTINE HABBART, LA BIRMANIE, TOTAL ET LES

international help, the Burmese regime had to appeal to foreign companies, and decided to negotiate with the French group Total and the American company Unocal.[5] A production sharing contract defined the terms of agreement for the operation for the four partners involved as Total (31%), Unocal (28%), Petroleum Authority of Thailand Exploration & Production (a Thai company) (PTT-EP) (25.5%) and MOGE (15%). The consortium constructed offshore equipment to produce gas, which is conveyed as far as the Burmese coast through a sub sea pipeline, and then 63 km further to the Thai border through an onshore pipeline. Thailand purchased most of the prospective yield through a long-term contract.[6] Work began at the end of 1995 and was completed in 1998. Production began in July 1998, and commercial exploitation in 2000. The production sharing contract binds the parties for a period of 30 years from the date of commencement of production. As is usual for this type of contract, the host state remains the owner of the hydrocarbon resources and equipment and the investor receives payment in the form of hydrocarbon products.

5. The Burmese regime is heavily involved in the Yadana project. It controls MOGE and has a direct interest in the exploitation of the gas deposit, which is a source of considerable wealth, much of which is used for the purchase of weapons.[7] The international community regularly condemns the Burmese junta for its poor human rights record. In his last reports,[8] the United Nations Special Rapporteur declared that he was particularly worried by the human rights situation in areas populated by ethnic minorities. The use of forced labor is institutionalized[9]

DROITS DE L'HOMME: DISSECTION D'UN CHANTIER, REPORT OF THE FEDERATION INTERNATIONALE DES DROITS DE L'HOMME 8 n.5 (1996), http://www.fidh.org/IMG/pdf/my_total1996a.pdf.

[5] *See* TOTAL, TOTAL AU MYANMAR, UN ENGAGEMENT DURABLE (2005).

[6] *Id.* at 7. Moreover, Total insists on the economic importance of the exploitation of the Yadana gas field for Thailand.

[7] LAROCHE & HABBART, *supra* note 2.

[8] Paulo Sérgio Pinheiro, Interim Report on the Situation of Human Rights in Myanmar Established by the Special Rapporteur of the Commission on Human Rights, §§ 40-80, U.N. Doc. A/60/221 (Aug. 12, 2005); Paulo Sérgio Pinheiro, Special Rapporteur of the Commission on Human Rights, Report on the human rights situation in Myanmar, § 37, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/34 (Feb. 7, 2006): "The Special Rapporteur regrets that according to information received during the last reporting period, the situation regarding the exercise of fundamental human rights and freedoms remains grave. The intimidation, harassment, arbitrary arrest and imprisonment of civilians for peacefully exercising their civil and political rights and freedoms continue. Members of registered political parties, human rights defenders, pro-democracy advocates are particular targets."

[9] Paulo Sérgio Pinheiro, Interim Report on the Situation of Human Rights in Myanmar Established by the Special Rapporteur of the Commission on Human Rights, § 69, U.N. Doc. A/60/221 (Aug. 12, 2005): "The Special Rapporteur is particularly preoccupied by the declarations made during a recent press conference on behalf of the government, according to which every person making allegations of forced labour judged by the government to be false, or putting forward such allegations to the International Labour Organisation (ILO) will be prosecuted. Moreover, it is troubling to note that the person responsible for liaising with the ILO is subject to constantly increasing restrictions, and that the organisations linked to the government have suggested that he withdraws from the ILO." Several reports have been published by the United Nations Special Rapporteur for the situation of human rights in Burma/Myanmar. See the reports of Yozo Yokota, Special Rapporteur for the Commission on Human Rights (U.N. Doc. E/CN.4/1993/37 (Feb. 17, 1993); U.N. Doc. E/CN.4/1994/57 (Feb. 16,

and the military has been guilty of grave and systematic violations of human rights: child labor; use of child soldiers; sexual violence; arbitrary imposition of taxes; confiscation of property; forced displacement; corporal punishment; summary executions; abusive restrictions of freedom of movement; religious persecution; *etc*. The Special Rapporteur also reported cases of using civilians as human minesweepers.

6. The Yadana project gave the Burmese army the opportunity to commit new abuses against the population. The project involved the construction of a sixty kilometer-long onshore pipeline to convey the gas collected in the Andaman Sea as far as the Thai border. The pipeline crosses areas inhabited by ethnic minorities oppressed by the regime, in particular the Karen. The petroleum exploitation contract had delegated the task of ensuring the "security" of the pipeline region and the construction sites to the Burmese partner. As a consequence, several battalions of the army were dispatched to the pipeline region where they were able to commit violations against the population unchecked. The army proceeded to carry out a mass relocation of local populations in order to create a security perimeter around the pipeline, thereby dispossessing local residents of their land. Furthermore, the army imposed forced labor on these populations. Village leaders had to provide "voluntary workers" to the army, who were assigned to different construction sites related directly to the pipeline, notably to construct heliports, roads, or military camps and even to transport equipment. The soldiers also carried out summary executions, rapes, acts of torture, and extortion of the populations in the area of the construction site. Total and Unocal are accused not only of having collaborated with the Burmese regime, but also of having aided and abetted the army in committing these crimes. According to their detractors, they took advantage and profited from these abuses and, in any case, they could not have been ignorant of them. Total and Unocal do not deny having been informed that forced labor was practiced in Burma, but they do contest allegations of forced labor on their construction sites. Total acknowledges at most some isolated cases related to the pipeline region while emphasizing that these victims have been compensated.[10]

1994); U.N. Doc. E/CN.4/1995/65 (Jan. 12, 1995); U.N. Doc. E/CN.4/1996/65 (Feb. 5, 1996)); of Rasjmoor Lallah, Special Rapporteur for the Commission on Human Rights (U.N. Doc. E/CN.4/1997/64 (Feb. 6, 1997); U.N. Doc. E/CN.4/1998/70 (Jan. 15, 1998); U.N. Doc. E/CN.4/1999/35 (Jan. 22, 1999)); and of Paulo Sérgio Pinheiro, Special Rapporteur for the Commission on Human Rights (U.N. Doc. E/CN.4/2002/45 (Jan. 10, 2002); U.N. Doc. E/CN.4/2003/41 (Dec. 27, 2002); U.N. Doc. E/CN.4/2004/33 (Jan. 5, 2004); U.N. Doc. A/60/221 (Aug. 12, 2005); U.N. Doc. E/CN.4/2006/34 (Feb. 7, 2006)).

[10] On the subject of these condemnations, see various activist organisations' reports: EARTHRIGHTS INTERNATIONAL, FUELING ABUSE (2002), http://www.earthrights.org/files/Reports/fuelingabusenglish.pdf; EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES (2000), http://www.earthrights.org/burmareports/total_denial_continues.html; FÉDÉRATION INTERNATIONALE DES DROITS DE L'HOMME, INFO BIRMANIE ET AL., TOTAL POLLUE LA DÉMOCRATIE – ATOPPONS LE TOTALITARISME EN BIRMANIE (2005), http://www.fidh.org/IMG/pdf/mm04062005fr.pdf; BURMA CAMPAIGN UK, TOTAL OIL: FUELLING THE OPPRESSION IN BURMA (2005), http://www.burmacampaign.org.uk/PDFs/total%20report.pdf. The military forced the civilians to work. Besides forced labour, numerous persons were forcibly displaced so as to allow the installation of a security perimeter around the pipeline worksite. Several allegations of torture, extrajudicial

7. With no hope of obtaining justice from the Burmese authorities, a few victims living abroad as refugees have brought their claims before foreign national courts with the help of human rights associations. Because of the state immunity doctrine under international law, these legal actions have primarily targeted the corporations involved in the project, accusing them of aiding and abetting the atrocities committed. Petitions were first lodged in the United States, then in Belgium and in France, on various legal bases. The American actions, based on the Alien Tort Claims Act, aimed at making Total, Unocal, MOGE and the Burmese army civilly liable, while in Europe, victims sought damages by participating in the criminal proceedings against Total as plaintiffs. All of these actions raised challenging legal questions regarding jurisdiction of the courts and, in particular, regarding the possibility of holding corporations liable for these human rights violations. They gave rise to significant procedural battles, which are outlined below, showing the difficulties and obstacles that the victims of severe human rights violations have to face when they attempt to target transnational enterprises.

Part II – The issues

8. Condemnations of human rights violations committed by TNCs are increasingly frequent.[11] TNCs are accused of maintaining inadequate standards of social and labor rights as well as of failing to ensure the most basic safety rules in workplaces and factories. This can provoke not only a rise in accidents in the workplace,[12] but may also lead to environmental catastrophes,[13] such as those that occurred at the Union Carbide factory in Bhopal in 1984, where dilapidated equipment led to a toxic gas leak causing the deaths of more than 2.000 people.[14] Moreover, TNCs are accused of carrying out corrupt practices or, more seriously still, involving themselves in militarized commerce, meaning that they rely on

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killings, rape and extortion of property were made against the Burmese army in charge of pipeline security.

[11] In the context of globalization, TNCs have been able to expand and increase their business in every part of the world. It is undisputable that TNCs' impact on the lives of a growing number of people is therefore significant, not only for the workers they employ and for the consumers who buy their products, but also for all those who suffer, directly or indirectly, economically, socially, environmentally or politically, from the consequences of their activities. Indeed, TNCs may even play a major role in respecting and guaranteeing human rights. *See* THOMAS BERNS, PIERRE-FRANÇOIS DOCQUIR, BENOÎT FRYDMAN, LUDOVIC HENNEBEL & GREGORY LEWKOWICZ, RESPONSABILITÉS DES ENTREPRISES ET CORÉGULATION (Bruylant 2007).

[12] For example, see criticism of the social conditions of workers employed by the Belgian company Besix, which is in charge of constructing tower blocks in the United Arab Emirates, particularly the report HUMAN RIGHTS WATCH, BUILDING TOWERS, CHEATING WORKERS, http://hrw.org/reports/2006/uae1106/.

[13] *See* Pauline Abadie, *A New Story of David and Goliath: the Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745 (2004).

[14] *See* Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235 (1994); Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV 311 (2001).

armed forces, official or otherwise, to ensure the security of industrial equipment.[15] This type of "commerce" gives rise to the most serious abuses, and several TNCs have been accused of aiding and abetting acts of torture, summary executions or even genocides and crimes against humanity. Such accusations were brought most notably against Talisman for its involvement in human rights violations related to its business operations in Sudan,[16] Exxon,[17] and Freeport McMoran in Indonesia,[18] Rio Tinto in Papua New Guinea,[19] Shell and Chevron in Nigeria,[20] Coca-Cola in Colombia,[21] and of course Total and Unocal in Burma to pick but a few names from a constantly expanding list of cases.

9. The challenge is to adapt human rights regimes so they protect individuals and communities against corporate-related human rights harms. John Ruggie, the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises, summarized in his April 2008 report some of the most obvious problems related to TNCs and human rights. According to Ruggie, there are governance gaps created by globalization that provide a "permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation."[22] One of the key challenges is providing access to justice for the victims of corporate-related human rights abuses. Can the victims of such human rights violations claim justice against these TNCs? What are the legal remedies in such cases?[23] As a matter of principle, the state must regulate the behavior and sanction infringement by all persons under its jurisdiction, including TNCs. As stated by Ruggie in his April

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[15] *See* Craig Forcese, *Deterring 'Militarized Commerce': The Prospect of Liability for 'Privatized' Human Rights Abuses*, 31 OTTAWA L. REV. 171 (2000). *See also* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 3 (Hart Publishing 2004).

[16] *See* Stephen J. Kobrin, *Oil and International Law: The Geopolitical Significance of Petroleum Corporations*, 36 N.Y.U. J. INT'L L. & POL. 425 (2004).

[17] *See* Brian C. Free, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467 (2003).

[18] *See* Craig Forcese, *A.T.C.A.'s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claim Act*, 26 YALE J. INT'L L. 487 (2001).

[19] *See* Borchien Lai, *The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?*, 26 NW. J. INT'L L. & BUS. 139 (2005).

[20] Forcese, *supra* note 16.

[21] *See* Daniel Kovalik, *War and Human Rights Abuses: Colombia and the Corporate Support for Anti-Union Suppression*, 2 SEATTLE J. FOR SOC. JUST. 393 (2004).

[22] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Justice, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (April 7, 2008), http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf [hereinafter Ruggie Report].

[23] Academic literature dealing with this question is abundant. *See generally* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., Kluwer Law International 2000); TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Olivier De Schutter ed., Hart Publishing 2006); MIREILLE DELMAS-MARTY, COMMERCE MONDIAL ET PROTECTION DES DROITS DE L'HOMME 1-17 (Bruylant 2001); JOSEPH, *supra* note 13, at 3; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 452 *et seq.* (2001).

2008 report, "the human rights regime rests upon the bedrock role of states."[24] However, cases of militarized commerce generally occur in weak or authoritarian states unable or unwilling to ensure that human rights are respected on their territory. Certain developing countries are in an unfavorable position when confronted with the power of large multinationals: they fear that if they attempt to monitor companies' activities or take legal action against them, multinationals will retaliate by withdrawing their investment from the country. Moreover, even in cases where the state demonstrates a strong political will to monitor and sanction the abuses committed by TNCs on its territory, its administrative and legal systems may lack the necessary resources to enable such actions. Finally, and most importantly, in most of the cases, "militarized commerce" results from the collusion between TNCs and local governments, making domestic legal remedies impossible in the host state where human rights violations occurred.[25]

10. Since bringing a successful case within the host state is usually unworkable, victims must turn elsewhere in their attempts to obtain justice and hold TNCs liable for their actions. This alternative route almost always entails turning to fora in foreign states. This type of action, which is occurring more and more frequently, encounters considerable practical and legal obstacles, and often results in long and difficult procedural battles.[26] These possibilities for action are being followed closely by proponents of an increasingly influential theory on transnational human rights law, which emphasizes the unsatisfactory and insufficient nature of the legal status of TNCs in the current context of globalization, and advocates an extension of their responsibilities.[27]

11. In particular, the theory raises two delicate questions, which the judge must settle. First, on what basis may a company be held legally responsible, as perpetrator or accomplice of human rights violations or more general violations of international law? Second, when may a national judge declare himself competent to adjudicate a case regarding human rights violations committed outside his own territory, a question which raises the issues of extraterritorial and universal jurisdiction. Behind these two technical questions related to the liability of TNCs and extraterritoriality issues, there is an even more fundamental question concerning access to justice: can the victim of a violation committed by a multinational company on the territory of a weak or authoritarian state have his rights upheld by a domestic judge of another state?

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[24] Ruggie Report, *supra* note 20, § 50.

[25] JOSEPH, *supra* note 13, at 5.

[26] In certain cases, national legislation directly protects transnational enterprises from all legal actions. For example, legislation adopted in Papua New Guinea in 1995 criminalized all claims for redress made in foreign jurisdictions by victims of environmental damage. It seems that the legal department of BHP drafted this legislation in order to avoid any legal proceedings related to their actions in the country. *See* MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 116 (Ashgate 2001).

[27] *See generally* De Schutter, *supra* note 21; DELMAS-MARTY, *supra* note 21; JOSEPH, *supra* note 13; Kamminga & Zia-Zarifi, *supra* note 21; Ratner, *supra* note 21.

Part III – The litigations

12. The emergence of globalization have not left judicial systems unaffected. Transnational human rights litigation fully integrates the concept of the global market for justice, and litigators make use of all these newly available avenues to find the best judicial forum for their cases. It's not surprising that the same set of human rights abuses were brought to the attention of courts in three countries over the past decade. The narrative of the judicial matters of the Unocal and Total case is a journey through courtrooms, and their findings, in San Francisco, Versailles and Brussels.

San Francisco: the American Episode of the Unocal-Total Case

13. While scholars have extensively commented on the litigation against Unocal in the United States and its main procedural aspects, the hurdles faced and outcomes which resulted must be briefly recalled to enable a legal comparison with the European litigations. However, this paper will focus mainly on the elements of the case that show the "legal relativism" of this kind of action, the procedural battle of the Unocal case, and the specificities of the American legal system that may play a major role in choosing American fora for transnational human rights litigation.

14. Invoking the Alien Tort Statute (ATS), the litigators used the tort strategy as grounds for jurisdiction of American courts for human rights violations committed abroad. The ATS, now well known to transnational human rights litigators in the United States, was adopted in 1789 as part of the American Judiciary Act.[28] This unique provision succinctly states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." The ATS was used very infrequently for almost two centuries and had almost been forgotten[29] until the 1980s. Since then, it has been revived by ingenious litigators acting on behalf of victims of serious human rights violations committed outside the territory of the United States. First brought against persons acting as agents of the law, this cause of action was subsequently used against private persons and has been regularly used since the 1990s to sue transnational companies accused of severe human rights abuses in the course of their activities abroad[30] with relative success.

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[28] The grounds justifying the adoption of the ATS remain obscure. The question was discussed by Justice Souter of the Supreme Court of the United States in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) [hereinafter Sosa v. Machain].

[29] See Filartiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980). In the Filartiga judgment, Justice Kaufman summarized the preceding uses of the ATCA in these terms: "[The ATCA] afforded the basis for jurisdiction over a child custody suit between aliens in Adra v. Clift, 195 F.Supp. 857 (D. Md. 1961), with a falsified passport supplying the requisite international law violation. In Bolchos v. Darrel, 1 Bee 74, 3 Fed.Cas. 810 (D. S.C. 1795), the Alien Tort Statute provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas."

[30] Commentators recognize that there have been dozens of actions introduced against transnational enterprises, even if they do not necessarily agree on the figures. See, in particular, the summary of cases in JOSEPH, *supra* note 13.

15. Initially, two actions were brought against Unocal and its partners in the Yadana project almost simultaneously. First, in September 1996, the Federation of Trade Unions of Burma and the Government in Exile (the National Coalition Government of the Union of Burma) brought an action (Roe I) alleging violations of the law of nations under the ATS and of state law. Their allegations related mainly to forced labor and property loss. Second, in October 1996, fourteen farmers from the Tenasserim region of Burma, claiming to potentially represent thousands of victims, brought a class action (Doe I) before the District Court, against defendants Unocal, Total, MOGE, the military junta, the President of Unocal, and the Chairman and Chief Executive Officer of Unocal. Plaintiffs sought "injunctive, declaratory and compensatory relief for alleged international human rights violations perpetrated by defendants." They alleged that the defendants' conduct in the course of the Yadana operations caused them to suffer assault, rape, torture, forced labor, property loss, and the death of relatives.[31] The suit introduced 19 causes of action, including crimes against humanity, forced labor, arbitrary arrest and detention, and torture.[32]

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[31] For a summary of the American proceedings in this case: Ryan A. Tyz, *Searching for a Corporate Liability Standard under the Alien Tort Claims Act in Doe v. Unocal*, 82 OR. L. REV. 559, 568-569 (2003); the literature on the Unocal case is abundant. *See* Andrew Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act, in* De Schutter, *supra* note 21; David I. Becker, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT'L L.J. 183 (1998); Laura Bowersett, *Doe v. Unocal: Tortuous Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRANSNAT'L LAW. 361 (1998); Tawney Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009 (2003); Terry Collingsworth, *Separating Fact From Fiction in the Debate Over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563 (2003); Lucien J. Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C. J. INT'L L. & COM. REG. 1 (1998); Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401 (2002); Sonia Jimenez, *The Alien Tort Claims Act: A Tool for Repairing Ethically Challenged U.S. Corporations*, 16 ST. THOMAS L. REV. 721 (2004); Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141 (2005); Gabriel D. Pinilla, *Corporate Liability for Human Rights Violations on Foreign Soil: A Historical and Prospective Analysis of the Alien Tort Claims Controversy*, 16 ST. THOMAS L. REV. 687 (2004); Justin Prociv, *Incorporating Specific Internationals Standards into ATCA Jurisprudence: Why the Ninth Circuit Should Affirm Unocal*, 34 U. MIAMI INTER-AM. L. REV. 515 (2003); Eileen Rice, *Doe v. Unocal Corporation: Corporate Liability for International Human Rights Violations*, 33 U.S.F. L. REV. 153 (1998); Andrew Ridenour, *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violations of the Law of Nations Under the Alien Tort Claims Act*, 9 TUL. J. INT'L & COMP. L. 581 (2001); Courtney Shaw, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359 (2002); Pia Z. Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer?*, 42 WM. & MARY L. REV. 619 (2000); Shanaira Udwadia, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359 (2004); Edwin V. Woodsome & T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a 'Reason to Know' Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 16 LOY. L.A. INT'L & COMP. L. REV. 89 (2003); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 82 (1999).

[32] *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997).

16. Defendants filed a number of motions to dismiss these two actions and were partially successful. The District Court found that the Government in Exile and the Trade Unions lacked standing to pursue their claims. Moreover, the Court dismissed the claim against the SLORC and the MOGE since they were entitled to immunity pursuant to the Foreign Sovereign Immunities Act.[33] The District Court held however that the defendants Unocal, Unocal's managers, and the French Total were not immune pursuant to the act of state doctrine. Total's motion to dismiss for lack of personal jurisdiction was granted by the District Court that found, *inter alia*, that the French corporations' contacts with California were insufficient to warrant exercise of personal jurisdiction,[34] sparing Total from the American lawsuit related to the Yadana violations. The District Court further found, though, that the plaintiffs had established subject matter jurisdiction and had sufficient evidence to seek a claim under the ATS. The discovery stage lasted for more than two years and gave the parties the opportunity to collect and produce an impressive body of evidence: more than 58 statements from witnesses and plaintiffs were collected, while Unocal presented over 70,000 pages of documents to clarify its role in the matter.[35]

17. In August 2000, a District Court granted Unocal's consolidated motions for a summary judgment on all claims in both actions, holding that the California-based oil corporation could not be held liable under ATS for the Myanmar government's use of forced labor in furtherance and for the benefit of the pipeline portion of the joint venture project. According to District Judge Lew, who replaced Judge Paez who had been elevated to the Court of Appeals, the plaintiffs failed to show that Unocal intended the proven abuse by the military. Moreover, the District Court held that Unocal's participation in the Yadana project was insufficient to establish liability because no material facts indicated that Unocal either "controlled" the military or participated in state action. In other words, the plaintiffs had failed to demonstrate that Unocal controlled the actions of the Burmese army or that Unocal actively and directly participated in practices of forced labor.[36] A few weeks later, the District Court granted Unocal's motion to recover costs for over $125,000. The plaintiffs appealed the summary judgment order.

18. A three-judge panel of the 9th Circuit Court of Appeal then reversed the District Court's grant of a summary judgment in favor of Unocal on the Plaintiffs' ATS claims for forced labor, murder, and rape.[37] The panel agreed, however, on the

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[33] *Id.* at 884-88.

[34] *Doe v. Unocal Corp*., 2001 U.S. App. LEXIS 7691 (9th Circuit, 27 April 2001); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1190 (C.D. Cal. 1998).

[35] Marion Cohen, *Responsabilité sociale des entreprises: Total en Birmanie 2/2*, NET HEBDO, n° 49, Dec. 12, 2003, http://www.info-birmanie.org/Birmanie/www.info-birmanie.org/info/nethebdo/Net%20Hebdo%20n%C2%B049%20-%2012%20d%C3%A9cembre%202003.html.

[36] Forcese, *supra* note 16. This note examines case studies involving complicity of American companies with foreign states' grave human rights abuses, and reviews the ATS jurisprudence and the concept of complicity to apply the analysis to the Unocal case and more specifically to suggest weaknesses in the District Court's reasoning.

[37] *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Circuit, 2002).

District Court's ruling that MOGE and SLORC were immune under the Foreign Sovereign Immunities Act. The opinion, written by Circuit Judge Pregerson, presents two major points that are highly interesting from the perspective of the legal translation analysis featured in this paper.

19. First, the opinion tells the story of the human rights abuses in Burma in the context of the natural gas project. More than ten pages of the opinion deal with the factual background of the case. From the victims' perspective, part of the victory lies in the official acknowledgement of the injustices they had suffered. A federal judge in the United States describes in a public opinion Unocal's investment in the gas project in Burma, asserts that Unocal's knew that the Burmese military was providing security and other services for the project, describes the role of the military in the project and the alleged bonds between Unocal and the military, and states that Unocal knew that the military was allegedly committing human rights violations in connection with the project and describes the alleged abuses in referring to the testimonials of the victims. The opinion reads like a kind of civil accusation, exposing factual evidence against the defendants. It constitutes, to this day, a rare legal document, with no European equivalent, offering a comprehensive and narrative overview of the case. The Court's ruling deals with the procedural aspects of a civil procedure. However, the Court's references to international criminal law, as explained below, reinforce the "criminal atmosphere" of the case. As stated in the opinion, "what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction [between criminal prosecutions and civil proceedings] is therefore of little help in ascertaining the standards of international human rights law."[38]

20. Second, the opinion offers an interesting legal argument on the very concept of TNC liability for human rights abuses perpetrated in the course of operations abroad. The majority found that all torts alleged in the case were *jus cogens* violations (forced labor, murder, rape and torture), and thereby, violations of the law of nations, which is necessary to have a cause of action under the ATS. Furthermore, the majority cited the 2nd Circuit Court of Appeal's ruling in *Kadic v. Karadic*, to assert that "even crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do *not* require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require [it]." Since the majority considers forced labor as a modern variant of slavery, it doesn't require state action and could trigger the liability of a private party such as Unocal under the ATS. And because the alleged acts of murder, rape, and torture were inflicted in furtherance of forced labor, state action is neither required to give rise to liability for these acts under the ATS. The Circuit Court agreed with the District Court to apply international law to define the role played by Unocal in the abuses committed by the army. To determine if, as alleged by the plaintiffs, Unocal aided and abetted the military in subjecting the victims to forced labor and in inflicting other violations upon them, the Circuit Court considered it appropriate to refer to the "aiding and abetting" test set by the International Criminal Tribunals. The Court relied mainly on the International Criminal Tribunal for former Yugoslavia's

[38] *Id.* at 14216.

ruling in *Furundzija* to define the aiding and abetting test comprising the *actus reus* standard that "requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" and of the *mens rea* standard that the accomplice has reasonable knowledge that his "actions will assist the perpetrator in the commission of the crime". After a careful analysis, the Court found that a reasonable fact finder could conclude that Unocal's conduct met the requirements of aiding and abetting in the commission of the crimes of forced labor, murder and rape. The legal construction of the aiding and abetting test, borrowed from international criminal law, is a key contribution to the doctrine of TNC liability for human rights abuses committed abroad. In most cases of militarized commerce, the corporation is not the direct abuser but rather aids and abets the violators, as defined above, for the benefit of their business. Finally, the Unocal case, like all ATS cases, also included an extraterritorial dimension that could have been considered as prejudicing or impeding the conduct of U.S. foreign relations with the government of Burma, and therefore could have barred plaintiffs' claims pursuant to the act of state doctrine. This prudential doctrine rests on the idea that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory". The Court found, however, that the act of state doctrine did not preclude suit under the ATS in this case and that plaintiff's claims were not barred by this doctrine.

21. The Circuit Court's ruling opened the door to a jury trial. However, the 9th Circuit Court ordered on February 14, 2003 that the case be reheard *en banc*. In December 2004, just before the Court's hearing, the parties announced that they agreed to settle the case. The settlement aborted the lawsuit.[39] The terms of this settlement remain secret. It was nonetheless described by Earthrights, the NGO that spearheaded the American actions, as very favorable to the plaintiffs and, ultimately, as a victory.

Versailles: the French episode of the Total case

22. In Europe, there is no dormant act such as the ATS that could be reactivated by transnational human rights litigators to sue TNCs for human rights abuses committed abroad. But, there is criminal law and in the European legal culture, this is the regular avenue for human rights violations. So, it's not surprising that the translating Unocal into the French and Belgian legal cultures resulted in criminal proceedings. Did it work? The success of legal proceedings is relative, and depends on one's perspective. However, it can be said that procedural hurdles seriously crippled the European proceedings and cause profound frustrations for the litigators and human rights defenders.

23. In France, in 2002, six years after the beginning of the lawsuit against Unocal in the US, two Burmese villagers, later joined by six others, filed a criminal complaint with the examining judge along with an application to join the proceedings as a civil party against Total's executives. Sherpa, a French NGO,

[39] Albeit not completely: an interesting lawsuit has been brought against Unocal and its insurers regarding the legal costs sustained by Unocal in this case. The insurance companies are refusing to indemnify their client on the basis of Unocal's complicity in crimes committed by the Burmese army in Myanmar. We do not examine this new development here.

actively supported them. The founder of that NGO was the main plaintiffs' attorney. The extraterritorial character of the case did not pose a major difficulty since the two defendants and Total's executive were French, and the French courts' jurisdiction may extend to a case based on the nationality of the defendant following the active personal jurisdiction doctrine.[40] The complaint targeted Total's executives and not the corporation Total as such. The main reason that may help to understand this point is that the 1994 French Act on corporate criminal responsibility was too narrow. Corporate criminal responsibility was limited to certain kinds of substantive offenses for which a corporation may be liable and the extension of the substantive corporate offenses needed a legislative extension. It was only in 2001 that the substantive corporate offenses was extended to human rights abuses caused by corporate actors, but since it was criminal law it could not be applied retroactively to the 1995-1998 activities in the Yadana field as a result of the legality principle.[41]

24. The procedure used by the victims is pretty standard in the French criminal system. In France, the investigating judge may only investigate a case in accordance with a submission made by the district prosecutor who has exclusive jurisdiction to initiate a criminal investigation. The prosecution submission may be made against a named or unnamed person. However, any person claiming to have suffered harm from a felony or misdemeanor may petition to become a civil party by filing a complaint with the competent investigating judge.[42] Through this procedure, the civil party may try to initiate a criminal inquiry. Then, the judge may order to send the complaint to the district prosecutor who may draft his submissions. At the time of the preliminary judicial inquiry, the judge investigates the facts and may hear all sorts of witnesses and experts or take any steps necessary for the discovery of the truth. In lodging a civil complaint, the villagers initiated the criminal enquiry. However, it's not because the investigating judge opens a judicial inquiry that he may or must arrest or place under judicial examination the persons mentioned in the complaint or in the prosecutor's submission. He may place under judicial examination only those persons against whom there is strong and concordant evidence making it probable that they may have participated, as

[40] C. PÉN art. 113-6.

[41] Sara S. Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 121 (2004); Leonard Orland & Charles Cachera, *Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code (Nouveau Code Pénal)*, 11 CONN. J. INT'L L. 111, 113 (1995); *Id.* at 141-46 (listing offenses); OLIVIER SAUTEL, LA MISE EN OEUVRE DE LA RESPONSABILITÉ PÉNALE DES PERSONNES MORALE: ENTRE LITANIE ET LITURGIE no. 14, at 1147 (2002); *See also* Jean-François Seuvis, *Chroniques – B. Chronique législative*, 4 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 840, 843 (2001) (reviewing new legislative enactments of substantive offenses). This expansion of substantive liability has caused one commentator to argue that French corporate criminal liability has become "totally incoherent" and to recommend that the legislature adopt a general system of criminal liability that makes criminal corporate liability more "rational" and "predictable." Playing on the French term for "juridicial person" (*personne morale*), Sautel suggests that the expansion of substantive corporate liability has "left no doubt" that *personnes morale* have become *personne immorale* capable of killing, injuring, and raping." SAUTEL, *supra* note 39, at 1147-48.

[42] C. PR. PÉN. art. 85.

perpetrator or accomplice, in the commission of the offences he is investigating. And, he must first hear the observations of the person or give him the opportunity to be heard.[43] Any person mentioned by name in the initial submission or in a complaint and who is not indicted may only be heard as an assisted witness.[44] The assisted witness benefits from the right to be assisted by a lawyer and enjoys various rights such as the right to ask the judge to be confronted with the person who has implicated him in the complaint.[45] In this case, one of Total's executives was heard as an assisted witness, and was never indicted, while Total was not directly involved but intervened in the procedure.

25. The examining judge of Nanterre decided to begin a judicial inquiry for arrests and illegal confinement. The Nanterre judge gathered several testimonies regarding the practices of the army in its dealings with local populations and the involvement of the French company in the human rights abuses. These statements – abstracts of these statements can be found in the plaintiffs' brief before the Versailles Court of Appeal[46] – assert that the battalions responsible for supervising and providing security for the pipeline zone deprived the alleged victims of all freedom. They were forcibly conscripted by the army to carry out unpaid work on the pipeline construction site and forced to work and live there for a certain time, with no possibility of escape. One of the plaintiffs testified that, even though he was only 13 years old, he was forced to replace his father in carrying out this "voluntary work." Another witness maintained having seen about 300 workers construct the heliport of the French company Total. He stated that he was forced to work for 10 days on the construction, with permission to return to his home in a nearby village at night. The workers and their families were placed under such threat of violence that none of these "voluntary workers" dared not show up at work the following morning. The French Examining Judge also heard a former soldier describe how the workers were threatened with death if they refused to comply. Several witness statements revealed that the workers were conscripted by the army to work on the site run by Total, the infrastructure linked to the construction site, or other projects in Total's interests such as the construction of heliports used by the French company. Moreover, the witness statements indicated that Total had influence and control over the Burmese army. For example, one of the witnesses, who claimed to have been employed by Total for ten months, stated that before every helicopter journey, Total informed the army of where its team would be traveling, and the army would then send a battalion to the heliport to provide security.[47]

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[43] C. PR. PÉN. art. 80.

[44] The legal status of *témoin assisté* protects the rights of a witness implicated in the facts of the case in which he is testifying. Unlike ordinary witnesses, he may avail himself of such benefits as legal representation.

[45] C. PR. PÉN. art. 113-3.

[46] Statement addressed to the President and Councillors, Cour d'appel [CA] [regional court of appeal] Versailles, 10ème ch.-section A, Chambre de l'Instruction [examining chamber], Dec. 14, 2004, Case n°2004/01/600, 11 *et seq*.

[47] *Id.* at 15 *et seq.*

26. In 2003, Total,[48] even though not officially involved in proceedings, lodged a motion to dismiss the case before the Nanterre prosecutor and the examining judge in charge, on the grounds that illegal confinement does not include forced labor, and that as a result the complaint was not legally grounded.[49] The request was denied. The inquiry continued and the judge held several hearings. The admissibility of the action for damages was contested, and moreover the statute of limitations was invoked.[50] In January 2004, the examining judge transmitted his file to the court for a judgment on the action for damages and the application of the statute of limitations.[51] As regards the motion to institute proceedings, the district prosecutor ultimately accepted Total's objections, calling on the examining judge to discontinue the proceedings on the grounds that the facts at hand could not be qualified as offenses under French criminal law.[52] The examining judge refused to do so, because according to him, the request to discontinue the proceedings constituted a new and delayed opinion from the district prosecutor. He announced he would pursue the inquiry, and that it would not be limited to the facts strictly related to the legal definition of forced labor and that the inquiry will extend to all the facts of the case. The district prosecutor appealed this order before the Versailles Court of Criminal Appeal.[53] This court dismissed the prosecutor's request on the grounds that he did not have jurisdiction to request the dismissal of the case at this stage. According to the French Code of Criminal Procedure, the prosecutor may never ask directly for the dismissal of a case and the Versailles ruling clearly underlines the prosecutor's attempted misuse of power. As a result, the Versailles Court ordered the continuation of the investigation.[54] This ruling is the most significant judicial document to stem from the French proceedings. As discussed below, the plaintiffs and Total decided to settle and the investigating judge finally decided to drop the case. Before describing the settlement, one should consider the lessons to be learnt from the ruling. The Versailles Court of Appeal's ruling is far less interesting than the 9th Circuit Court's ruling in the Unocal case on both aspects mentioned above: the ruling is poor on the factual aspects and on the legal construction of a TNC liability doctrine.

27. First, on the factual background of the case, some findings of the Examining Judge of Nanterre are revealed in the plaintiffs' brief before the Versailles Court of Appeal. The Court of Appeal's ruling referred to the brief and integrates some of its paragraphs. The ruling is however technical and procedural, and does not adopt the narrative style found in the 9th Circuit Court's ruling. From the victims' perspective, a glimpse of justice could be found in the fact that a French criminal judge opened a criminal judicial inquiry. But, such inquiry is secret and the story

[48] Total alleged that it had been informed of the proceedings by the press. *See id.* at 11.

[49] *Id.* at 11.

[50] *Id.* at 12.

[51] *Id.* at 13.

[52] *Id.* at 14.

[53] *Id.* at 16.

[54] *Id.* at 17-19.

was not told publicly through the judicial voice. Most of the judicial rulings[55] and documents were not published and when a document such as the Versailles Court of Appeal's ruling happened to be legally available to the public, it was almost impossible to get a copy of it. Not surprisingly, scholars did not comment given that much of the case remained confidential.

28. Second, the Versailles Court didn't discuss the question of TNC (and TNC executive) liability for human rights abuses. For procedural reasons, it focused solely on whether or not to discontinue the case. Even though, unlike in the US and Belgian lawsuits, the defendants didn't raise any objections related to the jurisdiction of the French tribunals in this case, they nevertheless entered into a procedural battle over another issue – that of the definition of the offence. The plaintiffs claimed to have been forced, under threat of violence from the junta soldiers, to work on the sites managed by Total.[56] The legal problem, raised by Total's lawyers, was that forced labor is not a specific offence under French law (except in times of war), which is why the plaintiffs suggested qualifying the offences as illegal confinement, since that offence mentioned in the criminal code was the less severe categorization.[57] The Versailles Court's ruling only discussed that technical and legal point. But the legal approach to the issue, when compared to the 9th Circuit Court's ruling is radically different. The American Court elevates the illegality of forced labor to the level of the slavery prohibition and *jus cogens*. The interpretation is dynamic, liberal and extremely protective of individuals. In France, the discussion dealt with the criminalization of forced labor under French law. One can firstly wonder how it could be that forced labor is not an offense in the French criminal code. And this was the question asked in another case, *Siliadin v. France*,[58] to the European Court of Human Rights (ECHR) in 2005. The victim of several years of domestic servitude, an immigrant who was forced to work as a domestic servant for a French couple who kept her passport, claimed before the Strasbourg Court that states had an obligation to "adopt tangible criminal-law provisions that would deter such offences, backed up by law-enforcement machinery for the prevention, detection and punishment" of such human rights abuses.[59] She added "that, in the absence of any appropriate criminal-law machinery to prevent and punish the direct perpetrators of alleged ill-treatment, it could not be maintained that civil proceedings to afford reparation of the damage suffered were sufficient to provide her with adequate protection against possible assaults on her integrity."[60] The Court condemned France and stated that states

[55] The judgments are public but the bureaucratic procedure to have access to a copy of a specific ruling is so heavy that we can consider that in practice rulings are not made available to the public. The author wishes to thank William Bourdon, the lawyer of the villagers, who provided us with a copy of the Versailles ruling.

[56] *See* Cour d'appel [CA] [regional court of appeal] Versailles, 10ème ch., Jan. 11, 2005, 6-7, citing some extracts of the complaint. This judgment remains unpublished and we thank William Bourdon for having shared it with us. The judgment is on file with the author.

[57] *Id.* at 8-10.

[58] Siliadin v. France, 43 Eur. Ct. H.R 16 (2006).

[59] *Id.* §71.

[60] *Id.* §69.

have positive obligations to adopt criminal-law provisions, which penalize the practice of slavery, servitude and forced or compulsory labor as they have such obligations concerning the practice of torture and ill treatment.[61] Bearing in mind *Siliadin*, the discussion in the Total case concerning the legal qualification of the offense would not have been an issue if France had respected its international obligations to criminalize forced labor. And one could even argue that France had the obligation to prosecute the offenders in the Total case or at least to conduct a judicial inquiry or investigation. While in the 9th Circuit ruling the Court refers extensively to international law to define complicity but also to identify *jus cogens* norms, the reference to international law seems to be very superficial in the French case. The litigators themselves seem to be extremely careful in referring to international law since French law was not consistent with France's obligations under international human rights law. Thus, is it fair to say that the whole French episode of the Total case is misleading, due to France's breach of its international obligations regarding slavery, servitude and forced labor? The central questions for the theory of TNC liability for human rights abuses are not tackled in the French proceedings, or at least not directly before the judges. As mentioned above, this is not an extraterritorial case since the action was targeting French individuals. Moreover, the complicity issue is not addressed. For the plaintiffs, it didn't seem to be disputable that the Yadana field was under the direct responsibility of Total, though its Burma subsidiary, and that the military was recruited and compensated by Total to ensure the security of the work.

29. Some months later, on 29 November 2005, Total concluded a settlement with the Burmese nationals represented by the Sherpa association. The text of this agreement was never made public, but the media was aware of its principal terms. It stipulated that Total, without accepting any responsibility for the matter, was to pay the sum of €10,000 per plaintiff in exchange for the complaint being withdrawn. Moreover, the other victims who had come forward in the meantime were provided with compensation, which was given out locally in the thirteen villages affected by the facts of the case. In this way, Total made funds of more than 5 million euros available, the eventual balance of which will be allocated to different social and economic programs launched by Total in Myanmar since 1995. The settlement was strongly criticized by human rights groups in both France[62] and Belgium.[63] Theoretically, the withdrawal of the plaintiffs' case did not end the criminal action. The action was nevertheless dismissed by a examining judge's

[61] *Id.* §89.

[62] The Ligue des Droits de l'Homme, la Fondation Internationale des Droits de l'Homme (F.I.D.H.) and the action group Infobirmanie published a press release on Nov. 30, 2005, particularly condemning the Sherpa organization for having accepting Total's version of the events in which it denied all responsibility for the case.

[63] *See* Front peu Commun pour la Justice dans le dossier Total en Birmanie, *L'Affaire Total et l'honneur de la démocratie*, LE SOIR, Dec. 6, 2005, at 16 [hereinafter *Total et l'honneur de la démocratie*]. This article is cosigned by several human rights defense associations, including the Ligue des droits de l'homme, the Liga voor Mensenrechten and the F.I.D.H., as well as other groups and associations including F.G.T.B., C.S.C., the M.O.C., la Ligue des familles, Oxfam, Attac, etc., together forming the "Front peu Commun pour la Justice dans le dossier Total en Birmanie". The authors strongly criticize the settlement in France: "Total believes it can save itself by buying the silence of the victims."

order d.d. June 22, 2006.[64] The judge declared that, on the basis of a number of witness statements gathered during the inquiry, the "*reality of the denounced facts can not be doubted.*" The judge confirmed however that forced labor, in spite of France's international obligations, was not the object of any criminal offence under French law, and that it could not be assimilated purely and simply to the crime of illegal confinement. She also noted that the constituent elements of illegal detention could not be gathered together at trial and that the evidence capable of demonstrating the existence of the crime could only be provided by the plaintiffs, who had withdrawn their complaints and could not be contacted (it seems that they were living illegally in Thailand, and that there was no knowledge of their whereabouts). This closed the French episode of the Total case. The matter was still ongoing in Belgium, where an investigation was undertaken on the basis of similar facts as described below.

Brussels: the Belgian episode of the Total case

30. In Belgium, four Burmese victims of the Yadana project filed a criminal complaint with the examining judge along with an application to join the proceedings as civil parties on April 25, 2002 against Total and its executives.[65] The complaint was brought before an examining judge from the Brussels Court of First Instance for complicity in crimes against humanity. Plaintiffs claimed not only that the moral and financial support given by Total to the Rangoon military regime made the French company and its directors complicit in the perpetrated crimes against humanity, but also that the moral, financial, logistic and military support given by Total and its directors to the military battalions (named "Total battalions" by the local population) in charge of ensuring the security of the Yadana pipeline in the Tenasserim region facilitated the commission of these crimes. More concretely, the plaintiffs claimed that they had been victims of human rights violations or acts of torture; cigarette burns, the "iron rod" (where a metal bar is rolled up and down the shinbone until the skin peels off), blows to the head with bags of sand leading to permanent lesions of the optic nerve, etc.

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[64] Here again, the order remains unpublished, impeding both legal research and public debate. However, extracts from the order are cited in Marc Bastian, *Non-lieu pour Total, même si le travail forcé a existé en Birmanie*, AFP DISPATCH, June 22, 2006, at 8 H 53.

[65] Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire [Law of 16 June 1993 relative to the repression of serious violations of international humanitarian law], Moniteur belge [Official Gazette of Belgium], Aug. 5, 1993, p. 17751, March 23, 1999, p. 9286 and May 7, 2003, p. 24846. On universal jurisdiction, see: Pierre D'Argent & Jean d'Aspremont Lynden, *La loi de compétence universelle revue mais pas corrigée*, 122 JOURNAL DES TRIBUNAUX 480 (2003); ANTONIO CASSESE & MIREILLE DELMAS-MARTY, JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX (2002); DE GENOCIDEWET IN INTERNATIONAAL PERSPECTIEF (Jan Wouters & Heidi Panken eds., 2002); Damien Vandermeersch, *Compétence universelle et immunités en droit international humanitaire. La situation belge*, *in* LE DROIT PÉNAL À L'ÉPREUVE DE L'INTERNATIONALISATION 277-304 (Marc Henzelin & Robert Roth eds., 2002); Damien Vandermeersch, *La compétence universelle en droit belge*, *in* POURSUITES PÉNALES ET EXTRATERRITORIALITÉ 39-89 (Serge Brammertz et al. eds., 2002); MARC HENZELIN, LE PRINCIPE DE L'UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL (2000); Eric David, *Le champ d'application de la loi belge du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire*, 36 MIL. L. & L. WAR REV. 111 (1997); Damien Vandermeersch, *La répression en droit belge des crimes de droit international*, 68 INT'L REV. PENAL L. 1092 (1997).

Plaintiffs alleged that these acts were part of a systematic, general, organized attack, carried out by the military junta, through multiple acts of repression including the massacre of opponents, arbitrary arrests, torture, forced displacement and massive forced labor.[66]

31. Since the offenses were perpetrated abroad by aliens with the alleged complicity of aliens (corporation Total and its executives, all French nationals) and that the victims were Burmese, Belgian courts did not, according to the general criminal procedural rules, have jurisdiction to inquire, investigate or hear the case. However, litigators based their criminal complaint on the Universal Jurisdiction Act. That law was adopted in 1993 and granted Belgian courts universal jurisdiction for alleged grave violations of the 1949 Geneva Conventions and 1977 Additional Protocols I and II. The law of universal jurisdiction had first been extensively modified by the law of 10 February 1999, so as to include genocide and crimes against humanity, and to prevent the perpetrators from hiding behind their immunity. The Universal Jurisdiction Act opened the door to the entire world's alleged victims, some of whom unlawfully took advantage of the Belgian system, filing complaints against political figures such as Hissène Habré, Augusto Pinochet, Saddam Hussein, Fidel Castro, Paul Kagame, Yasser Arafat, Ariel Sharon and George Bush. Following the condemnation of Belgium by the International Court of Justice in 2002 for violating the immunity of heads of state, the increase in complaints, notably against important members of the American administration and the resulting pressures, universal jurisdiction was reviewed in a restrictive sense, this time by the law of 23 April 2003; this did not end the diplomatic difficulties however. The law of 5 August 2003 finally repealed the 1993 law and amended the Criminal Code, the preliminary heading of Criminal Procedure Code and the Criminal Procedural Code with a view to permitting, only under certain conditions, the prosecution of grave breaches of international humanitarian law. The Belgian episode of the Total case was based on that Universal Jurisdiction Act. The investigation was interrupted by the 2003 amendment.[67] Transitional provisions governed the fate of pending cases and gave the Court of Cassation the power to dismiss cases having an insufficient connection with Belgium.[68] However, article 29 § 3 (2) provides an exception for "*cases which*

[66] Summary of the claim brought by Actions Birmanie against Totalfinaelf et al. before the Investigating Judge at the Brussels Tribunal of First Instance, http://www.birmanie.net/birma/ab112_ab080502.html (last visited Dec. 25, 2008).

[67] *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

[68] Loi du 5 août 2003 relative aux violations graves du droit international humanitaire [Law of 5 August 2003 relative to serious violations of international humanitarian law], art. 29 § 3, Moniteur belge [Official Gazette of Belgium], Aug. 7, 2003, p. 40506. Previously, Belgian judges were competent for grave breaches of international humanitarian law in three cases: when the breach was committed by a Belgian national or a person residing in Belgium (Titre préliminaire du Code de procédure pénale [Preliminary Heading of the Criminal Procedure Code], art. 6); when the victim of the breach is Belgian or a person who, at the moment of the facts, had been residing effectively, habitually and legally in Belgium for three years (Titre préliminaire du Code de procédure pénale [Preliminary Heading of the Criminal Procedure Code], art. 10.1° bis); or finally, when a rule of international law, treaty or custom, obliges Belgium to pursue the perpetrator of certain offences (Titre préliminaire du Code de procédure pénale [Preliminary Heading of the Criminal Procedure Code], art. 12bis).

had been made the object of an inquiry at the date of entry into force of the present law, after which, either a plaintiff must be of Belgian nationality at the moment of the initial taking of the action, or an accused must have his principal residence in Belgium on the date of the entry into force of the present law". The main legal battle of the Belgian episode of the *Total* case focused on the applicability of the Universal Jurisdiction Act, as amended in 2003. The highest courts of the country ruled on the case, adopting conflicting positions.

32. Applying the new law, the state prosecutor referred the Total case to the General Prosecutor of the Court of Cassation, who ordered to dismiss the case. Total has its head office in France, not in Belgium, even though it had set up a coordination centre in Belgium. This centre, however, held separate legal personality. Moreover, no plaintiff was of Belgian nationality or had been residing in Belgium for more than three years since the time of the complaint, even though one of the plaintiffs had held refugee status in Belgium since 2001.[69] As a matter of principle, refugees enjoy the same rights as citizens regarding access to courts. Therefore, the plaintiffs questioned the conformity of the transitional provisions of the law of 5 August 2003 with the Belgian Constitution, insofar as they were silent on the subject of complaints brought by refugees. If that transitional law were to be interpreted as excluding refugees from using the procedure, that would have been, according to the plaintiffs, in complete violation of the Belgian Constitution. The plaintiffs requested the Court of Cassation, which was competent to decide on the motion to dismiss, to refer a preliminary ruling request to the Constitutional Court regarding the constitutionality of the transitional provisions of the 2003 Law. The answer seemed almost indisputable. According to Article 16 of the 1951 United Nations Convention relating to the Status of Refugees,[70] ratified by Belgium, "a refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts […]". In its ruling of 13 April 2005, the Constitutional Court confirmed that and asserted that "*in so far it imposes the dismissal of Belgian jurisdiction, even though one of the plaintiffs was granted a refugee status in Belgium at the time of the initial bringing of the action, Article 29 § 3 (2) of the 5th August 2003 law relating to grave violations of international humanitarian law violates Articles 10, 11 and 191 of the Constitution.*"[71] The Constitutional Court's ruling paved the way for

[69] He has since obtained Belgian citizenship, but this fact did not come into consideration because the transitional provisions assess the status of the plaintiff at the moment when the complaint is brought. (Aurélie Kettels, *L'affaire Total Fina: quand le pragmatisme prend le pas sur la réalité intellectuelle. Observations sous l'arrêt de la Cour d'arbitrage n°104/2006 du 21 juin 2006*, 34 REVUE DE JURISPRUDENCE DE LIEGE, MONS ET BRUXELLES 1503, 1504 n.1 (2006).

[70] United Nations Convention Relating to the Status of Refugees art. 16.2, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150: "A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts (…)".

[71] Cour constitutionnele [Constitutional Court], Apr. 13, 2005, Arrêt [Judgment], n°68, I.a, http://www.arbitrage.be/. It may be noted that the Constitutional Court did not resort to the formulation of a conciliatory interpretation, contrary to other cases. The Court could have indicated, for example, that the provision in question is not contrary to the Constitution when the exception relating to nationals is interpreted in light of the Refugee Convention, as applying equally to refugees. Generally, however, the Court of Cassation does not consider itself bound by interpretations of this kind. *See* Benoît Frydman, *L'autorité des interprétations de la Cour d'arbitrage*, 25 REVUE DE DROIT DE L'U.L.B. 107 (2002).

pursuing a criminal inquiry.[72] The state prosecutor was of the same opinion, declaring that there were no grounds for dismissing the case.[73] In its ruling adopted on June 29, 2005, the Court of Cassation, however, refused to follow the state prosecutor's opinion.[74] The Court of Cassation ordered the dismissal of the case. The Court held that it had no jurisdiction to remedy the unconstitutionality of the 2003 law. According to the Court of Cassation, article 29 § 3 (2) of the Law of 5 August 2003, judged unconstitutional, amounted to a "*rule of material criminal law because its object was especially to prevent, in certain conditions, a situation whereby certain grave violations of humanitarian criminal law case would not be punishable in Belgium*". In this regard, the provision was subject to the rule requiring that offences and punishments shall be strictly defined by law as provided by the European Convention on Human Rights (Article 7.1) and by the International Covenant on Civil and Political Rights (Article 15.1). The strict interpretation of criminal law is supposed to benefit the suspects or accused. It forbids any kind of extensive interpretation of criminal law. The Court of Cassation seemed to consider that any extensive interpretation of the amendment law relating to universal jurisdiction as granting the right to petition to the refugees would hurt that general principle of criminal law and human rights law. In other words, the Court of Cassation acknowledged the Constitutional Court's ruling saying that discriminating between citizens and refugees on that matter is unconstitutional, but refuses however to correct the Parliament's mistakes because any extensive interpretation will be in direct contradiction with the principle of strict interpretation in criminal law. The judicial assimilation of a refugee to a national would have required an interpretation by analogy and an extensive interpretation in violation of the rights of accused persons.

33. The Court of Cassation's ruling dismissed the case and ended, at least for a while, the Belgian investigation. However, the decision to dismiss was not welcomed by civil society. The judgment of the Court of Cassation was greeted with a certain amount of incomprehension, and even unease regarding part of its reasoning.[75] Whatever the legal arguments, which were per se debatable, the Court

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[72] *See* Nabela Benaïssa, *La loi de compétence universelle: commentaire des arrêts rendus les 23 mars et 13 avril 2005 par la Cour d'arbitrage*, 22 JOURNAL DES TRIBUNAUX 391 (2005).

[73] Cour de cassation 2e ch. [Cass.] [Court of Cassation], June 29, 2005, 2 REVUE DE JURISPRUDENCE DE LIÈGE, MONS ET BRUXELLES 59, 60 (2006): "The State Prosecutor considers, following this judgment (of the Court of Arbitration n° 68/2005 of 13 April 2005) that there are no grounds for relinquishing Belgian jurisdiction."

[74] *Id.*: "The Public Prosecutor decides in favor of relinquishment". The commentary to the opinion adds the following elements which suggest an evolution in the Court of Cassation's position, as influenced by Total's advice: "If Advocate General Loop could interpret judgment number 68/2005 as preventing the relinquishment of Belgian jurisdictions regarding the plaintiff with refugee status, this was without relying on the intervention of Maître Kirkpatrick, Total's counsel. Putting forward the theory according to which the dossier revealed a legislative lacuna which only the legislature could correct, he invalidated the assertions of the Advocate General and, at the same time, made the Court of Cassation follow his reasoning." *See* Kettels, *supra* note 67, at 1505.

[75] Jean-Claude Scholsem, *L'affaire 'Total': Lacune ou pas? Observations sous Cass. 29 June 2005*, 2 REVUE DE JURISPRUDENCE DE LIÈGE, MONS ET BRUXELLES 59, 63-65 (2006). In the same sense, see Kettels, *supra* note 67, at 1505. *Contra* John Kirkpatrick and Simone Nudelhole, who clarify the Court's position: John Kirkpatrick & Simone Nudelhole, *Les questions préjudicielles sur les violations du principe constitutionnel d'égalité résultant de lacunes de la loi et les rapports entre la*

of Cassation's ruling resulted in denying access to justice to a refugee and was perceived as a victory for Total. Since the Court of Cassation asserted that it was not up to the judicial branch to correct the unconstitutionality of the law, and that such an amendment required the Parliament's intervention, some members of the Parliament introduced an interpretive bill proposal in order to grant refugees identical procedural rights as nationals under the Universal Jurisdiction Act as amended in 2003.[76] In the meantime, since both the Court of Cassation and the Constitutional Court, seemed to agree that the transitional law was unconstitutional because of its inherent and implicit discrimination of refugees, the refugee plaintiff requested the Constitutional Court to annul the amendment law.[77] The plaintiff's aim was an attempt to bypass the judgment of the Court of Cassation.[78] The Constitutional Court granted the request in its ruling of 21 June 2006.[79] The Court argued that article 16.2 of the United Nations Convention relating to the Status of Refugees, requiring that refugees have the same access to justice as nationals,[80] was directly applicable in Belgian law. According to the Court, this provision requires interpreting the transitional provision in a manner consistent with the Convention. Therefore, the transitional law must be interpreted to grant refugees the right to petition under the universal jurisdiction Act as amended.[81] Total argued, following the Court of Cassation's ruling, that transitional provisions were rules of material criminal law that must be strictly defined by law and that could not be interpreted extensively.[82] The Constitutional Court dismissed that argument. Taking into account, in turn, the Court of Cassation's ruling[83] refusing to fill the lacuna thanks to an interpretation in conformity with Belgium's international obligations, the Constitutional Court granted the request for annulment. However,

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Cour de cassation et la Cour d'arbitrage, *in* LIBER AMICORUM PAUL MARTENS § 15-24 (Georges de Leval et al. eds., 2007).

[76] *See Total et l'honneur de la démocratie*, *supra* note 61. Proposition de loi interprétative de l'article 29, § 3, alinéa 2, de la loi du 5 août 2003 relative aux violations graves du droit international humanitaire [Proposal for the interpretive law of Article 29, §3, alinea 2, of the law of 5 August 2003 relating to serious violations of international humanitarian law], submitted by Lalieux, Van Parys, Viseur, Verhaert, Gerkens and Massin, Document Parlementaire [Parliamentary Document], June 30, 2005, Ch. doc. number 51-1900/001.

[77] Based on Loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage [Special Law of 6 January 1989 on the Court of Arbitration], art. 4 (2), Moniteur belge [Official Gazette of Belgium], Jan. 7, 1989, p. 00315.

[78] Cour constitutionnelle [Constitutional Court], June 21, 2006, Arrêt [Judgment], n° 104/2006, A.3, http://www.arbitrage.be/: "[the claimant] states that only an annulment by the Constitutional Court will suffice to permit him to benefit from a retraction of the judgment of the Court of Cassation of 29th June 2005, by applying Articles 10 and 11 of the special law of 6 January 1989 on the Constitutional Court".

[79] *Id.* at A.3.

[80] *Id.* at B.8.1.

[81] *Id.* at B.9.

[82] *Id.* at B.16. & B.17. *Compare* Cour constitutionnelle [Constitutional Court], Apr. 20, 2005, Arrêt [Judgment], n° 73/2005, http://www.arbitrage.be/ (the *Erdal* case, in which the Court adopted a different position).

[83] *Id.* at B.8.2.

the Constitutional Court didn't simply annul the 2003 amendment but rather did the following: on the one hand, the Court set aside almost all of the transitory regime to avoid the result whereby setting aside the provision at issue would negatively affect the Belgian plaintiffs whose rights the legislature had intended to safeguard;[84] on the other hand, it considered as definitive the decisions to dismiss Belgian jurisdiction when no plaintiff is a refugee.[85] In order to reactivate the procedure, the Court of Cassation's order to dismiss the case needed to be retracted, based on the Constitutional Court's ruling regarding the partial annulment of the 2003 amendment. Because the state counsel's office didn't file a motion for retraction of the Court of Cassation's ruling to dismiss the case, the Minister for Defense, acting as the Minister for Justice,[86] placed an affirmative injunction on the Court of Cassation to rule on the retraction of its own ruling.[87] This was not the first time that the government had resorted to a positive injunction to constrain the Court from acting with regard to the Universal Jurisdiction Act. The Minister for Justice had already used this tactic to request that legal action be taken in cases concerning the Rwandan genocide.[88] If a retraction had been decided at trial, the investigation into Total and its managers could have been resumed. Indeed, by virtue of articles 10 to 14 of the Special Law of 6 January 1989 on the Constitutional Court, final decisions of criminal judicature, can wholly or partially be retracted by the court that has pronounced them, if they are founded on a statute that has subsequently been annulled. Nevertheless, in its ruling of 28 March 2007, the Court of Cassation declared the claim inadmissible, since retraction only aims at "*final decisions on public actions that might be prejudicial to the person against whom these actions are exercised*"[89] which was not the case. The judgment of the Court of Cassation ended the Belgian proceedings against the French transnational corporation. However, the Minister of Defense used his power of positive injunction once more on 26 April 2007,[90] but, on 5 March 2008, the Court of Criminal Appeal dismissed the case on the *res judicata* argument. The plaintiffs filed an appeal against that ruling before the Court of Cassation. The Court of Cassation's ruling, expected in late 2008, should be the final act of those complex

[84] *Id.* at B.13 & B.14.

[85] *Id.* at B.18-20 & dispositif.

[86] The Minister of Justice, Mme. Onkelinx, recused herself; her husband, Marc Uytendaele, was counsel for the Burmese refugee. *See* Isabelle Durant's oral "question" to the Minister of Defense on the "continuation of the trial against TotalFinaElf", Dec. 14, 2006, Belgian Senate, Annales [Annals], n° 3-194, Question n° 3-1328, 11.

[87] The retraction procedure is governed by the Loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage, *supra* note 75, at part II.

[88] *See* Damien Vandermeersch, *La situation belge*, *in* JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX Chapter 3 (Antonio Cassese & Mireille Delmas-Marty eds., 2002).

[89] Cour de cassation [Cass.] [Court of Cassation], March 28, 2007, unpublished, § 12.

[90] The Minister of Defense ordered the Federal Public Prosecutor to take the matter up with the examining magistrate in the case, in order to resume the investigation. *See* the press communication of the Minister of Defense of 26 April 2007.

and inconsistent judicial proceedings. However, the episode may not be over yet if the litigators bring the case before the European Court of Human Rights as they have planned to do.

34. The outcome of the case in Belgium remains uncertain to this day. It is unlikely that it will ever lead to the trial of the petroleum corporation or of its executives. The proceedings reached the highest levels, requiring the intervention of two Supreme Courts and the federal government nevertheless contributed to giving the case a certain amount of renewed publicity, which the French corporation tried desperately to avoid. Although Total was successful in blocking the course of the investigation in Belgium, it was unable to avoid the resulting public scrutiny, and suffered further damage to its corporate image. Some well-informed commentators reported in the press that Total made, like in France, an offer to the plaintiffs to settle the case during the proceedings, but they rejected it, preferring to seek justice for all than compensation for a few.

35. The Belgian episode of the Total case is extremely complex and therefore not easy to grasp even for experienced lawyers. The Courts' rulings did not tackle the factual background of the case, which may have frustrated the victims' quest for justice. Of course, from the victims' perspective, like in France and the US, an investigating judge opened an inquiry and for more than six years the highest courts of Belgium had to deal with some aspects of the case, keeping ajar the door for access to justice. Those victims even requested a Minister to order affirmative injunction, not once, but twice, in favor of their case. Thanks to these initiatives and even though the procedural battles did not enable any discussions on the reality of the abuses and the corporation's liability, some of the victims of the Yadana project could disclose some chapters of their story in the spotlights of the courtroom.

36. The proceedings before Belgian courts did not contribute much to the theory of TNC liability for human rights violations. The whole legal proceedings focused on another issue, namely the constitutionality of the 2003 amendment. It is interesting to compare this point with the French proceedings. In France and Belgium, a direct conflict between international and domestic law was at stake. This conflict radically impeded the legal proceedings and prevented victims' access to justice since forced labor was not criminalized under French criminal law. But in Belgium, the amendment law was unconstitutional and violated international law, as formally confirmed by the Constitutional Court. Faced with the contradiction between domestic and international law, the Court of Cassation preferred to dismiss the case considering that it's not its responsibility to amend the law. More than the other proceedings, the Belgian episode of the *Total* case illustrates an open conflict between powers, a war between courts opposing the Court of Cassation and the Constitutional Court. What may be difficult to understand in the Belgian case is that the Universal Jurisdiction Act is based on the need to punish serious breaches of humanitarian law and egregious crimes such as crimes against humanity. The foundational idea of universal jurisdiction is to offer victims of serious abuses access to justice. From the lawmaker's perspective, such an initiative was a way of bringing domestic law into conformity with international

law.[91] The paradox of the *Total* case is that by excluding refugees, the Universal Jurisdiction Act, which aims to redress serious human rights abuses, constituted *per se* a breach of Belgium's obligation to comply with international human rights law. That breach fully benefited, *in fine*, the alleged human rights abusers, Total and its executive, who successfully avoided any further investigation and prosecution.

Part IV – The lessons

37. Like many other cases, the Total-Unocal case raises the question of the jurisdiction of foreign courts over severe human rights violations committed by or with the complicity of a transnational corporation, on the territory of a weak or authoritarian state. The question is particularly significant today, not only *de lege lata* but also *de lege ferenda,* because foreign courts frequently provide the only effective remedy for victims of such violations. Only when effective remedies are available to victims before an international jurisdiction will the issue be resolved.[92] Currently, however, although present international mechanisms are the only channels of recourse available to many victims, in practice these solutions are only possible in a limited number of cases. For example, no route of international litigation is open to the victims of the Yadana project.

38. The Total-Unocal case also shows that the legal avenues for claiming justice before a foreign court for corporate-related human rights abuses committed abroad may be either civil or criminal, and concretely illustrates the differences and similarities between both types of proceedings. All three litigations are premised on the idea that a foreign court should have jurisdiction over those who abuse international human rights abroad and are able to hold them accountable. For cultural and procedural reasons, human rights litigators chose to translate the criminal prosecutions into civil litigation. However, such civil human rights litigation may be seen as part of American exceptionalism in the field human rights and exact equivalents of the ATS are not found in other legal cultures. In Europe, at least, criminal proceedings are the more natural legal avenue to litigating serious violations prohibited by international law. Under international law, states are obligated to investigate the abuses and enforce criminal sanctions against human rights abusers. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for instance, obliges states party to the treaty to ensure that all acts of torture are offences under their domestic criminal law. The same language is used in other human rights treaties such as the 1990 International

[91] *See* Vandermeersch, *Droit belge*, *in* JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX 89-97 (Antonio Cassese & Mireille Delmas-Marty eds., 2002); Vandermeersch, *supra* note 63, at 39-89; A. Andries, E. David, C. Van Den Wyngaert & J. Verhaegen, *Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire*, 74 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 1114, 1133 (1994).

[92] In particular, we have in mind the individual complaints procedure set out in the First Optional Protocol to the International Covenant on Civil and Political Rights, and the international litigation procedure such as that within the framework of the European Convention or the American Convention of Human Rights.

Convention for the Protection of All Persons from Enforced Disappearance,[93] and both international and regional human rights bodies have affirmed the obligation of states to use criminal avenues against human rights abusers. However, the viability of the translation process and the justification of civil human rights litigation have been clearly demonstrated by scholars. The question addressed in this paper is not whether or not civil litigation conforms to international law, but rather what the best available avenues before foreign courts are for litigating corporate-related human rights abuses committed abroad. In other words, the paper aims to examine what strategies work best within in the current context.

Procedure

39. The Burmese victims who initiated the actions in Europe and in the US did not act without assistance. They received the full legal and financial support of non-governmental organizations, who built the cases and conducted the litigation in the domestic judicial systems in an unexpected and creative way. The Total-Unocal case demonstrates the complexity of such litigation in Europe and in the US. Before they could address the fundamental questions of the case, and more specifically the corporation's liability for human rights abuses, the litigators entered into an elaborate and uncertain procedural battle dealing with the domestic courts' jurisdiction. They were literally challenging the conventional conception of justice concerning the role and the jurisdiction of the courts. Their action aims at achieving political reform addressing corporate-related human rights abuses. In general terms, the American judicial system seems to offer more advantages than the French and Belgian systems to conduct such legal action. The appeal of American courts for cases like *Total-Unocal* is related to the general procedural advantages that the American legal system offers to litigators, as well as the more specific advantages of civil action over the more rigid procedures of criminal action.

40. Private parties initiated all the actions of the Total-Unocal case in both America and Europe.[94] As noted by Vandermeersch, "practice shows that public prosecutors have seldom been the driving force behind prosecutions for crimes against international humanitarian law." Considering the practical legal obstacles involved as well as the burden of such actions in the field of serious human rights or humanitarian abuses, prosecutors "will therefore think twice before launching into such operations."[95] However, although civil petitioners play an important part

[93] International Convention for the Protection of All Persons from Enforced Disappearance art. 4, Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, at 32, U.N. Doc. A/HRC/1/L.10 (June 29, 2006).

[94] *See* Beth Van Schaack, *Justice Without Borders: Universal Civil Jurisdiction*, 99 AM. SOC. INT'L L. PROC. 120 (2005). The author suggests that the multiplication of this type of privately initiated recourse will lead to a form of "plaintiff diplomacy" susceptible to complicating international relations. She notes that the exercise of universal civil jurisdiction considerably reduces, compared to universal criminal jurisdiction, the risk and the nature of friction between states. On the emergence of universal civil justice to fight against violations of human rights, see: Donald F. Donavan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142 (2006).

[95] Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 409 (2005).

in initiating proceedings in the French and Belgian judicial systems, the role of the public prosecutor remains crucial since he or she directs the proceedings once it has been initiated. In the French case, for example, the prosecutor suddenly suggested dismissing the case, while the investigating judge disagreed. The prosecutor can thus be an ally or an opponent in the criminal procedure, and since they are traditionally reluctant to support cases related to humanitarian or human rights abuses, the fact that criminal proceedings depend upon them is by and large an obstacle. On the other hand, the American litigation against Unocal enjoyed the advantage of being exclusively civil. The success of the procedure was therefore in the hands of the private parties and not dependent upon a prosecutor or an investigating judge. American litigators did not need to struggle with reluctant prosecutors and investigating judges throughout the process of inquiries and prosecution, even if they did have to challenge numerous motions to dismiss that were submitted, with some success, by the defendants.

41. When the action was initiated in Belgium and in France, an investigating judge opened a judicial inquiry, supposedly impartial and independent. Such a procedure is at the state's expense and therefore doesn't burden the victims. Of course, criminal law is more stringent in terms of evidentiary requirements than civil procedure. The gathering of evidence for human rights abuses committed in a foreign state where the culture, the language, and the law are completely different is extremely complex. It is expensive and the investigating judge usually lacks the necessary financial resources. In addition, it requires complex international procedures such as the transfer of witnesses to the trial court and the submission of international rogatory letters giving the investigating judge authorization to investigate abroad. In the course of the inquiry, the victims and the plaintiffs do not play any role, they have fewer procedural rights than the defendants (or assisted witnesses), and they do not control the conduct of the investigation. Moreover, the investigation conducted by the investigating judge is confidential and cannot be publicly divulged. In the French and Belgian proceedings, all these elements posed procedural hurdles for the plaintiffs. In the American litigation, the allegations must be of reasonable belief to be admissible in the first stage of the lawsuit. The preliminary inquiry that follows is private. The plaintiffs may benefit from the broad US discovery rules enabling them to prove their case using information obtained from the defendant, and they need only demonstrate that they have enough evidence to potentially convince a jury. In contrast to criminal prosecution, the burden of proof is on the claimants, which most likely requires them to pay the high costs of experts' fees, the expenses of gathering witness statements, as well as the cost of the proceedings and lawyers' fees. This can be an issue especially in cases opposing victims of human rights abuses and transnational corporations, since obviously the means of the former will never match those of the latter. The image of a Burmese villager, now a refugee, challenging one of the world's richest and most powerful transnational corporations seems almost surrealist. However, the resources that non-governmental organizations[96] can gather should not be underestimated, and in American legal culture the best lawyers, law firms, human

[96] *See* for example the important role played by associations such as Earthrights and Sherpa in the *Total-Unocal* case, as well as, in a more general manner, human rights associations and committees of vigilance and action created to protest the political system and human rights violations in Burma.

rights clinics of prestigious law schools, and non-governmental organizations may join forces to combat a Goliath. In the *Unocal* case, the plaintiffs' control over the investigation and the rules of discovery were very much to their advantage. Thanks to their networks and available means, the non-governmental organizations supporting the victims were able to conduct an investigation going beyond a single investigating judge's capacity, without having to respect strict procedural rules (independence, impartiality, international cooperation, and confidentiality).

Law

42. Choosing a forum to sue or prosecute a TNC for corporate-related human rights abuses has consequences for the applicable substantial law. The references to the relevant law in the three litigations show the major differences between the Unocal litigation in the US and the litigations in Europe.

43. The first difference is due to the differences in interpretation in civil versus criminal law. The rights of the defendants or the accused, such as the presumption of innocence, the strict interpretation of criminal law, the non-retroactivity of criminal law, to mention just a few, are seen in these cases as an obstacle to obtain justice in Europe. The defendant may take a more passive stance due to the presumption of innocence. The principle of legality of criminal law, that implies that criminal law should be of strict interpretation, has been the major legal hurdle of the European litigations. In France, the plaintiffs had to build their case on an artificial legal qualification because forced labor was not specifically criminalized in the French criminal code. The legal discussion, if it had gone further, would have probably focused on the legality of criminal law. This is an excellent defense argument and it is indisputable that the defendants as well as the accused should be protected against any broad interpretation of criminal law. However, it's also clear that in the context of a criminal action for corporate-related human rights abuses, the rights of the corporation and its executive may obstruct the human rights, and most specifically the access to justice, of the victims of human rights abuses. The Belgian case confirms this principle since the Court of Cassation categorically refused to extensively amend the criminal law and to correct its unconstitutionality if it would hurt the legality of criminal law. That principle leaves no room for discussion and if invoked, it closes the debate. The US litigation avoids these issues since the proceedings are based on torts. This doesn't mean that the defendants do not have procedural rights in a civil case. However, they have to raise questions and file motions to dismiss that must be fully considered by the judge. The judge may grant their requests or not depending on his own understanding of the case and the arguments of the parties.

44. The second difference relates to the reference to international law. Both the French and Belgian courts seem to be extremely uncomfortable with the international law references. Both proceedings in Europe were fundamentally impeded by domestic laws that directly violated international human rights obligations of those states. In France, as demonstrated in the 2005 case before the European Court of Human Rights, the lacunae of the criminal code regarding forced labor and servitude violated the European Convention of Human Rights, and justified the 2005 condemnation of France. In Belgium, the Constitutional Court declared unconstitutional the transitory law which discriminated between refugees

and Belgian citizens, in full violation of Belgium's international obligations. In both cases, if these two states had respected their obligations under international law at the legislative level, the plaintiffs would probably have won at least one or two more battles. The arguments before the domestic judges in both countries focused on domestic law, and hardly even referred to international law, as if it were taboo. The *Unocal* litigation in the US took a completely different direction. The Court of Appeals referred extensively to *jus gentium* and based part of its reasoning on *jus cogens* to extend the list of the violations of international law that could justify an American courts' jurisdiction under the ATS. The American court went even further by incorporating into its own ruling the decisions of international criminal courts on aiding and abetting. The corporation's liability for human rights abuses was not a simple matter that could be dealt with using the existing criminal law or the international human rights regime. An adequate regime must be found and constructed and judges may play a major role in that construction. In referring to tort law, international law and criminal law, the judge in *Unocal* seems to be willing to break the traditional rigid conception of territorial law and extend the doctrine of global TNC liability for human rights abuses.

Justice

45. In transnational human rights litigation cases, the plaintiffs have to constantly challenge the law and procedures, as shown in the three litigations concerning Total-Unocal. These litigations are highly unusual and the litigators do not necessarily expect to win the case. Their quest for justice[97] is broader and goes far beyond litigating a specific case. Transnational human rights litigation is not about obtaining a favorable judgment, condemnation or financial compensation.[98] It aims at reforming the law and practice, generating political pressure,[99] shaming the defendants, forcing them to justify their actions, preventing future violations, preserving the collective memory, and enforcing the victims' right to the truth. In a nutshell, it's about recognition and memory.[100] The justice sought by the transnational human rights litigators is merely therapeutic.[101] Still, the symbolic significance of a civil lawsuit is not the same as that of a criminal prosecution. However, the question of the translation and the symbolic significance of justice depend on the pragmatic perspective of the actors involved. Justice in transnational human rights litigation may be seen under three complementary lenses: the perspective of the victims; of the litigators; and of the defendants.

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[97] *See* Stathis Banakas, *A Global Concept of Justice - Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World*, 67 LA. L. REV. 1021 (2007).

[98] BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 234 (1996).

[99] Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L L. & TRADE 1, 16 (1994).

[100] *See* Edward A. Amley, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177 (1998).

[101] Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2102 (1998).

46. First, from the perspective of the victims, obtaining justice begins when they can tell their story, preferably before a judge. Justice for the victims is about the facts, the abuses, and the truth. It's not, at first, about revenge or punishment of the abusers. Despite the procedural hurdles, the victims may place great worth on the investigation of the facts and the attention paid to their own public testimonies. The *Unocal* case in the US gave much more consideration to telling the story than did the cases in France and Belgium. The 9th Circuit Court's ruling for instance tells the story of the abuses of the Yadana field and summarizes the background of the case. The factual description is clear and quite long considering that the ruling was purely at the procedural stage. The French and the Belgian proceedings were, despite the confidential inquiry and investigation, very technical and the few judicial rulings told very little of the victims' story. These rulings, especially the Belgian rulings, remained confidential and were inaccessible to lay readers. Most of the European rulings in the *Total-Unocal* cases ignored the facts and the victims and read more like a technical, procedural and political debate between judges using expert language than a ruling for justice readable by all.

47. Second, in most transnational human rights litigations, the goal of the litigators goes far beyond the specific case they are dealing with and rather extends to reforming social policies. In the European and American judicial episodes of the Total-Unocal case, litigators used the judicial forum to condemn a problem and to reform policies. A case like this one contributes to opening the debate in the international community concerning corporate-related human rights abuses. The procedural hurdles and important problems inhibiting access to justice for the victims of human rights abuses committed abroad by Western corporations highlight a shocking situation that is fundamentally ethically wrong. The litigators must reveal these problems in order to achieve social and judicial reforms. In America, filing lawsuits to seek reform is extremely common while in Europe, civil society will usually prefer to pressure officials in forums outside of the courtroom, or compel the government to press criminal charges to sanction wrongdoings. The civil court is seen in America as a democratic tool that may be used by private parties to contribute to reforms in the general interest.

48. Some may object that it is not the role of the courts to create publicity for the parties whose cases they examine, refusing to accept that the legal system be used in this manner. This opinion is however inconsistent with the political philosophy foundations and the history and evolution of our democratic institutions. The court is, along with the parliament, one of the public arenas intended to provide for public discussion on questions of public interest. Legal institutions should be allowed to activate the legal forum by making a complaint or bringing a case, thereby mobilizing public opinion on questions of justice that concern the general interest.

49. Third, from the perspective of the corporations, the publicity of the case seems to be one of the major punishments, at least in the *Unocal* case, that prevents any further operations of the petroleum corporations in Burma and sanctions the abuses. Criminal law seems to be the most adequate legal avenue to sanction at least the corporations' executives. However, it seems that it is the harm to companies' reputations and the bad publicity surrounding court action are the most

effective penalties.[102] They are certainly the most feared: they affect brand image, and can drive down turnover and stock values. These results may even serve as examples, inciting other companies to behave more responsibly, or at least more prudently.[103]

Settlement

50. Finally, the choice for a civil route raises the delicate matter of settlements.[104] These open the door for a negotiated resolution such as the one that was reached in the *Unocal* case (and are agreed in a large majority of cases brought before American federal courts). In France, Total settled with the plaintiffs who then agreed to withdraw their claim, which seems to have had some influence on the case's subsequent dismissal. This settlement, arranged at the initiative of the plaintiffs' lawyer and the association of which he was the founder, aroused great controversy not only in France, but also in Belgium, where, as seen above, it was

[102] For example, the Norwegian government established an Ethical Committee in 2004, responsible for determining whether public investment, in particular in a company, is contrary to the ethical rules to which investment is supposed to conform. The Minister for Finance may decide to exclude a company from public investment funds, comprising of the *Government Pension Fund – Global* (formerly the Petroleum Fund) and the *Government Pension Fund – Norway*. In conformity with ethical rules, companies which produce arms prohibited by humanitarian law are in principle excluded by means of a first negative screening. Moreover, the Minister must exclude companies if it is demonstrated that there is an "unacceptable" risk that the investment will, by its nature, contribute to systematic and grave violations of human rights (murder, torture, arbitrary deprivation of freedom, forced labor, exploitation of children), to grave violations of individual rights in conflict situations, to severe environmental damage, to corruption, or to all other grave violations of fundamental ethical norms. As one example, on 5 January 2006, the Norwegian Minister for Finance published a press release indicating that he had decided to exclude seven companies from the Fund because of their involvement in the production of nuclear arms, corresponding to 3.3 billion Norwegian crowns. However, the Ethical Committee is of the opinion that Total's activities in Burma were not of such a nature as to exclude the company from the Fund. The enquiry of the Committee focused on the alleged complicity of Total in violations linked to the construction of infrastructure for the Yadana project between 1995 and 1998, but also on the allegation of complicity in the present violations of human rights committed by the Burmese army which was benefiting from revenue from Total's economic operations. The Committee began by noting that it believed that Burma is governed by a military regime responsible for grave and systematic human rights violations. The Committee underlined that it was not within its mandate to determine whether exclusion from the Fund would improve the political situation of a state. If the Committee believes that it is clear that Total was aware of the human rights violations committed in relation to the Yadana project between 1995 et 1998 and that it did not seriously try to prevent them, this assessment would not justify excluding Total from the Fund, given that it would require a retroactive application of the ethical rules of the management of the fund. To exclude a company from the Fund, it is necessary to show a direct link between the activities of the company and the human rights violations. The information relating to this initiative and the details of the Ethical Committee's recommendations and the decisions of exclusion are available on the Committee's website: http://odin.dep.no/fin/english/bn.html.

[103] This was the intention of the legal team defending the victims in the American procedure against Unocal, who asserted that: "This case will reverberate in corporate boardrooms around the world and will have a deterrent effect on the worst forms of corporate behaviour".

[104] *See* Benjamin C. Fishman, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433 (2006). ("This note argues (…) that the Unocal and Total settlements inadequately reflect the public importance of the cases, which sought to force Unocal and Total to answer for their complicity in human rights abuses committed in Burma, and also represented a growing movement to legally bind corporations to human rights norms").

interpreted as a sort of betrayal. In the United States, the Earthrights association and all of the claimants' advisors prided themselves on having achieved an amicable settlement, which they saw as a great victory.[105] These different perceptions may be explained at least in part by the different legal cultures of civil and common law.[106] One can clearly see that the two settlements, the terms of which remain confidential, allowed Total and Unocal to buy themselves a certain peace of mind by ending the embarrassing proceedings and limiting the subsequent publicity. As well as interrupting the judicial process, the settlement prevented the development of new jurisprudence. On the other hand, the proponents of these settlements point out that they obtained reparations not only for the claimants, but also for other victims of these abuses by means of a special fund set up in both cases. Certainly, the settlement and the reparations paid did not imply that Total, Unocal or their managers accepted or recognized any legal, or even moral, responsibility. Undoubtedly, it is the lack of recognition of the facts and of moral responsibility which raises the most fundamental opposition to this type of recourse: it considerably reduces the possibility for the victim to quench his thirst for justice. Taking into account the present state of the law, however, and especially the rules related to competence which leave the victims without recourse, one can understand that some will prefer to pursue this victory rather than run the risk of long-term legal proceedings with an unpredictable outcome.

Part V – Conclusion

51. The proceedings brought against Total and Unocal relating to human rights abuses committed in Burma have yet to produce a definitive legal decision and the situation may remain unchanged lest it be taken up again in Belgium or brought before the European Court in Strasbourg. Certain observations may be made in comparing the cases against the two corporations in the United States, France and Belgium; one may also draw some lessons for the future.

52. These cases represent one of the countless examples that demonstrate the urgent need for access to justice in cases of grave human rights violations. The victims of such abuses are often deprived of recourse. They can expect nothing from local jurisdictions, especially in weak or authoritarian states, a fortiori when the facts implicate public actors, either directly or indirectly. Neither do they have access to effective international recourse. Victims and the civil society associations which support and represent them are increasingly turning to certain national jurisdictions around the world in an attempt to obtain justice. Plaintiffs and civil society must be determined, resourceful, and even creative, if they are to discover through the jurisprudence of certain states the legal means to have their cause heard and to demand justice in a court worthy of that title. The large number of

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[105] "This is a historic victory for human rights and for the corporate accountability movement. Corporations can no longer fool themselves into thinking they can get away with human rights violations" (extract from joint declaration of counsel to the Burmese victims, http://ccrjustice.org/newsroom/press-releases/historic-advance-universal-human-rights:-unocal-compensate-burmese-villagers (last visited Dec. 25, 2008)).

[106] ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUGER EN AMERIQUE ET EN FRANCE 67 *et seq.* (2003) (which is limited to plea bargaining).

complaints lodged under the Belgian Universal Jurisdiction Act, which was in a sense a victim of its own success, were a symptom rather than the cause. The phenomenon it represented quickly passed beyond Belgian borders while the unexpected reawakening of the Aliens Tort Claims Act in the United States after two centuries of lethargy is a confirmation of this trend.

53. Plaintiffs' determination and ingenuity have meant that whether in Brussels, Paris, or California, a judge may be presented with facts from the other end of the world and thus his or her court is suddenly promoted to the highest levels of "glocal" justice.[107] Although local in its institutional basis, every such case is global through the expectations it raises. To us, the attempt to stigmatize such claims as an excess of "judicial activism" is unjustified.[108] It is well known that judges do not bring cases themselves; they are at the disposal of those who present legal actions. It seems that given the under-institutionalized and especially the under-judicialized state of international structures,[109] plaintiffs are choosing, more and more frequently, to turn in desperation to one or more national judges, clearly favoring those likely to be the most receptive. National legal systems, especially those of democratic countries which are established to assure justice for the public, are now regularly mobilized by plaintiffs who come to bring before them calls for justice which have been refused elsewhere because their access is largely open. They find themselves, to a certain extent, in a permanent state of providing justice. The judge finds him or herself assigned, sometimes without warning, to a case which does not come from his or her usual jurisdiction. Presented with a case he or she has neither requested nor chosen, the judge is forced to accept responsibility and it is up to him or her to decide, according to the law, whether he or she can hear the request of a person who often sees the judiciary as a last resort.

54. Understandably, when confronted with a case involving moral conscience, judges hesitate and respond differently to these requests, depending on the state of national law, but also depending on their temperament, beliefs or jurisdiction.[110] Prudence is often the general rule in these cases, as Damien Vandermeersch has shown, and this causes particular difficulties. These cases require legal, material, financial and human means, without which they cannot be examined or judged in a

[107] The neologism "glocalization" was coined to refer to the intertwining global and local dimensions which characterize globalization in its different aspects. The judiciary does not seem to have to make an exception to this point of view.

[108] With regard to the Unocal judgment, see: Tawny A. Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: the Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009 (2003).

[109] In the same sense, Habermas argues that the fight for human rights is carried out in the context of the "under-institutionalisation of cosmopolitan law". *See* JÜRGEN HABERMAS, APRES L'ETAT NATION, UNE NOUVELLE CONSTELLATION POLITIQUE (2000).

[110] One may note that Judge Lew, who succeeded Judge Paez in the Unocal case before the Californian District Court, did not have the same appreciation of the case as his predecessor, who had in the meantime been promoted to the Ninth Circuit Court of Appeal. In the Belgian case, it may also be seen quite clearly that the Constitutional Court and the Court of Cassation did not approach the question from the same angle.

credible manner.[111] They are susceptible to posing problems, notably at the diplomatic level, unfamiliar to judges, and to interfering with the exercise of other powers, in particular that of the executive.[112] It is necessary to note that states and their governments do not generally show huge enthusiasm for the intervention of national jurisdictions in cases of human rights violations committed abroad, which risks embarrassing them or hampering their policies and foreign relations. This was seen in Belgium with the repeal of the Universal Jurisdiction Act, and also in the United States with the position taken by the federal administration. This was followed by other governments of democratic states, which openly declared themselves hostile to the use of the ATCA in cases involving violations of international human rights law and thus intervened to request the Supreme Court of the United States that it declare itself incompetent.[113]

55. The issue of the *Total-Unocal* case is nevertheless fundamental and poses the question of effective universal legal recourse for victims in a civil sense. When these violations are committed on the territory of weak or authoritarian states, victims often find themselves deprived of effective recourse before local or international jurisdictions; as a result, the perpetrators go unpunished. Exiled or living abroad as refugees, these victims do not have any other recourse than to try to bring their case before national jurisdictions, which sometimes welcome them. A study of the proceedings against Total and Unocal in the United States, France and Belgium shows how difficult it is for victims to make themselves heard and to obtain justice, despite the tenacity and the ingenuity of their supporters. Under these conditions, national jurisdictions should be authorized to hear their complaints. This must certainly be the case when recourse is directed against private persons – notably when it is against companies registered in a state where they carry out business and they are accused of being a co-perpetrator or accomplice in a grave violation of human rights or humanitarian law. The current situation, which often amounts in practice to giving companies *de facto* immunity for their offshore activities, is not acceptable in light of the relevant legal requirements.

56. Taking account of the considerable obstacles to successful criminal action against those responsible for or accessories to such violations, and following the repeal of the Universal Jurisdiction Act in Belgium, one may also wonder if it would be advisable to widen access to civil actions brought by victims or the associations which support them. The example of the ATCA, reawakened in the United States by resourceful plaintiffs and judicial decisions and its role in the *Unocal* case, has shed important new light on the matter. The recourse does not

[111] Vandermeersch, *supra* note 86, at 119: "*For reasons of geographic distance, elements of extraterritoriality and competence of the court, the administration of the evidence for crimes of international law is particularly fraught and the enquiry on such facts requires extensive resources. In the same sense, the lack of means or information from the victims, the disinterest or absence of criminal policy in the courts or even the lack of political will to give necessary means for justice, are equally natural elements to slow down the deployment of universal jurisdiction*".

[112] These factors have been explicitly taken into account by the American judge, as demonstrated by the inclusion of the act of state doctrine and the request for a Department of State opinion.

[113] In the case Sosa v. Machain, *supra* note 26.

constitute a panacea or an end in itself. From a pragmatic point of view it perhaps represents, especially when conditions are so unfavorable to victims, a realistic prospect for one day obtaining a legal decision which condemns the guilty and orders reparation.