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## Codes, Lawsuits Or International Law: How Should The Multinational Corporation Be Regulated With Respect To Human Rights?

Nancy L. Mensch

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**Codes, Lawsuits or International Law: How Should the  
Multinational Corporation Be Regulated with Respect to Human  
Rights?**

*Nancy L. Mensch\**

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**INTRODUCTION**

**Bhopal, India - December 3, 1984**

Roughly forty metric tons of methyl isocyanate (“MIC”), an irrespirable gas used to create pesticides, leaked out of its holding tank at the Union Carbide plant.<sup>1</sup> As a result of the accident, thousands died within days, and thousands more suffered long term health effects. Union Carbide claimed that a disgruntled worker sabotaged the MIC tanks by filling them with water, which caused the chemical to turn into a deadly gas and escape.<sup>2</sup> However, Indian courts believed otherwise and issued criminal arrest warrants after finding that Union Carbide’s

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<sup>1</sup> D.R. Varma, *The Bhopal Accident and Methyl Isocyanate Toxicity*, 40 J. TOXICOL. ENVIRON. HEALTH 513, 513 (Dec. 1993).

<sup>2</sup> Jackson B. Browning, *Union Carbide: Disaster at Bhopal* in CRISIS RESPONSE: INSIDE STORIES ON MANAGING UNDER SEIGE 1 (Jack Gottschalk ed., 1993), available at <http://bhopal.com/pdfs/browning.pdf> (last visited February 27, 2006).

management encouraged too many shortcuts on safety with the intent to reduce costs.<sup>3</sup>

### **Tenasserim Region, Myanmar - early 1990's**

During construction of the Yadana gas pipeline, Burmese villagers accused American oil giant Unocal of aiding and abetting human rights violations carried out by Myanmar's military government for Unocal's benefit.<sup>4</sup> Allegations included the use of violence and intimidation, destruction or relocation of villages, mass rape, murder, and slave labor.<sup>5</sup> Unocal denied the allegations, but argued that even if the oil giant knew of the human rights abuses, it could not be held liable in United States courts under the Alien Tort Claims Act.<sup>6</sup>

### **United States - 1996**

Kathy Lee Gifford, a popular daytime talk-show host and advocate of children's rights, found herself embroiled in a sweatshop scandal when Charles Kernaghan of the National Labor Committee Education Fund in Support of Worker and Human Rights in Central America told the United States by way of Congress that Ms. Gifford's clothing line, made for and controlled by Wal-Mart, was manufactured by girls barely in their teens in a Honduras sweatshop.<sup>7</sup> This served as a lesson for celebrities with clothing lines that they had to monitor the manufacture of their products or face the court of public opinion.<sup>8</sup>

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<sup>3</sup> Chemical Industry Archives on the Bhopal disaster, <http://www.chemicalindustryarchives.org/dirtysecrets/bhopal/index.asp> (last visited February 27, 2006).

<sup>4</sup> Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

<sup>5</sup> For an overview of the allegations, court proceedings and outcome, see EarthRights International, *Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers* (April 2, 2005), at <http://www.earthrights.org/content/view/189/56/> (last visited February 27, 2006).

<sup>6</sup> Doe, 963 F. Supp. at 889-90.

<sup>7</sup> Stephanie Strom, *A Sweetheart Becomes Suspect; Looking Behind Those Kathie Lee Labels*, N.Y. TIMES, June 27, 1996, at D1.

<sup>8</sup> The Olsen twins nearly became the next Kathie Lee-Gifford in their own clothing line deal with Wal-Mart. See *Taking a Stand Against Sweatshops; On the Line; Brief Article*, THE PROGRESSIVE, Feb. 1, 2005, at 18 (reporting that after a protest organized by the National Labor Committee, the Olsen twins

Despite universal condemnation of human rights<sup>9</sup> abuses by the civilized nations of the world, nearly sixty years of work by the United Nations to end such behavior, and the work of literally hundreds of watchdog groups, the three above examples evidence that human rights violations still occur. However, state actors did not perpetuate the Union Carbide, Unocal, and Gifford abuses; rather, multinational corporations generated these abuses (“MNCs”<sup>10</sup>). Large, wealthy and powerful, these world-wide corporations have become the new poster-children of international human rights violations. In response to the abuses committed by MNCs, the federal court system in the United States, the United Nations, and even MNCs themselves have begun to craft solutions.

Yet policing MNCs is not simply a matter of disciplining corporations because they often cannot act alone. Since MNCs require the acquiescence of the state in order to operate, a state that does not demand that an MNC obey labor or environmental laws may be in breach of its traditional duty to uphold the law and protect its citizens. This can occur in countries that lack the legal infrastructure necessary to monitor the corporations.<sup>11</sup> A major factor of this inability is the fact that many MNCs have revenues far greater than the countries in which they operate.<sup>12</sup> MNCs desire the cheap labor that a developing nation offers,<sup>13</sup>

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signed a pledge to grant maternity leave to women working in sweatshops producing the Olsens’ clothing line).

<sup>9</sup> There are various violations of international law. The author will use the phrase “human rights” to denote many kinds of rights, such as cultural rights, economic rights, labor rights, etc. Violation of all such rights by MNCs may amount to violations of international law.

<sup>10</sup> Although the terms themselves vary, there are different names for a multinational corporation with identical meanings: Transnational Corporation (TNC), Transnational Enterprise (TNE), and Multinational Enterprise (MNE). The use of Multinational Corporation (MNC) is simply the author’s preference.

<sup>11</sup> Sukanya Pillay, *And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections*, 81 U. DET. MERCY L. REV. 489, 501 (2004).

<sup>12</sup> ROBERT F. GORMAN, GREAT DEBATES AT THE UNITED NATIONS: AN ENCYCLOPEDIA OF FIFTY KEY ISSUES 242 (2001). In 2001, for example, of the 100 top economies in the world, 51 were not nation-states, but corporations. Global Issues - Rise of the Corporation,

and the developing nation needs the capital that MNCs bring to the country, which allows it to grow and diversify its economy.<sup>14</sup> This financial gap often acts as a “trumping leverage” in their relationship,<sup>15</sup> resulting in the lack of oversight.

MNCs often act as accomplices of the state, or even the lone instigators, in acts resulting in human rights abuses. For example, MNCs in the extraction (mining) industry are “particularly prone to associate with egregious [government] violators of human rights,” because, as Saman Zia-Zafiri explains, “[MNCs] have to dig for resources where they find them, typically in the developing world, where the resource is one of the main sources of income for the government.”<sup>16</sup> As a result of both the MNC and the government looking for profit, local populations often suffer dislocation, destruction of their environment and property, death, mutilation, rape or other human rights abuses.<sup>17</sup>

The scope of this paper consists of industry, national (U.S.), and international methods of regulating or enforcing the conduct of private multinational corporations abroad. Part I defines a MNC and then

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<http://www.globalissues.org/TradeRelated/Corporations/Rise.asp> (last visited February 27, 2006).

<sup>13</sup> Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Give Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 745-746 (2004).

<sup>14</sup> GORMAN, *supra* note 12, at 242-43.

<sup>15</sup> Pillay, *supra* note 11, at 500.

<sup>16</sup> Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81-83 (1999).

<sup>17</sup> Such a situation occurred in Nigeria, a country rich with oil, but with a depraved military government. During the early 1990's, when the military government controlled the country, it granted the Royal Dutch Petroleum Co. (operating in conjunction with Shell Transport) extraction rights to remove Nigeria's oil. When members of the local Ogoni tribe organized to protest Shell's theft and destruction of their land, the Nigerian government, allegedly at the behest of Shell, arrested, tortured, and executed members of the Ogoni resistance, including its leader, Ken Saro-Wiwa. *See* *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (The subject matter of this case lies in a forum non conveniens action; however, the court delves into the background and discusses the allegations against Shell towards the Ogoni resistance).

tackles the question of whether or not MNCs should be held accountable for human rights violations. Part II deals with the voluntary codes of conduct promulgated either by the MNC itself, its industry, or by a non-government organization (“NGO”). Part III looks specifically at the Alien Tort Claims Act (“the Act”), a now frequently used tool to hold MNCs accountable for their actions. The discussion covers how the Act came to be used against MNCs, whether it is an effective tool for that purpose, and the future of litigation under the Act. Part IV examines the efforts of the United Nations to try to regulate the conduct of MNCs with a binding code of conduct. At the end, in Part V, I hope to paint a picture of the effectiveness of these three methods and offer suggestions on how to make them each more effective, both alone and in conjunction with each other.

#### **I. WHAT ARE MULTINATIONAL CORPORATIONS AND SHOULD THEY BE HELD ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS?**

Multinational corporations are entities “that do business in several countries through branches and subsidiaries located in countries” throughout the world (often in developing states) with their headquarters based in highly industrialized states.<sup>18</sup> The concept of a MNC is not new as its origin lies in the long period of colonization of the New World, Africa, the Near East, and the Far East by Western nations. The British East India Company, the Dutch East India Company, and Hudson’s Bay Company are prime examples of early MNCs controlled by the colonizing state.<sup>19</sup> The modern MNC emerged after World War II, when the goal of rebuilding a world torn asunder by war offered private business firms unparalleled opportunities to expand their operations abroad.<sup>20</sup> Developing countries also encouraged MNCs to invest in order to bring in a capital flow of money, to cultivate resources for development, and to diversify their economies.<sup>21</sup> MNCs

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<sup>18</sup> EDMUND JAN OSMANCZYK, 2 ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS, 1495 (Anthony Mango ed., 3d ed. 2003).

<sup>19</sup> Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 453 (2001).

<sup>20</sup> GORMAN, *supra* note 12, at 242.

<sup>21</sup> *Id.* at 242-43.

characteristically have large amounts of physical and monetary resources and an ability to move funds from one currency to another as they please.<sup>22</sup> They may even be much wealthier than the nation in which they operate, often a concern of not only that nation, but of the UN and other world trade bodies as well.<sup>23</sup>

As a corporation, an MNC is neither a state nor an individual. Since traditionally only states and state actors are held liable for human rights abuses, the debate about MNC violations of human rights must begin with whether or not they should have responsibilities under international law. There exist several arguments for not extending responsibility for human rights to MNCs:

- They are businesses. As such their only real social responsibility is to benefit their shareholders, not to be moral arbiters on human rights issues;
- As non-state actors, they have no obligation to observe human rights, but only to obey the law of the country in which they operate;
- Question of which human rights corporations should observe. Corporations as they operate can ensure that they do not infringe on their employees' economic and cultural rights, but they can do nothing to protect their civil or political rights since that is the government's job; and
- The "free-rider" problem: Morally conscious companies disadvantage themselves competitively by spending the time and effort it takes to observe human rights, while their less scrupulous counterparts do not even bother. Also, these scrupulous companies may either be unable or unwilling to work in countries with questionable human rights records.<sup>24</sup>

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<sup>22</sup> S. Prakash Sethi, *Corporate Codes of Conduct and the Success of Globalization, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS?* 205, 207 (Andrew Kuper, ed., 2005).

<sup>23</sup> GORMAN, *supra* note 12, at 242.

<sup>24</sup> Peter T. Muchlinski, *Human Rights and Multinationals: Is There a Problem?*, 77 INT'L AFF. 31, at 35-36 (2001).

Many states have also been reluctant to hold MNCs liable for abuses committed abroad because to do so would require them to “recognize the full international legal personality of corporations” and thus put the corporations “on equal terms with states and [allows them to] claim rights under international law.”<sup>25</sup>

Yet the MNC has responsibilities in the area of human rights for several compelling reasons. First, MNCs play an increasingly greater role in the economies of developing countries, which sometimes creates monopoly-like power that they use to control local manufacturers and the working conditions of their employees.<sup>26</sup> Also, many developing countries willingly “allow MNCs to own or manage projects in key public sectors, such as energy, telecommunications, transport, water, and sanitation,”<sup>27</sup> in essence giving them some of the power of a state. Moreover, many corporations agree that they have human rights responsibilities. Unocal (discussed in more detail later in this paper) professes it “believes that we have a responsibility to society, especially in relation to the impact of our operations. All employees must respect the human rights and dignity of others.”<sup>28</sup> Even Enron, before its demise, publicly stated, “[w]e do not and will not tolerate mistreatment or human rights abuses of any kind by our employees or contractors.”<sup>29</sup> The commonplace thinking today appears to be that MNCs do have human rights responsibilities, and this paper treats them as if they do.

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<sup>25</sup> Alex Wawryk, *Regulating Transnational Corporations Through Corporate Codes of Conduct*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 55 (Jedrej George Frynas and Scott Pegg, eds., 2003).

<sup>26</sup> Sethi, *supra* note 22, at 207.

<sup>27</sup> Sean D. Murphy, *Taking Multinational Corporate Codes to the Next Level*, 43 *COLUM. J. TRANSNAT'L L.* 389, 398 (2005).

<sup>28</sup> Unocal Code of Conduct, [http://www.unocal.com/ucl\\_code\\_of\\_conduct/ethics/labor.htm](http://www.unocal.com/ucl_code_of_conduct/ethics/labor.htm) (last visited February 27, 2006).

<sup>29</sup> Enron Press Room, [http://www.enron.com/corp/pressroom/responsibility/human\\_rights\\_statement.html](http://www.enron.com/corp/pressroom/responsibility/human_rights_statement.html) (last visited February 27, 2006).



## II. CORPORATE CODES OF CONDUCT FOR MULTINATIONAL CORPORATIONS

What is a corporate code of conduct? In general terms, codes are “policy statements that outline the ethical standards of conduct to which a corporation adheres.”<sup>30</sup> They can be thought of as “public welfare” codes, implemented not to facilitate private business transactions or to maximize profits, but rather, at least in the MNC context, to “promote socially responsible . . . conduct, largely in the developing world, so as to prevent harm or mistreatments of persons by MNC operations.”<sup>31</sup> Practically all MNCs in business today have adopted a code of conduct,<sup>32</sup> as the 1990’s saw a “cascade” of company codes come into place, prompted mostly by revelations of MNC misconduct in developing areas like Burma, Nigeria and parts of Asia.<sup>33</sup> Codes of conduct are not really “soft law” but voluntary behavioral guidelines that MNCs pledge themselves to abide by because they see it in their interests to do so (in terms of business strategy<sup>34</sup> and keeping away bad publicity<sup>35</sup>) and are the preferable alternative to legislatures forcing a code upon them.

MNC codes of conduct come in roughly four varieties:<sup>36</sup> public international codes of conduct (discussed in Part IV); private company

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<sup>30</sup> Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT’L. L.J. 309, 322 (2004).

<sup>31</sup> Murphy, *supra* note 27, at 393-94.

<sup>32</sup> Tara J. Radin, *The Effectiveness of Global Codes of Conduct: Role Models That Make Sense*, 109 (4) BUS. & SOCIETY R. 415, 420-21 (2004).

<sup>33</sup> Rob van Tulder & Ans Kolk, *Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry*, 32 J. Int’l Bus. Studies 267, 268 (2001).

<sup>34</sup> See e.g., Chiquita, Corporate Responsibility, <http://www.chiquita.com/chiquita/nitro.asp?category=corpres&file=corpresmen u.asp> (last visited February 27, 2006) (stating “Corporate Responsibility at Chiquita is an integral part of our global business strategy. It commits us to operate in a socially responsible way everywhere we do business . . . [and to build] a stronger and more financially successful Company.”).

<sup>35</sup> See e.g., Ethan B. Kapstein, *The Corporate Ethics Crusade*, 80 Foreign Aff. 105 (2001) (stating that NGOs and the media exert enormous pressure using bad publicity to get MNCs to change – and it works, although Kapstein is not sure such a strategy actually helps those abused by MNCs.).

<sup>36</sup> Wawryk, *supra* note 25, at 53, 59, 64, 69.

codes of conduct; industry association codes of conduct; and non-government organization (NGO) codes of conduct. Many scholars see these codes as an effective, even successful way to control MNC behavior,<sup>37</sup> while others see them as mere diversions, media ploys with no substance behind them or teeth to ensure compliance.<sup>38</sup> We shall examine each in turn.

Private company codes of conduct are the most common kind of code, since they are created by the MNCs themselves. Implementing an individual MNC code has considerable advantages for the organization. First, the MNC can personalize its own code, taking into account the needs of its employees, its business and its industry. Second, the costs of creation and implementation are lower than the costs of drafting an instrument of international or national law.<sup>39</sup> Third, well-drafted corporate codes that are consistent with international law have a certain moral persuasion,<sup>40</sup> which will influence other MNCs to follow their example.<sup>41</sup> Finally, a voluntarily adopted code may indicate that the MNC has recognized that its long-term viability is linked to its social responsibilities, which will make successful adherence to the code much more likely.<sup>42</sup>

An effective code should contain certain features including continuing training and awareness procedures for all members of the company about code implementation; an internal monitoring procedure that requires management to report their findings and make surprise visits to work sites; independent third-party monitoring that includes monitoring any sub-contractors; an anonymous "hotline" that employees and locals can use to report code violations; sanctions for not following the code; and arrangements to change/modify the code when necessary.<sup>43</sup> Despite the necessity of these features, most MNC codes have no such provisions, instead they outline general principles rather than concrete methods to ensure compliance with international law. Nike's code of

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<sup>37</sup> See, e.g., Radin, *supra* note 32.

<sup>38</sup> See Sethi, *supra* note 22, at 212-13.

<sup>39</sup> Wawryk, *supra* note 25, at 61.

<sup>40</sup> *Id.* at 62.

<sup>41</sup> See Radin, *supra* note 32, at 421.

<sup>42</sup> Wawryk, *supra* note 25, at 61.

<sup>43</sup> *Id.* at 60-61.

conduct is an excellent example.<sup>44</sup> Nike promises that it will not allow its overseas contractors to use forced labor or child labor, will make sure its contractors pay all their employees at least the minimum wage (for that country), and will ensure that its contractors have environmental policies and standards in place.<sup>45</sup> All excellent goals, but nowhere does the code describe any kind of monitoring system to effectuate them. Neither does the code mention possible sanctions for violations, nor does it list any methods for reporting violations. Nike's code, full of wonderful aspirations, falls short on the particulars that would ensure compliance.

The Levi Strauss and Co. code, however, offers a good example of an effective code consisting of a set of specific principles with some teeth to back them up.<sup>46</sup> It has essentially the same goals as Nike's, but the Levi code provides for sanctions if one of Levi's overseas contractors fails to comply with its provisions. For example, when Levi discovers a violation, it asks the contractor "to implement a corrective action plan within a specified time period," and if the contractor does not comply, then "Levi Strauss & Co. will terminate the business relationship."<sup>47</sup> Practically all MNCs, however, do not reveal whom they use as their overseas suppliers.<sup>48</sup> Levi, however, has published a list of all their suppliers so others can verify that the company is following its code.<sup>49</sup> Without such a list, a sanction like Levi's cannot be effective since no one could verify that the MNC has lived up to its obligations. As Levi Strauss & Co. shows, if an MNC gives teeth to its code and makes verification of its enforcement possible, then the code can be effective.

Industry association codes of conduct are much like their private company counterparts, except they belong to an entire industry or group of companies within the same industry. Such codes are typically

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<sup>44</sup> <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code> (last visited February 27, 2006).

<sup>45</sup> *Id.*

<sup>46</sup> [http://www.levistrauss.com/responsibility/toe/ourAppr\\_guidelines.htm](http://www.levistrauss.com/responsibility/toe/ourAppr_guidelines.htm) (last visited February 27, 2006).

<sup>47</sup> *Id.*

<sup>48</sup> Sethi, *supra* note 22, at 213.

<sup>49</sup> Levi Strauss & Co. Supplier's List, [http://www.levistrauss.com/responsibility/toe/supplier\\_list.pdf](http://www.levistrauss.com/responsibility/toe/supplier_list.pdf) (last visited February 27, 2006).

voluntary, as the MNC does not need to adopt them; however, some industry associations condition membership on adoption of, and compliance with, their respective codes.<sup>50</sup> An example of such a code requiring adoption is “Responsible Care” which regulates health, safety and environmental issues for the chemical industry.<sup>51</sup> Other industry codes, however, do not require adoption to join. These codes have provisions particular to the industry that a company can adopt as its own. One example is the Electronic Industry Code of Conduct (EICC).<sup>52</sup> EICC ‘participants’ do not need to verify that the MNC has complied with the code.

An offshoot of these industry codes are Rugmark<sup>53</sup> and “dolphin-safe tuna.”<sup>54</sup> These are not codes per se, but rather seals of approval. For Rugmark, a rug sold with the Rugmark symbol certifies that the rug was not made with child labor. For “dolphin-safe tuna,” the mark certifies that fishing techniques used did not allow dolphins to be caught in the tuna nets.

NGO codes are those created by organizations with interests in labor, environmental, religious and human rights, usually in response to a significant incident of MNC misconduct. For example, the Coalition for Environmentally Responsible Economics created the CERES Principles in response to the Exxon-Valdes oil spill of 1989.<sup>55</sup> These codes are non-specific, as they do not detail what an MNC can and cannot do in

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<sup>50</sup> Wawryk, *supra* note 25, at 64.

<sup>51</sup> Responsible Care homepage: <http://www.responsiblecare-us.com/> (last visited February 27, 2006).

<sup>52</sup> EICC, version 2.0 October 2005, <http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supcode.pdf> (last visited February 27, 2006). EICC code ‘participants’ include Hewlett-Packard, IBM, Dell, Microsoft and Intel.

<sup>53</sup> <http://www.rugmark.org/about/cert.htm> (last visited February 27, 2006).

<sup>54</sup> <http://www.earthtrust.org/fsa.html> (last visited February 27, 2006).

<sup>55</sup> Ceres Principles, <http://www.ceres.org/ceres/> (last visited February 27, 2006).

Other NGO codes include the Clean Clothes Campaign for the apparel industry, <http://www.cleanclothes.org/codes/ccccode.htm#ii> (last visited February 27, 2006); the Sunshine Standards promulgated by the Stakeholders Alliance, <http://www.stakeholderalliance.org/sunstds.html> (last visited February 27, 2006); and the Forest Stewardship Council for the lumber industry, [http://www.fscus.org/standards\\_criteria/](http://www.fscus.org/standards_criteria/) (last visited February 27, 2006).

their daily operations, but rather, they set out series of principles or goals around which the MNC is supposed to craft its own code. For example, CERES principle number five deals with risk reduction, stating merely: "We [insert MNC] will strive to minimize the environmental, health and safety risks to our employees and the communities in which we operate through safe technologies, facilities and operating procedures, and by being prepared for emergencies."<sup>56</sup>

The most famous of the NGO codes is the Global Sullivan Principles, crafted in 1977 by Rev. Leon H. Sullivan, who accepted a position on the GM board of directors to continue the fight for civil rights in the U.S. in the corporate setting.<sup>57</sup> However, South Africa turned out to be his focus of his work due to the increased public criticism of MNCs, including GM, and the companies' apparent compliance with the official policy of apartheid.<sup>58</sup> Sullivan created a set of principles that grew into an international standard of conduct for companies of all stripes, and since then more than a dozen MNCs announced their commitment in following the Global Sullivan Principles, including Chevron, GM and Proctor and Gamble.<sup>59</sup> Unocal professes to follow Rev. Sullivan's principles and states that its own code of conduct "aligns well" with them.<sup>60</sup>

Like the codes discussed above, NGO codes are voluntary, but once an MNC adopts an NGO code the company must agree to compliance monitoring by the NGO.<sup>61</sup> Despite the mantle of respectability that comes with NGO codes, most of them do not attract MNC support.<sup>62</sup> It is cheaper for MNCs to create their own codes and to

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<sup>56</sup> Ceres Principles, <http://www.ceres.org/coalitionandcompanies/principles.php> (last visited February 27, 2006).

<sup>57</sup> Global Sullivan Principles, <http://www.thesullivanfoundation.org/gsp/endorsement/history/default.asp> (last visited February 27, 2006).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Unocal Code of Conduct – Guiding Principles, [http://www.unocal.com/ucl\\_code\\_of\\_conduct/guiding\\_principles.htm](http://www.unocal.com/ucl_code_of_conduct/guiding_principles.htm) (last visited February 27, 2006).

<sup>61</sup> *See* Wawryk, *supra* note 25, at 69. The Global Sullivan Principles, however, contain no such provision.

<sup>62</sup> *Id.* at 71.

conduct their own monitoring, if they bother to monitor at all. NGOs also have a tendency to fall prey to anti-MNC bias, which makes the MNCs suspicious of NGOs' reasons for getting involved in formulating codes.<sup>63</sup>

Private company codes, industry association codes, and NGO codes generally share the same strengths and weaknesses. They can be effective if they are specific, contain appropriate sanctions, and followed by a company with an interest in abiding by its provisions. The voluntary nature of these codes will always cast suspicion on their effectiveness, but where nation's laws or leaders cannot or will not uphold human rights, codes are the best method to get MNCs to maintain acceptable human rights standards.

### III. THE ALIEN TORT CLAIMS ACT

Since nation-states traditionally are held liable for violations of international law, it reasons that a plaintiff could bring a state to court to punish it for such violations. Yet a plaintiff cannot do that in American courts for two reasons: the Foreign Sovereign Immunities Act (FSIA)<sup>64</sup> and the Act of State Doctrine. First, FSIA confers immunity onto a foreign state by removing the federal courts' subject matter jurisdiction unless an enumerated exception applies.<sup>65</sup> In the context of MNC human rights litigation, one of those exceptions could occur if the plaintiff can show that a foreign state's activities fall within the commercial activity exception.<sup>66</sup> Nevertheless, even if the plaintiff can demonstrate commercial activity, there is still the Act of State Doctrine, a judicially created device that prohibits the federal courts from examining the validity of a foreign sovereign's actions performed *inside* the foreign state, regardless of whether the acts violated international law.<sup>67</sup> The Act of State Doctrine works to maintain the separation of powers as the

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<sup>63</sup> Ratner, *supra* note 19, at 533.

<sup>64</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1994).

<sup>65</sup> 28 U.S.C. § 1602 (1994).

<sup>66</sup> 28 U.S.C. § 1605(a)(2) (1994).

<sup>67</sup> *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

judiciary should not interfere with the executive's role in foreign relations and diplomacy.<sup>68</sup>

Such a hurdle, however, does not exist in the context of MNCs because the plaintiff may be able bring his claim under the Alien Tort Claims Act (the Act).<sup>69</sup> Also known as the Alien Tort Statute, the Act is a jurisdictional statute which ostensibly allows one or more foreign individuals to file a civil tort claim against one or more foreign or domestic defendants if the defendant(s) can be properly served inside the United States. A mere sentence long, the Act states: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The elements of an ATCA claim are thus simple: “(1) a claim by an alien, (2) alleging a tort, and (3) a violation of international law.”<sup>70</sup>

The simplicity of the Act means little, however, because use of the Act to punish MNCs for violations of international law has evoked very strong reactions. For some, the Act represents “a uniquely powerful tool for seeking redress [in the U.S] from corporations violating basic international standards of behavior,” because there exists a “jurisdictional lacuna where the corporation is not subject to any law” as the “host government will not upbraid the foreign MNC for actions that the [host] government [itself] is involved in” and the home government’s courts “are unlikely to engage in extraterrestrial control.”<sup>71</sup> For others, however, claims brought under the Act “could plausibly culminate in a nightmare” scenario in which litigation would “spin out of control” to such an extent it would disrupt international trade, United States foreign relations, and turn into an international version of asbestos litigation.<sup>72</sup> In short, a commercial, international and judicial mess would ensue. To understand these differing perspectives, we need to explore the history of the statute and its use in federal courts today.

The Alien Tort Claims Act (ATCA) hails from the Judiciary Act of 1789, one of the provisions not struck down by John Marshall’s court

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<sup>68</sup> See *id.* at 423.

<sup>69</sup> 28 U.S.C. § 1350 (1994).

<sup>70</sup> *Doe v. Unocal Corp.*, *supra* note 4, at 890.

<sup>71</sup> *Zia-Zafiri*, *supra* note 16, at 84, 86.

<sup>72</sup> GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 1, 7, 37-48 (2003).

in *Marbury v. Madison*.<sup>73</sup> Its history is so arcane and purpose so hazy that Judge Friendly labeled the Act a “legal Lohengrin” as “no one seem[ed] to know whence it came.”<sup>74</sup> The Act lay dormant for nearly two centuries until the Second Circuit revived it in the 1980 case *Filartiga v. Irala-Pena*,<sup>75</sup> starting the modern usage of the Act by allowing foreigners access to U.S. federal courts to seek redress for human rights abuses that took place outside the U.S.<sup>76</sup> In *Filartiga*, Dr. Joel Filartiga, a citizen of Paraguay, filed suit against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, and accused him of kidnapping, torturing, and killing Dr. Filartiga’s son as revenge for his father’s opposition to the government. Dr. Filartiga was unable to pursue his claim in the Paraguayan court system,<sup>77</sup> so he sued under the little used ATCA. Since Pena was the Inspector General of Police in Asuncion, Paraguay, he could be held liable as a state actor under the customary rules of international law.

The *Filartiga* decision contains two significant holdings. The first concerned how the court was to interpret the meaning of a violation of international law under the Act - either in light of what the First Congress itself believed constituted a violation of international law in 1789, which would limit the kinds of claims an alien could bring into federal courts, or contemporaneously, thus allowing federal courts jurisdiction over practically all violations of international law.<sup>78</sup> The Second Circuit chose the latter, stating, “the law of nations forms an integral part of the common law, and a review of the history surrounding

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<sup>73</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>74</sup> *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1978); from the Wagner opera “Lohengrin,” where Lohengrin the Swan must leave his love Elsa because he has been imbued with mystical powers by the Grail, and those powers can only be maintained if their nature is kept secret.

<sup>75</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>76</sup> LINDA A. WILLET, et al, *THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS* 5 (National Legal Center for the Public Interest ed., 2003).

<sup>77</sup> Filartiga’s lawyer was arrested and threatened with death while chained to a wall at police headquarters, and then later was disbarred without cause. *Filartiga*, 630 F.2d at 878.

<sup>78</sup> WILLET, et al., *supra* note 76, at 7.



the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”<sup>79</sup> In other words, the court decided to interpret international law not as it existed in 1789, but as it exists among the nations of the present. A “jus cogens” violations of international law, therefore, would grant the federal courts jurisdiction over an ATCA case.

The second holding concerned the jurisdictional nature of the statute. Although the *Filartiga* Court maintained that it was only “opening the federal courts for adjudication of the rights already recognized by international law,”<sup>80</sup> its practical effect was to create a new private right of action for aliens. For Mr. Filartiga these two holdings meant that he could properly bring Pena to task under the ATCA because torture was defined as being a violation of international law at the time of his claim.

The evolution of modern ATCA cases continued in *Doe v. Karadzic*<sup>81</sup> where the court expanded its subject matter jurisdiction under the Act to include the actions of non-state actors.<sup>82</sup> In *Karadzic*, Bosnian Croats and Muslims brought suit against Radovan Karadzic, president of the so-called Bosnian-Serb Republic of Srpska, for atrocities committed by him and his followers with aid from Yugoslav officials during the Bosnian war. The district court initially threw the case out for lack of subject matter jurisdiction - Srpska was not a legally recognized state, which meant Karadzic and his followers could not have been acting “under the color of any recognized state law” despite Yugoslav aid.<sup>83</sup> As non-state actors, they therefore could not be held liable for violations of international law.<sup>84</sup>

On appeal, the Second Circuit rejected the district court’s reasoning, calling Srpska’s lack of statehood immaterial when what mattered was whether Karadzic and his followers violated well-established norms of international law.<sup>85</sup> The court thus maneuvered

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<sup>79</sup> *Filartiga*, 630 F.2d at 886.

<sup>80</sup> *Id.* at 887.

<sup>81</sup> 866 F.Supp. 734 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v Karadzic*, 70 F. 3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

<sup>82</sup> WILLET, et al., *supra* note 76, at 13.

<sup>83</sup> *Karadzic*, 866 F. Supp. at 741.

<sup>84</sup> *Id.* at 740-741.

<sup>85</sup> *Karadzic*, 70 F.3d at 245.

around the non-state actor obstacle by extending liability to individual actors regardless of their official connection to a state if they engage in genocidal activities “together with state officials or with significant state aid.”<sup>86</sup> *Karadzic* therefore set the stage for targeting MNCs under the Act. If an MNC acts with the state or with its aid, U.S. courts may hold them liable under the ATCA for violations of human rights. As the Supreme Court denied certiorari to *Karadzic*, the Second Circuit’s conclusions represented reliable precedent for ATCA litigation against MNCs.<sup>87</sup>

The most famous of the ATCA cases against MNCs, and the one that made it the farthest along in the litigation process, is *Doe v. Unocal Corp.*<sup>88</sup> In *Unocal*, Burmese refugees accused the oil giant Unocal of subsidizing the ruling military elite’s egregious violations of human rights for the benefit of Unocal in its construction of the Yadana pipeline.<sup>89</sup> The allegations included acts of murder and rape, forced relocation, use of slave labor, and the destruction of Burmese villagers’ homes and properties.<sup>90</sup> Unocal motioned to dismiss for three main reasons: first, it claimed the court lacked subject matter jurisdiction;<sup>91</sup> second, Unocal argued that its actions in Burma could not be categorized as state action, therefore the ATCA could not apply;<sup>92</sup> and third, that the litigation would breach the act of state doctrine by interfering with American foreign policy.<sup>93</sup> But the *Unocal* court rejected these arguments, finding that the court had subject matter jurisdiction under the ATCA,<sup>94</sup> that even private parties could be held accountable for violations of international law,<sup>95</sup> and that since the U.S. government had already denounced the new Burmese government, court adjudication

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<sup>86</sup> *Id.*

<sup>87</sup> *Zia-Zarifi*, *supra* note 16, at 93.

<sup>88</sup> *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

<sup>89</sup> *Id.* at 885.

<sup>90</sup> *Id.* at 883.

<sup>91</sup> *Id.* at 885-886.

<sup>92</sup> *Id.* at 890.

<sup>93</sup> *Id.* at 892.

<sup>94</sup> *Id.* at 891.

<sup>95</sup> *Id.*

over the matter could hardly make foreign relations worse.<sup>96</sup> The court's decision allowed the plaintiffs to begin discovery in preparation for trial, but before trial could begin, the Ninth Circuit reversed for further considerations.<sup>97</sup> Although the parties eventually settled out of court,<sup>98</sup> *Unocal* showed that if alien plaintiffs could allege sufficient facts showing that an MNC violated international law when acting in concert with a state, the case could be brought under the ATCA in federal courts.

Despite the supposed success of the *Unocal* litigation, serious deficiencies exist which should give ATCA plaintiffs pause. Brevity may be a virtue, but the language of the Act lacks many of the technical and procedural components that characterize modern legislation. First, the Act lacks a statute of limitations. How much time does a plaintiff have to bring an ATCA action? Ten years, like under the Torture Victims Protection Act?<sup>99</sup> Or much longer, say back to World War II?<sup>100</sup> So far, there is no apparent consensus among the Circuits.<sup>101</sup> Next, the Act does not require that a plaintiff exhaust all available remedies at home before filing in U.S. federal courts, as international law normally requires.<sup>102</sup> Instead, the plaintiff in an ATCA action does not have to plead exhaustion of all remedies as a condition precedent to invoke the jurisdictional authority of the federal courts.

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<sup>96</sup> *Id.* at 893.

<sup>97</sup> *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

<sup>98</sup> *EarthRights International*, *supra* note 5.

<sup>99</sup> *See HUFBAUER & MITROKOSTAS*, *supra* note 72, at 11. Companion legislation to the ATCA, the TVPA is codified under 28 U.S.C. §1350, n.2 (2003). Originally passed in 1992, it allows alien and U.S. citizen plaintiffs to bring an action against any individual acting "under actual or apparent authority, or color of law, of any foreign nation." The TVPA includes a 10-year statute of limitations, which the Ninth Circuit has instituted for ATCA litigation. *Papa v. U.S.*, 281 F.3d 1004 (9th Cir. 2002); reaffirmed in *Deutsch v. Tuner Corp.*, 317 F.3d 1005 (9th Cir. 2003).

<sup>100</sup> With holocaust victims or their relatives still alive today, a very long statute of limitations could conceivably create another judicial avenue to pursue corporations accused of aiding and abetting the Nazi state.

<sup>101</sup> *HUFBAUER*, *supra* note 72, at 11. The ninth circuit chose a 10-year statute of limitation for the Act; but the "other federal courts may choose a longer limitation." *Id.*

<sup>102</sup> *Id.*

Another problem that supporters of ATCA rarely mention is the Act's potential impact on international trade and American foreign relations. Tort litigation in the U.S. could result in large awards for the plaintiffs, and ATCA suits have the real possibility of depressing international trade by billions of dollars per year and putting thousands of American manufacturing jobs at risk.<sup>103</sup> For the developing nations that need MNC investment for their economies, ATCA suits could curtail their trading ability, investment opportunities and access to credit.<sup>104</sup>

Additionally, ATCA has the potential to affect American foreign relations.<sup>105</sup> For example, in *Unocal* one of the original four defendants was Total, S.A., a French oil firm, later dismissed from the case for lack of personal jurisdiction.<sup>106</sup> If the court had not dismissed Total and had the plaintiffs won judgment against Total, the *Unocal* court would have in effect passed judgment on a French firm for acts conducted outside the United States. Such a result reeks of judicial imperialism and comes into conflict with the powers of the executive branch, the only branch with the constitutional power to conduct foreign policy.

To counter some of this criticism (and most likely to lessen the number of potential suits), the Supreme Court granted certiorari in an ATCA case - *Sosa v. Alvarez-Machain*.<sup>107</sup> In *Sosa*, a Mexican national sued his kidnapper and fellow Mexican, alleging that the 24-hour detention he experienced in Mexico before being shipped across the border to face charges for murdering a DEA agent, violated his human rights.<sup>108</sup> *Sosa*'s main defense was that as a solely jurisdictional statute, the Act created no new causes of action as it merely vested federal courts with jurisdiction.<sup>109</sup> The Court agreed, concluding that the ATCA could apply only to the three violations of international law applicable in 1789: offenses against ambassadors, violations of "safe conducts," and individual actions arising out of prize capture and piracy.<sup>110</sup> This

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<sup>103</sup> *Id.* at 37-40.

<sup>104</sup> *Id.* at 42.

<sup>105</sup> *Id.* at 45.

<sup>106</sup> *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998).

<sup>107</sup> 542 U.S. 692 (2004).

<sup>108</sup> *Id.* at 698.

<sup>109</sup> *Id.* at 711-12.

<sup>110</sup> *Id.* at 724.

essentially repudiated the *Filartiga* court's holding that violations of international law could be found viewing international law in a modern light. In sum, *Sosa* cleared up some issues, but left others mired in ambiguity, especially the future of ATCA litigation against MNCs.

The Court's holding in *Sosa*, however, did not completely close the door on modern ATCA suits. The Court stated that in the future, district courts "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a *specificity comparable* to the features of the 18th century paradigms we have recognized."<sup>111</sup> This does not seem to overturn any of the previous ATCA cases, but merely ensures that when courts grant jurisdiction, they are doing so because there has been a violation of international law with "specificity comparable" to the First Congress's intent. However, the Supreme Court did not provide any further guidance on when a violation would be sufficiently comparable. Although a *jus cogens* violation will probably suffice for future cases, anything less may be insufficient to invoke the jurisdictional power of the U.S. courts.

#### IV. NORMS ON RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS: THE UN'S ATTEMPT TO CREATE A BINDING INTERNATIONAL CORPORATE CODE OF CONDUCT

Robert F. Gorman has characterized the subject of human rights and MNCs as one of the fifty great debates in the United Nations.<sup>112</sup> During the 1970's, the UN realized that the growth of MNC annual sales capacities had become so large as to exceed the GNPs of many developing nations. The potential influence the MNCs could have on the economic health of host countries and the global economy goaded the UN into action as they sought a way to regulate the growing power of the MNCs.<sup>113</sup> In 1972, an official UN action on the matter began when the Economic and Social Council (ECOSOC) asked the Secretary General to appoint a group of knowledgeable persons to study the impact that the

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<sup>111</sup> *Id.* at 725 (emphasis added).

<sup>112</sup> GORMAN, *supra* note 12, at 242.

<sup>113</sup> *See id.* at 243-44.

MNCs had on the world economy.<sup>114</sup> The group concluded that MNCs should be studied and possibly regulated by the UN. Subsequently in 1974, ECOSOC resolved to establish a Commission on Transnational Corporations (Commission) as a forum within the UN system for consideration of issues relating to MNCs.<sup>115</sup> One of its first tasks included the creation of a binding international code of conduct for MNCs.<sup>116</sup>

The Commission's efforts to create such a code, however, became mired in the strange, post-World War II interaction between communism, de-colonization and globalization. These three interlocking influences effectively destroyed the Commission's ability to create a code. First, the Soviet Union, being obviously anti-capitalist, enthusiastically pushed the code; they saw it as a means to contain Western economic influence and power as embodied in the emerging phenomenon of globalization.<sup>117</sup> Second, the 1960's and 1970's finally saw the end of hundreds of years of colonial rule by Western powers.<sup>118</sup> The newly de-colonized nations, practically all third-world, developing nations, perceived the MNCs as agents of their home countries and retaliated by expropriating foreign investment through a program of nationalizing concessions held by these MNCs.<sup>119</sup> When they refused to compensate the MNCs for their expropriated investments, the UN endorsed the de-colonized nations' position.<sup>120</sup> That, in turn, veered Western countries from any idea of placing a binding, UN sponsored code on their corporations. Further, as de-colonized nations and Eastern Europe dominated the Commission, a UN sponsored code had no chance to reach a consensus with capitalist Western Nations. By 1992, the deadlock caused the Commission to abandon work on the code.<sup>121</sup>

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<sup>114</sup> E.S.C Res. 1721 (LIII), U.N. ESCOR, 53rd Sess., Supp. No. 1, at 3 (1972).

<sup>115</sup> OSMANCZYK, *supra* note 18, at 1496.

<sup>116</sup> *Id.*

<sup>117</sup> See GORMAN, *supra* note 12, at 243, 245.

<sup>118</sup> Ratner, *supra* note 19, at 454-55.

<sup>119</sup> See *id.* at 455-56.

<sup>120</sup> See e.g., G.A. 3281, *Charter of Economic Rights and Duties of States*, U.N. GAOR, 29th Sess., Supp. No. 31, at 52, U.N. Doc. A/9631 (1974).

<sup>121</sup> OSMANCZYK, *supra* note 18, at 1496.

The fall of Communism in the beginning of the 1990's and the realization by developing nations that MNCs could be effective tools for their own economies turned the Commission's attitude around. ECOSOC recommended that the Commission be inserted into the institutional machinery of the UN Conference on Trade and Development (UNCTAD) and given a new title: Commission on International Investment and Transnational Corporations.<sup>122</sup> The function of the new commission changed to suit the new attitude - no longer trying to regulate MNCs, it instead focused on boosting governmental, intergovernmental and NGO efforts to encourage private sector investment in developing nations.<sup>123</sup> Yet the goal of creating a binding code of conduct for MNCs remained; and in August 2003 the UN Sub-Commission on Human Rights introduced the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms").<sup>124</sup>

The Norms, a truly singular document with big aspirations, begins with the recognition that "[s]tates have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."<sup>125</sup> Yet within their "spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote . . . and protect human rights" according to international and national norms.<sup>126</sup> The Norms does not grant parity to the MNCs as to the state, but it does not let the MNC off the hook if any of its actions are not in accordance to international law. The Norms also make very clear to the MNC that it is legally binding and all provisions within are mandatory.<sup>127</sup> Paragraphs B through G outline the obligations that are *specific* to MNCs: right to equal opportunity and non-discriminatory treatment; right to security of persons; rights of workers; respect for

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<sup>122</sup> GORMAN, *supra* note 12, at 246.

<sup>123</sup> *Id.*

<sup>124</sup> U.N. Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of the Transnational Corporations and Other Business Entities with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>125</sup> *Id.* at pt. A.

<sup>126</sup> *Id.*

<sup>127</sup> *See generally id.*

national sovereignty and human rights; obligations with regard to consumer protection; and obligations with regard to environmental protection.<sup>128</sup> MNCs must also “adopt, disseminate and implement internal rules of operations in compliance with these Norms,”<sup>129</sup> and the Norms notify MNCs that they “shall be subject to periodic monitoring and verification by the United Nations, other international and national mechanisms already in existence or yet to be created.”<sup>130</sup> There is even a provision for MNCs to make adequate reparations to persons, entities, or communities that are adversely affected by an MNC’s failure to comply with the Norms.<sup>131</sup>

The Norms as a public international code has several advantages. First, as a part of the body of international law, states must observe the code’s provisions.<sup>132</sup> Second, as a single, across the board consistent standard, it “levels the playing field” between MNCs that have codes and those that do not. Since all MNCs must have codes that implement the provisions of the Norms, no MNC can have a competitive advantage over another because all MNCs have to bear the cost of implementing such a code.<sup>133</sup> Finally, an international standard would remove any question of what kind of behavior is acceptable for MNCs.

Although the Norms represents the culmination of 30 years of UN effort to exert some sort of control over the activities of MNCs, the reaction of the international community (including developing countries) has been less than enthusiastic. The International Chamber of Commerce (“ICC”), the ICC’s American branch, and the International Organization of Employers (“IOE”) all opposed the Norms due to its legalistic approach and enforceability.<sup>134</sup> Developing countries disliked the Norms as well because it imposed upon the countries obligations to

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<sup>128</sup> *Id.* at pts. B-G.

<sup>129</sup> *Id.* at para. 15.

<sup>130</sup> *Id.* at para. 16.

<sup>131</sup> *Id.* at para. 18.

<sup>132</sup> Wawryk, *supra* note 25, at 58.

<sup>133</sup> *Id.*

<sup>134</sup> Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. Marshall L.Rev. 1205, 1207-08 (2004).



monitor MNCs themselves and report periodically to the UN, the costs of which the developing countries did not want to bear.<sup>135</sup> Finally, even important branches of the UN will not endorse the code. The Commission on Human Rights, after taking note of the Norms, stated that because the Norms had not been requested by the Commission on Human Rights, it had no legal standing.<sup>136</sup> The Commission on Human Rights' ruling essentially rendered the Norms dead in the water, thereby removing any chance that the Norms could become part of the body of international law.

### CONCLUSION

The corporate codes of conduct, the ATCA suits, and even the Norms, have attributes that could prevent or remedy MNC violations of international law, but in their present incarnations, they cannot themselves work to create an environment where MNCs and the public will not have to worry about such violations. The key is not only strengthening these measures, but also integrating them to create a system with redundant safeguards. Here are some thoughts on how to make these systems work for the better, both individually and jointly.

First, let us examine the corporate codes of conduct. If an MNC is serious about preventing human rights violations, then a corporate code of conduct represents an excellent starting point. An MNC can tailor a code specific to its industry and its own needs. The overwhelming problem with MNC codes, however, is that they are voluntary, making it difficult to hold MNCs to their promises, especially if outside monitoring is lacking. As such, MNCs need an incentive not only to adopt a code, but to keep to it. One possible incentive comes from domestic corporate law, where a corporation can reduce its liability for violations of its duty of care if the corporate directors institute a reasonable monitoring system that can alert them to any material events.<sup>137</sup> Under this concept, when the corporation has instituted reasonable internal monitoring systems, the company incurs no liability for any violation as long as they are not systematic or particularly egregious. If a similar system was to be

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<sup>135</sup> Wawryk, *supra* note 25, at 59.

<sup>136</sup> Murphy, *supra* note 27, at 408.

<sup>137</sup> See *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (1996).

applied to MNC codes of conduct, then MNC liability under the ATCA could be reduced (although not totally eliminated because these are human rights abuses) if the MNC has instituted a reasonable code of conduct for preventing abuses in operations abroad. In such a system, the more specific code gives the MNC protection by keeping away large damage awards.

As for the ATCA, it is hard to be enthusiastic about using a statute that has yet to produce results on the merits.<sup>138</sup> Even in *Unocal*, which remained on the judicial docket for nearly a decade, the parties settled out of court.<sup>139</sup> Also, no country has an even remotely equivalent statute comparable to the Act.<sup>140</sup> While some see that distinction as proof that the United States is willing to envision innovative steps to protect human rights and willing to prod other civilized countries in the same direction,<sup>141</sup> others think it a dubious distinction because it merely shows that the United States is playing way out in left field.<sup>142</sup>

Despite all of the problems associated with the Act and the ambiguities created by the Supreme Court in *Sosa*, it could still be an effective tool for punishing MNCs while not creating the plausible commercial, international and judicial nightmare. First, responsibility would go to Congress to fill in the gaps of the Act, like the statute of limitations and exhaustion of local remedies. Because the TVPA is a companion act to the ATCA and already has such provisions, the easiest thing Congress could do is apply them to the ATCA. Congress should

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<sup>138</sup> The Business and Human Rights Centre, <http://www.business-humanrights.org>, keeps an updated list of all ATCA cases currently on the docket and has an excellent archive covering ATCA litigation. A lengthy review of the cases listed on the website failed to turn up a single case that had made it completely through the process to be decided on the merits.

<sup>139</sup> Duncan Campbell, *Energy Giant Agrees [to] Settlement with Burmese Villagers*, THE GUARDIAN UNLIMITED, <http://www.guardian.co.uk/international/story/0,,1373704,00.html> (last visited February 27, 2006). *Unocal did* settle though, which means the Burmese refugees received some compensation for the horrors visited upon them because of the construction of the Yadana.

<sup>140</sup> HUFBAUER & MITROKOSTAS, *supra* note 72, at 46.

<sup>141</sup> Zia-Zarifi, *supra* note 16, at 84.

<sup>142</sup> See HUFBAUER & MITROKOSTAS, *supra* note 72.

also limit which corporations can be brought to task under the Act, namely only those MNCs incorporated in the U.S.. Such a bright-line rule avoids the potential foreign relations faux pas of holding a non-American company liable for an act committed outside the U.S. territory. All these measures would ensure that only serious, recognizable violations of international law by American-based MNCs would make it into federal courts under the ATCA.

Yet Congress and the Supreme Court should not worry too much about the number of cases brought under the Act spinning out of control. As the Court held in *Sosa*, a plaintiff will need to allege either a violation of international law that is of a “specificity comparable” to the 18th Century conception of that term (offenses against ambassadors, violations of “safe conducts,” and individual actions arising out of prize capture and piracy) or a “jus cogens” violation.<sup>143</sup> Because an MNC would be hard pressed to violate any one of the three 18th Century violations, only a “jus cogens” violation will be actionable.

Finally, there is the dead-on-arrival Norms. The UN should abandon any kind of effort to create a mandatory code of conduct. The chances of agreement between developing and developed countries (even between developed countries themselves) will not be coming soon. Nor will developed countries allow their corporations to be controlled by anyone but themselves and the countries in which the corporations operate. Instead, the UN should focus on pushing nations to follow guidelines like the Organization of Economic Cooperation and Developments’ (“OECD”) Guidelines.<sup>144</sup>

The OECD Guidelines outline a standard of behavior that MNCs should follow when operating in countries that adhere to them.<sup>145</sup> The Guidelines include provisions that are very general,<sup>146</sup> usually a sign of a weak code, but it covers a wide spectrum of topics – such as the duty to

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<sup>143</sup> *Sosa*, *supra* note 107, at 2761-62.

<sup>144</sup> OECD, *The OECD Guidelines for Multinational Enterprises* (4th ed. 2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last visited February 27, 2006).

<sup>145</sup> *Id.* at 5.

<sup>146</sup> For example, number 2 of the “General Policies” section of the OECD Guidelines states that MNCs must “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” *Id.* at 19.

disclose, provisions on employment and industrial relations, the environment, combating bribery, even consumer interest and taxation – making it comprehensive. The Guidelines, however, are not meant to substitute or override the applicable law of a nation; they merely supplement it.<sup>147</sup> That removes a major obstacle experienced by the Norms. In addition, labor and corporate groups participated in the making of the Guidelines, so it has earned greater support from both as a result.<sup>148</sup> Its only weaknesses are its voluntary nature and the lack of participation in the OECD by developing nations.<sup>149</sup> The Guidelines, however, with their comprehensive provisions and popular support, represent a good alternative for the UN to explore, rather than further attempting to create a binding, international code of conduct.

Another avenue that the UN could explore would be the possibility of giving developing nations monetary incentives to create or enforce their own legislation that will protect their citizens. As mentioned earlier in this paper, developing nations often do not have the infrastructure available to police the MNCs operating in their countries.<sup>150</sup> The UN could therefore look for ways to help these nations create the necessary legal infrastructure to protect human rights by finding them money to do so. The UN could also look to lowering these countries' debt, or get them access to greater credit if they do create or enforce domestic human rights legislation. Instead of trying to have overall authority on human rights, the UN should move the world as best it can to get there on its own.

In all, corporations, the U.S. federal courts, and the UN are moving in the right direction. They just need a little prodding to achieve the goal of a world free from human rights abuses committed by multinational corporations.

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<sup>147</sup> *Id.* at 5.

<sup>148</sup> Murphy, *supra* note 27, at 410.

<sup>149</sup> Ratner, *supra* note 19, at 536.

<sup>150</sup> Pillay, *supra* note 11, at 501.