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Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States For International Human Rights Violations Under the Alien Tort Claims Act

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APPLYING INTERNATIONAL HUMAN RIGHTS NORMS IN THE UNITED STATES: HOLDING MULTINATIONAL CORPORATIONS ACCOUNTABLE IN THE UNITED STATES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS UNDER THE ALIEN TORT CLAIMS ACT

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I. INTRODUCTION

Our current international system is composed of both state actors and a variety of non-state actors. While the classic definition of international law is the law governing states,[1] this definition has drastically changed in the last century due to the evolution of the current international system. International law has adapted to changes within our system in response to the needs of the global order. Consequently, modern international law recognizes that non-state actors, including individuals, are capable of breaching international law.[2] The international

[1] More than 350 years ago, The Peace of Westphalia led to the establishment of the classic system of international law. This system centered exclusively on sovereign states with defined territories which are theoretically equal. States created international law and were accountable to each other in meeting international legal obligations.

Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 798 (2002). *See* Lucy Reed, *Great Expectations, Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?* 96 AM. SOC'Y INT'L L. PROC. 219, 221 (2002), wherein the author explains that public international law is traditionally defined as the law governing relations only between states. It is noteworthy that the crimes of piracy and slave trade were long prohibited under international law and could be committed by individuals. However, the sovereignty norm was the dominant theme of international law up until the end of World War II. *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 75 (2002), which notes that international law historically prohibited piracy and slave trading, crimes which private individuals could violate.

[2] *See generally* Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) (recognizing that private individuals may be held accountable for war crimes and other international

human rights norms that acknowledge the accountability of non-state actors for violations of human rights and recognize state responsibility for protecting human rights of individuals were established in response to the atrocities of World War II.[3] States acknowledged their responsibility over the human rights of individuals and were found to have a duty in promoting and protecting the human rights of their citizens.[4] Individuals were also found to be accountable under international law for violations of human rights.[5]

Globalization has been a further catalyst in the expansion of the structure of our current international system.[6] Globalization has facilitated transactions between states and non-state actors; consequently, allowing such transactions to cross state boundaries with relative ease.[7] At times, these increased contacts

violations); Ge v. Peng, 201 F. Supp. 2d 14, 19 (D.C. Cir. 2000) (stating in dicta that an individual need not act under color of state law to be validly prosecuted under the law of nations); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 2 (introductory note) (1987) (explaining that individuals may incur liability for breach of international law).

[3] *See* David S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 HASTINGS INT'L & COMP. L. REV. 1, 18 (1998) (noting that Nuremburg and subsequent trials addressed the issues of liability by non-state actors such as "doctors, judges, nongovernmental officials and industrialists"). *See generally* William T. D'Zurilla, *Individual Responsibility for Torture Under International Law*, 56 TUL. L. REV. 186, 189–91 (1981) (analyzing the individualistic approach to international law prosecutions); Beth Fain, Comment, *The International Criminal Court: An Eminent Impact on a Hesitant United States*, 35 TEX. TECH L. REV. 163, 171 (2004) (noting impact of Nuremburg trials on development of human rights).

[4] *See* Reed, *supra* note 1, at 222 (stating that "[s]ince the end of World War II, however, the development of universal human rights law has created a new focus in public international law, one that concentrates on the conduct of the state directly towards the individual"); *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2358 (1991) (describing how the evolution of modern transnational public law litigation in American courts after World War II and in turn pierced "the veil of state sovereignty"). *See generally* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1–6 (1982) (discussing the historical evolution of the state's protectionist role in human rights).

[5] *See* Stephens, *supra* note 1, at 60 (noting that non-state actors such as corporations may be liable for human rights violations). *See generally* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 6–9 (2002) (discussing personal jurisdiction over individual terrorists for human rights violations); Reed, *supra* note 1, at 221 (suggesting that private individuals may be liable for human rights violations such as slavery).

[6] *See* Rudi G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 357–58 (2002) (noting ramifications of globalization on international law). *See generally* Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 183–84 (1997) (stating that "the State is not disappearing, it is disaggregating into its separate, functionally distinct parts"); Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEG. STUD. 375, 375 (1996) (explaining the intersection of globalization and changing policy).

[7] *See generally* Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1015 (1997) (noting the emergence of a global market); Joel P. Trachtman, *The*

between developed and developing nations have created negative consequences in developing countries.[8] Globalization has also brought forth the dominance of one particular non-state actor into the system, the modern multinational corporation (MNC).[9] MNCs are in economically powerful positions within the international system.[10] Currently, fifty-two MNCs compose one hundred of the largest economies in the world.[11] Wal-Mart, for example, is worth more than 161 countries in the world.[12] MNCs

International Law Revolution, 17 U. PA. J. INT'L ECON. L. 33, 36 (1996) (calling global economic integration "the leading motivation for new public international law today, and the most fertile source of new legislation and constitutionalization in international law"); Tracy M. Abels, Comment, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467, 469 (1996) (discussing global nature of transactions).

[8] *See generally* J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 353, 372 (2002) (suggesting that developing nations lack the transactional leverage of developed countries); Surya P. Subedi, *The Road From Doha: The Issues For The Development Round Of The WTO And The Future Of International Trade*, 52 INT'L & COMP. L. Q. 425, 425 (2003) (noting that some regulation schemes put in place by developed countries do not protect traditional product output by developing countries). *But see* D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System of Preferences: "Instant Replay" or a Real Change?*, 6 NW. J. INT'L L. & BUS. 1035, 1036 (1984) (analyzing a transaction system that specifically benefits developing countries).

[9] *See* Dinah Shelton, *Globalization & the Erosion of Sovereignty in Honor of Professor Lichtenstein: Protecting Human Rights in a Globalized World*, 25 B.C.INT'L & COMP. L. REV. 273, 273 (2002) (discussing the increasing power of MNCs). *See generally* Allan E. Gotlieb, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT'L L. & BUS. 449, 451 (1983) (stating "to a considerable extent, the multinational corporation has been the engine of international economic activity, the economic actor whose activities so regularly cross national boundaries that it often blurs those very boundaries"); Stephens, *supra* note 1, at 56 (noting the modern multinational corporation arose after World War II).

[10] *See* Shelton, *supra* note 9, at 273 wherein the author states that "components of what has come to be known as globalization---have led to the emergence of powerful non state actors who have resources sometimes greater than those of many states." *See* Douglass Cassel, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global, Political, and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1963 (1996) for the point that the end of the Cold War has possibly brought forth "a second human rights revolution" involving expanded responsibility in MNCs to protect human rights and the opinion that MNCs are "more powerful than most national governments." Additionally, it has been argued that multinational enterprises are the most powerful phenomena arising from capitalism. *See* Kojo Yelpaala, *In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies*, 7 NW. J. INT'L L. & BUS. 208, 224 (1985).

[11] *See* discussion *infra* Part IV (detailing existence of MNCs in global economy); *see also Exxon is Bigger than Pakistan*, JOURNAL (Newcastle, UK), Apr. 14, 2002, at 25 (reporting that the Exxon corporation is worth more than the entire national economy of Pakistan); Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Watch*, CORPORATE WATCH 2000 (noting that MNCs outnumber countries in the top 100 largest economies in the world), *available at* http://www.globalpolicy.org/socecon/tncs/top200.htm. (last visited Apr. 17, 2004).

[12] *See id.* (stating that Wal-Mart is worth more than 161 countries in the world); *see also* Michael Olesker, *$1.9 million Mcdonald not in touch with reality*, SUN (Baltimore), August 10, 1997, at 1B (reporting that Wal-Mart's sales "are bigger than 161 countries, including Israel, Poland and Greece"). *See generally* Nicholas Thompson, *Netflix Uses*

have become important actors in the international system because of their economic dominance, particularly in their relations with developing countries.[13] Their economically dominant position gives them a bargaining chip in their interactions with developing countries because of the potential wealth they can bring to such countries.[14] Foreign direct investment enables MNCs to contract with developing countries for use of resources, cheap labor, land, and military protection over MNC projects.[15] Unfortunately, these relations have involved contracting with countries that are known for their disregard for human rights and have consequently led to issues within international human rights law.[16] For example, there have been incidences of the use of child labor and worker's rights

Speed to Fend Off Wal-Mart Challenge, N.Y. TIMES, Sept. 29, 2003, at C1 (mentioning that Wal-Mart has sales of about $244 billion per year).

[13] *See* Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT'L L. 1, 9 (2003) (noting that the most frequent victims of human rights violations by MNCs are developing countries); Eric Engle, *Corporate Social Responsibility: Market-Based Remedies For International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103, 109 (2004) (discussing corporations using labor from third-world countries); *see also* John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 463 (2000) (establishing that world trade powers are calling for implementation of codes of conduct for MNCs to curb abuses in developing countries).

[14] *See* Barnaby J. Feder, *Talking Business, From Tobacco to Insurance*, N.Y. TIMES, Aug. 14, 1984, at 2 (calling MNCs "wealth generators" in the context of both developed and developing countries); *see also* Louis Uchitelle, *International Business; Globalization Marches On, as U.S. Eases Up on the Reins*, N.Y. TIMES, Dec. 17, 2001, at C12 (noting that MNCs more effectively produce wealth when properly regulated). *But see* William J. Broad, *Gas Leak is Expected to Reduce Investment in the Third World*, N.Y. TIMES, Dec. 12, 1984, at A8 (explaining that certain events incite developing countries to reject MNC advances).

[15] *See* El Hadji Guisse, *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations*, U.N. ESCOR, 50th Sess., U.N. Doc. E/CN4/Sub.2/1998/6 (1998) (stating "[t]oday's economic and financial systems are organized in such a way as to act as pumps that suck out the output of the labour of the toiling masses and transfer it, in the form of wealth and power, to a privileged minority"); *see also* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 91 (2002) (noting MNCs involvement in extractions industries has led them to contract with developing countries). *See generally* Paul Lewis, *Multinationals Raised '95 Investment in 3d World 13%*, N.Y. TIMES, Mar. 13, 1996, at D5 (saying that foreign direct investment in developing countries has more than tripled since 1991 and is expected to continue increasing).

[16] *See* Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 69 INT'L LAW. 102, 178 (2003) (explaining how globalization is "antithetical to the systemic goals of human rights protection"). *See generally* Anderson, *supra* note 13, at 468 (arguing that corporations have no right to profit from human rights violations); Kelly, *supra* note 8, at 355 (suggesting that some developing countries view strict human rights regulations over MNC involvement as an impediment to wealth acquisition).

abuses by MNCs in developing countries.[17] Additionally, foreign military, known to have had a history of violating human rights, have committed human rights violations while in working for MNCs.[18] MNCs argue they are not responsible nor should be found liable for such atrocities because they did not directly commit the violations nor ordered such violations to occur.[19] Arguably, developing host countries have not sought claims against MNCs for human rights abuses for fear of losing foreign direct investment.[20] Unfortunately, international legal procedures whereby MNCs are held directly accountable for human rights violations are non-existent.[21]

[17] *See* Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT'L L. 139, 177 (2001) (discussing a series of lawsuits brought against numerous corporations for violations of workers rights). *See generally* Bruce Bigelow, *8 U.S. Clothing Firms to Settle Suit Alleging Sweatshops on Saipan*, SAN DIEGO UNION TRIB., Mar. 29, 2000, at C2; Nancy Cleeland, *4 U.S. Retailers Settle Saipan Labor Suit*, L.A. TIMES, Aug. 10, 1999, at C2 (reporting settlement details of workers' rights violation case).

[18] *See, e.g.*, Stephens *supra* note 1, at 52 (discussing British Petroleum's contracting with Colombian military forces who committed human rights abuses); *see also* Bloomberg News, *Court Tells Unocal to Face Rights Charges*, N.Y. TIMES, Sept. 19, 2002, at C13 (exploring Unocal's liability for human rights abuses by the Myanmar military that the corporation had hired as security); *Shell Game in Nigeria*, N.Y. TIMES, Dec. 3, 1995, at 4–14 (editorializing on the role of Shell in the execution of those who opposed their corporate expansion in India).

[19] *See* Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Torts Claim Act*, 48 CATH. U.L. REV. 881, 882 (1999) (stating MNCs argue "they are not responsible for the abusive conduct of their foreign host governments"); *see also* Andy Rowell, *Shell Shocked: Did the Shell Petroleum Company Silence Nigerian Environmentalist Ken Saro-Wiwa?*, VILLAGE VOICE, Nov. 21, 1995, at 20 (reporting Shell's claims that it could not get involved in the affairs of a sovereign state and refused to exercise its influence over the Nigerian military junta to prevent the execution of activist Ken Saro-Wiwa). *See generally* Paul Lewis, *Rights Groups Say Shell Oil Shares Blame*, N.Y. TIMES, Nov. 11, 1995, at 1–6 (discussing backlash against Shell by human rights groups who believed Shell either affirmatively encouraged Saro-Wiwa's execution or could have done more to prevent it).

[20] *See* Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 422 (1999) (recognizing economic constraints that hold developing countries back from enforcing labor laws to protect labor rights of citizens); *see also* Maria Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?* 35 COLUM. J.L. & SOC. PROBS. 1, 26 (2001) (blaming the risk host countries face of losing MNCs business for their failure in preventing MNC behavior). *See generally* Kieserman, *supra* note 19, at 910–11 (describing symbiotic relationship between host governments and MNCs).

[21] *See* Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Corporation*, 20 WIS. INT'L L.J. 89, 141 (2001) (writing that MNCs "sail on the seas of commerce virtually untrammeled"); *see also* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 184 (bemoaning lack of "any real enforcement power" at the International Labor Organization and the United Nations). *See generally* Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1211 (2002)

As previously stated, the accountability of non-state actors for human rights violations is an international human rights norm.[22] International law is recognized by states through the internalization of these international norms,[23] such as application through domestic legislation.[24] The United States has internalized the norm of holding non-state actors accountable for violations of international law through the enforcement of the two hundred year old statute, the Alien Torts Claim Act (ATCA).[25] In the last two decades, U.S. federal courts have heard numerous suits brought forth under the ATCA claiming human rights violations abroad.[26] The rise in this litigation has been attributed to the Second Circuit's landmark holding in *Filartiga v. Irala-Pena*.[27] There, the ATCA was interpreted as granting

(arguing for increased role of international organizations in handling problems with MNCs).

[22] *See* Koh, *supra* note 4, at 2358–59 (emphasizing that international law norms have application beyond states); *see also* Reed, *supra* note 1, at 223 (recognizing development of international norms to hold private actors responsible for human rights violations). *See generally* Fain, *supra* note 3, at 171 (noting role of customary international law in establishment of human rights on international stage).

[23] *See* Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 699 (1998) (describing process of state conformity to international law); *see also* Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 282–83 (1999) (recognizing potential link between internationalization and compliance); Scott M. Sullivan, *Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition*, 7 UCLA J. INT'L L. & FOR. AFF. 265, 297 (2003) (ascribing import to internalization of international norms in process of ensuring state compliance).

[24] *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556 (1984) (noting that a "state ordinarily finds it necessary or convenient to incorporate international law into its municipal law to be applied by its courts"); *see also* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1830–31 (2003) (describing treaty ratification as one process through which states internalize international norms); Levit, *supra* note 23, at 281 (reporting Argentina's incorporation of international norms through its constitution).

[25] 28 U.S.C. § 1350 (1994). The Alien Torts Claim Act is also known as the Alien Tort Statute. *See, e.g.*, Hon. John. M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 539 (1997); Eric Gruzen, Comment, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution*, 14 TRANSNAT'L LAW. 207, 209.

[26] *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 457 (2001) (noting that "[i]nternational human rights litigation in US courts largely began in 1980 with the Second Circuit's decision in *Filartiga v. Pena-Irala*"); *see also* William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 HASTINGS INT'L & COMP. L. REV. 261, 274 (2002) (observing increase in human rights lawsuits under the ATCA after *Filartiga*); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 485 (2001) (reporting ATCA human rights suits brought forth in federal courts over the past twenty years).

[27] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (finding Paraguayan police officer liable for violating the law of nations for committing torture upon Paraguayan citizen while acting under color of law); *see* Bradley, *supra* note 26, at 457 (signaling *Filartiga* decision as corresponding with rise of "human rights litigation in US courts");

plaintiffs a cause of action and federal courts jurisdiction over cases arising under violations of the law of nations.[28] Since *Filartiga*, U.S. federal courts have expanded the ATCA's jurisdiction to encompass a broad range of categories of violations of international law.[29] Additionally, the category of defendants liable under ATCA has evolved to include state officers,[30] individuals,[31] and most recently MNCs.[32] This Note argues that use of the ATCA is consistent with modern international law because it internalizes an accepted norm, which is subject to universal jurisdiction. Use of the ATCA against MNCs is further justified in light of their status within the global order making them the equivalent of states.

The evolution of the ATCA litigation is consistent with the expansion of the structure of the international system and the evolution of international law.[33] Accordingly, the application of

see also Aceves, *supra* note 26, at 274 (attributing increase in human rights cases filed in U.S. to the *Filartiga* decision).

[28] *See Filartiga*, 630 F.2d. at 888 (holding that "it sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law"); Bradley, *supra* note 26, at 458 (reporting holding of *Filartiga*); *see also* Aceves, *supra* note 26, at 273 (noting court's decision in *Filartiga*).

[29] *See* Aceves, *supra* note 26, at 274 (listing "numerous violations of international law" that now fall under ATCA); *see also* Kadic v. Karadzic, 70 F.3d 232, 241–43 (2d. Cir. 1995) (extending protections of ATCA to rape, genocide, and torture); Xuncax v. Gramajo, 886 F. Supp. 162, 189 (D.Mass. 1995) (extending protections of ATCA summary execution and arbitrary detention).

[30] *See Filartiga*, 630 F.2d at 889 (applying ATCA to Paraguayan police officer); Aceves, *supra* note 26, at 274 (including "government officials" in list of possible defendants under the ACTA); *see also* In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 497 (9th Cir. 1992) (applying ATCA to former president of Philippines).

[31] *See* Aceves, *supra* note 26, at 274 (listing "private individuals" as possible defendants under ATCA); *see also Kadic*, 70 F.3d at 236 (holding self-proclaimed president of non-identified state of "Srpska" could be liable under ATCA). *See generally* David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 250 (1999) (noting application of international law to individuals not associated with "recognized nations").

[32] *See* Aceves, *supra* note 26, at 274 (listing "multinational corporations" among possible defendants under ATCA); *see also* Doe v. Unocal Corp., Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th. Cir. Sept. 18, 2002), at *3 (finding Unocal, an American MNC, liable for "aiding and abetting" human rights violations committed by Myanmar military officers), *vacated and reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003) (finding corporate defendant liable under ATCA).

[33] *See generally* H. Knox Thames,, *Forced Labor and Private Individual Liability in U.S. Courts*, 9 MSU-DCL J. INT'L L. 153, 153 (2000) (looking to international standards to determine whether there should be ACTA liability); John F. Carella, Comment, *Of Foreign Planitiffs and Proper Fora: Forum Non Conveniens and ATCA Class Actions*, 2003 U. CHI. LEGAL F. 717, 722 (2003) (tying together expansion of ATCA to private actors to "modern law of nations"); Justin Lu, Note, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531, 543 (1997) (noting

the ATCA upon MNCs is consistent with their present role in our current international system and accepted international human rights norms. Self regulation among MNCs is not necessarily the best answer. For example, some MNCs have implemented their own corporate codes of conduct in response to claims against them for allowing such violations to occur.[34] However, such codes have not proven effective in ending human rights abuses because they are often vague or lack enforcement mechanisms.[35]

This Note sets forth an explanation of how the ATCA is applied to MNCs and why it is justified in the enforcement of international human rights norms. Part II will delineate a brief history of the origins and use of the ATCA prior to *Filartiga*. Part II will also discuss the international legal setting following World War II prior to *Filartiga*. Part III will analyze *Filartiga* and then outline the development of the ATCA's application by federal courts. A discussion of the evolution of categories of defendants for violations of international law will follow, culminating in the latest application of the ATCA upon MNCs. Part IV will summarize possible applications upon MNCs in light of current ATCA interpretation. Part V will conclude the current interpretation by federal courts of the ATCA is applicable. Lastly, it will explain the justification of the ATCA's application upon MNCs for human rights violations.

justification of private actor liability under the ATCA has been developing international norms along the same lines)..

[34] *See* Ayoub, *supra* note 20, at 403 (noting development of "codes of conduct"); *see also* Jorge F. Perez-Lopez, *Promoting International Respect for Workers Rights Through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1, 5 (mentioning use of voluntary "codes of conduct" in U.S. corporations); Nike Code of Conduct, *at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance&sub cat=code (last updated Jan. 2004) (giving Nike's standards that are meant to guide facility decisions).

[35] *See* Ayoub, *supra* note 20, at 403–04 (noting lack of impact of some corporate codes of conduct); *see also* Stephen G. Wood & Brett G. Scharfs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 556–57 (2002) (explicating various problems with corporate codes of conduct). *But see* Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 400 (arguing that MNCs should be self-regulated).

II. EARLY HISTORY OF THE ATCA: PRE-*FILARTIGA*

A. Enactment and Application

The ATCA was originally enacted during the first session of the U.S. Congress in 1789.[36] Minimal legislative history exists to aid in identifying Congress' original intent in enacting the statute.[37] The ATCA specifically grants district courts "original jurisdiction over 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."[38] Professor Ann-Marie Slaughter[39] posits Congress purposely chose the exact words of the statute to further our nation's self-interest; to protect our nation from other nations' retaliation for not abiding by international law.[40] Secondly, Congress wanted to promote trade within our country by enabling foreign merchants to have the opportunity to bring civil claims in our courts.[41] Lastly, the United States would have been viewed as a legitimate player within the international

[36] *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 A.J.I.L 461, 461 (1989) (noting date of original enactment); *see also* Peter Schuyler Black, *Recent Development,* Kadic v. Karadzic*: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281, 281 (1996) (reporting ATCA inclusion in Judiciary Act of 1789); Matthew R. Skolnik, Comment, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self after WIWA*, 16 EMORY INT'L L. REV. 187, 187 (citing date of enactment of the ATCA).

[37] *See id.* at 196 n.53 (citing to the statute); *see also* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) (stating that the ATCA "has no formal legislative history"); Joshua Ratner,, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 121 (2002) (recognizing "paucity of legislative history" for the ATCA).

[38] 28 U.S.C. § 1350 (1994).

[39] Professor Slaughter is formerly known as Ann-Marie Burley and was the author of *The Alien Tort Statute and the Judiciary Act of 1789,* an extensive study of the ATCA.

[40] *See* Burley, *supra* note 36, at 481 (detailing the interests that foreign governments and individuals had in seeing justice, or compensation, dealt out fairly); *see also* Anthony D'Amato, Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 A.J.I.L 62, 64–65 (1988) (explaining that the ATCA was an important national security interest in 1789). *See generally* THE FEDERALIST NO. 80, at 500–01 (Alexander Hamilton) (stating the standard support the ATCA).

[41] *See* Burley, supra note 36, at 482 (stating that the ATCA sent a message to foreigners that they could conduct "business as usual"); *see also* Jamison G. White, Note, *Nowhere To Run, Nowhere To Hide: Augusto Pinochet, Universal Jurisdiction, The ICC, And A Wake-Up Call For Former Heads Of State*, 50 CASE W. RES. L. REV. 127, 141 (1999) (comparing the ATCA with the TVPA, AEDPA, and the Foreign Sovereign Immunities Act). *See generally* 3 William Blackstone, *Commentaries on the Laws of England* 881 (G. Chase 4th ed. 1923) (detailing the importance of criminalizing the violation of safe passage for foreign merchants).

system in 1789 with the enactment of the ATCA by acknowledging the rule of international law.[42]

After the ATCA was enacted, it was seldom cited or used and jurisdiction under the ATCA was only upheld twice prior to *Filartiga*.[43] The first was the 1795 case of *Bolchos v. Darrell*.[44] There, the court found jurisdiction existed under the ATCA because a treaty existed that dealt with the property rights of slaves seized as prizes of war - the main issue in the case.[45] The next case to find jurisdiction under the ATCA did not arise until 1961. In *Adra v.Clift*,[46] the plaintiff claimed his former wife and her new husband violated international law when they concealed the name and identity of his daughter on an Iraqi passport attempting to evade handing her over to the plaintiff.[47] This clearly fell under the definition of a tort as required under the ATCA.[48] Both cases were therefore relatively simple applications under the ATCA. One involved looking to a treaty while the other involved a tort which had occurred within the United States.[49]

The historical events of the 1940s and 1950s led to substantial changes within the structure of the international system and framework of international law.[50] By its nature, international

[42] *See* Burley, *supra* note 36, at 482 (stating that the founders sought to uphold the "law of nations as a moral imperative."); Jonathan Charney, *Universal International Law*, 87 A.J.I.L 529, 529 (1993) (stating that international law must be accepted as having the authority to legislate universal norms). *See generally* Jianming Shen, *The Basics of International Law: Why Countries Observe*, 17 DICK. J. INT'L L. 287, 291 (1999) (describing the natural law foundations for international law).

[43] *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Torts Claims Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 (1985) (noting that twenty-one cases *claimed* ATCA jurisdiction prior to *Filartiga*); *see also* 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, 7 (2002) (stating the ATCA was "relied upon in only two cases"). *See generally* Bolchos v. Darrell, 3 F.Cas. 810 (D.S.C. 1795) (upholding jurisdiction under the ATCA).

[44] *Id.* (stating that because original case arose at sea admiralty law applied though seizure occurred on land).

[45] *Id.* at 810 (stating treaty with France alters the "law of nations" and states that property of friends found on ships of enemies must be forfeited).

[46] 195 F. Supp. 857 (D. Md. 1961)(denying father's request for the return of his daughter, and dismissed counterclaim for child support in custody action).

[47] *Id.* at 863 (stating under Lebanese law, the father is entitled to the custody of his daughter).

[48] *Id.* at 862 (stating facts of case).

[49] *See* Bolchos v. Darrell, 3 F.Cas. 810, 811 (D.S.C. 1795) (mentioning treaty with France); *see also Adra*, 195 F. Supp. at 861 (noting various facts of case which occurred in the United States); Stephens, *supra* note 43, at 7 (examining both cases in turn).

[50] *See* Shelton, *supra* note 9, at 281 (noting change in international law due to Nazi acts); *see also* Elisabeth Zoller, *The "Corporate Will" of the United Nations and the Rights*

law is not static; it adapts over time based on interactions between states and their responses in internalizing and externalizing norms.[51] International law is also affected by developments within international society.[52] Hence, it is important to assess the historical setting prior to *Filartiga* which influenced modern interpretation of the ATCA.

B. International Law after World War II

1. The Recognition of Non-State Actor's Liability Under International Law

The atrocities of World War II led to the development of international human rights law.[53] Human rights law developed to apply to both individuals and states.[54] International human rights law further recognized that states owe a duty to their citizens.[55]

of the Minority, 81 AM. J. INT'L L. 610, 626 (1987) (noting fundamental changes in the United Nations including the adoption of the "Uniting for Peace" resolution); Rajesh Swaminathan, Note, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 COLUM. J. TRANSNAT'L L. 161, 163–69 (1998) (examining the International Monetary Fund and World Bank).

[51] *See* Shelton, *supra* note 9, at 281 (noting changes in international after World War II); *see also* John Alan Cohen, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 299–300 (2003) (detailing changes in international law after the World Trade Center attacks). *See generally* Oleg Tiunov, *Concepts and Features of International Law: Its Relation To Norms of the National Law of the State*, 38 ST. LOUIS L. J. 915, 916 (1994) (speaking generally of how international law changes over time).

[52] *See* Cohen, *supra* note 51, at 298–99 (noting changes after 9/11 on international law and customs); *see also* Shelton, *supra* note 9, at 281 (detailing changes after the Nazi atrocities). *See generally* Tiunov, *supra* note 51, at 916 (noting changes to international law after international events).

[53] *See* MICHEAL FREEMAN, HUMAN RIGHTS 33 (Polity Press ed., Blackwell Publishers Inc. 2002) (stating "the immediate cause of the human rights revival, however, was the growing knowledge of Nazi atrocities in the Second World War"); *see also* Shelton, *supra* note 9, at 281 (noting human rights law the international community response to the atrocities of WWII). *See generally* Koh, *supra* note 4, at 2358–59 (stating end of WWII "dispelled the myth that international law is for states only, re-declaring that individuals are subjects, not objects, of international law").

[54] *See id.* at 2359 (stating "[t]hereafter, private citizens, government officials, nongovernmental organizations and multinational enterprises could all be rights holders and responsible actors under international law..."); *see also* Stephens, *supra* note 1, at 89 (noting her conclusion that "that core human rights norms apply to corporations as well as to states and individuals"). *See generally* Aceves, *supra* note 26, at 262 (arguing that state sovereignty may conflict and lose against *jus cogens* norms, such as the right to life and prohibition against genocide).

[55] *See* Stephen R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 455 (2001) (describing the evolution of international law after WWII acknowledge state responsibility in the area of human rights); *see also* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights*

Human rights developed when states cooperated to implement numerous international organizations, such as the United Nations (UN),[56] to ensure that human rights were respected.[57] The UN Charter establishes human rights as the objective of the organization by listing its third purpose under Article 1.[58] The standard for human rights is also exemplified in the Universal Declaration of Human Rights ('UDHR') adopted by the United Nations General Assembly of on December 10, 1948.[59] The UDHR codified the view that all people are entitled to human rights.[60] The text specifically refers to the respect and promotion of human rights by "every individual, and *every organ of society*."[61] It concludes stating that "nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth

Law, 97 AM. J. INT'L L. 38, 49 n.65 (2003) (arguing that "the affirmative responsibilities of states with respect to the realization of human rights should not be limited to their own citizens or territorial jurisdiction, but should extend to a duty of solidarity and cooperation with other states for the creation and maintenance of an international order in which human rights are realized"). *See generally* Surya P. Subedi, *Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism*, 30 CAL. W. INT'L L.J. 45, 68 (1999) (stating that "it is the duty of the State to promote and protect the rights of its citizens").

[56] The victorious Allies signed the United Nations into effect on October 24, 1945. *See, e.g.*, Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 DAYTON L. REV. 565, 571 n.17 (1996). A brief historical account of the development of the United Nations can be obtained at http://www.un.org/Overview/brief1.html. (last visited April 17, 2004). The UN came into existence on October 24, 1945 in San Francisco "[t]o maintain peace and security." *See* U.N. CHARTER art. 1, para. 1.

[57] *See id.* (noting the end of WWII led to a legal order based on institutions); *see also* Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 541 (1986) (stating "all members of the United Nations all legally bound to observe and respect human rights"). *See generally* Cox, *supra* note 56, at 571 n.17 (quoting the United Nations charter).

[58] *See* U.N. CHARTER art. 30; *see also* Cox, *supra* note 56, at 571 n.17 (quoting the United Nations charter). *See generally* Lee, *supra* note 57, at 541–42 (calling attention to the Charter itself).

[59] *See* Universal Declaration of Human Rights, GA Res. 217 III (A) (1948) [hereinafter "Universal Declaration"] (creating uniform human rights standards); *see also* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 150–51 (Oxford University Press 2000) (noting the significance of the Universal Declaration). *See generally* Mary Ann Glendon, Rights from Wrongs, ch. 9 (forthcoming 2004 manuscript) (detailing the increased protections afforded by the Universal Declaration).

[60] *See* Universal Declaration, *supra* note 59, at III(A) (emphasizing the broad applicability of the Universal Declaration); *see also* STEINER & ALSTON, *supra* note 59, at 150–51 (detailing the "universal" aspects of the Universal Declaration). *See generally* Glendon, *supra* note 59, at ch. 9 (indicating the broad sweep of the Universal Declaration).

[61] *See* Universal Declaration, *supra* note 59, at 71, U.N. Doc. A/810 (1948).

herein."[62] Components of the UDHR are now viewed as customary international law by many nations.[63]

Human rights law was applied to individuals after World War II through "transnational public law litigation."[64] Transnational public law litigation occurred through the enforcement of human rights norms in the international arena in the Nuremberg war crime tribunals.[65] There, German soldiers were held accountable for participating in acts of genocide on behalf of Germany.[66] Their claims of acting under government orders were unjustified in light of the egregious violations they had committed upon the Jewish populations.[67]

The aftermath of the war incorporated non-state actors into the international legal system.[68] It led to the recognition of individual and state accountability for violations of human

[62] *Id.* at art. 30.

[63] *See* Harold Hongju Koh, *Different But Equal: The Human Rights of Persons with Intellectual Disabilities*, 63 MD. L. REV. 1, 5 (2004) (discussing universal acceptance of UDHR); *see also* STEINER & ALSTON, *supra* note 59, at 142–43 (indicating the conjunction between customary international law and the Universal Declaration). *See generally* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 61 (Praeger 1950) (noting the general acceptance of the Universal Declaration).

[64] *See* Koh, *supra* note 4, at 2348–49 (defining transnational public law litigation as involving suits brought by individuals, government officers, and nation states, who in turn sue one another or are sued in domestic courts or other judicial fora and in these suits, the parties involved bring claims under both domestic and international law, otherwise called "transnational" law); *see also* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 6 (1982) (indicating the application of transnational public law litigation after World War II). *See generally* STEINER & ALSTON, *supra* note 59, at 142–45 (detailing the advancement of human rights law through transnational public law litigation).

[65] *See* Koh, *supra* note 4, at 2358–2361 (describing the Nuremberg and Tokyo war crime tribunals as "pierc[ing] the veil of state sovereignty and dispell[ing] the myth that international law is for states only, re-declaring that individuals are subjects not just objects, of international law"); *see also* Aceves, *supra* note 26, at 266 (citing the Charter of the International Military Tribunal to exemplify the normative development of "individual responsibility for human rights abuses"). *See generally* STEINER & ALSTON, *supra* note 59, at 115–21 (noting the role of transnational public law litigation in war crimes tribunals).

[66] *See* Koh, *supra* note 4, at 3258 (discussing Allied powers view of international law after WWII); *see also* Louis Henkin, *International Law: Politics, Values, and Functions*, 216 COLLECTED COURSES OF THE HAGUE LAW ACADEMY OF INTERNATIONAL DROIT 208 (Vol. IV, 1989) (indicating the accountability of German soldiers). *See generally* STEINER & ALSTON, *supra* note 59, at 115–21 (noting the then contemporary view of war crimes).

[67] *See* Koh, *supra* note 4, at 3258 (noting the unsuccessful defense of acting under orders); *see also* Henkin, *supra* note 66, at 208 (indicating the liability of German soldiers). *See generally* STEINER & ALSTON, *supra* note 59, at 115–21(noting the failure of any defense related to acting under orders).

[68] *See* Sohn, *supra* note 64, at 6 (noting the post-war involvement of non-state actors); *see also* Henkin, *supra* note 66, at 208 (detailing the post-war human rights landscape). *See generally* STEINER & ALSTON, *supra* note 59, at 115–21 (surveying the role of non-state actors after World War II).

rights.[69] States were required to respect their citizens' human rights under international human rights law.[70] Human rights were also to be respected by non-state actors.[71] Consequently, these events defined the human rights norms in place today.

2. Globalization and MNCs in Our International System

Globalization existed intermittently over centuries[72] but expanded at a more rapid pace at the end of World War II.[73] The proliferation of globalization was in part due to increased cooperation between nations to recoup from the war.[74] The Allied nations came together in an attempt to ease the economic devastation by creating the World Bank, the International Monetary Fund, and the General Agreement on Tariffs and Trade, now known as the World Trade Organization.[75] These international organizations were implemented to liberalize trade across state boundaries.[76] An open market was expected as

[69] *See* Shelton, *supra* note 9, at 282 (detailing individual responsibility for human rights violations); *see also* Sohn, *supra* note 64, at 10–11 (noting the dual accountability of both states and individuals). *See generally* Henkin, *supra* note 66, at 208 (indicating the application of human rights norms to individuals).

[70] *See* Shelton, *supra* note 9, at 282 (indicating the state's responsibility); *see also* Sohn, *supra* note 64, at 10–11 (detailing the role of states in protecting human rights). *See generally* Henkin, *supra* note 66, at 208 (noting the new functions of states within the human rights context).

[71] *See* THEODOR MERON, HUMAN RIGHTS LAW MAKING IN THE UNITED NATIONS 60 (Oxford University Press 1986) (detailing the accountability of non-state actors); *see also* STEINER & ALSTON, *supra* note 59, at 211–14 (noting the responsibility of non-state actors). *See generally* Shelton, *supra* note 9, at 322 n.8 (describing the roles and responsibilities of non-state actors).

[72] *See id.* (noting that some have noted globalization may gave existed prior to the 15th century); *see also* MERON, *supra* note 71, at 60 (detailing the historical trends in globalization). *See generally* STEINER & ALSTON, *supra* note 59, at 211–14 (indicating the historical development of globalization).

[73] *See* Shelton, *supra* note , at 322 n.8 (explaining the emphasis on international human rights law began with the entrance of globalization as a result of the greater trade between nations at the end of the 19th century and the ramifications of industrialization upon working conditions); *see also* MERON, *supra* note 71, at 60 (detailing the rapid post-war globalization). *See generally* STEINER & ALSTON, *supra* note 58, at 1351–53 (indicating the increased trend towards globalization following World War II).

[74] *See* Freeman, *supra* note 53, at 160 (noting the increased inter-cooperation among nations following World War II); *see also* Shelton, *supra* note 9, at 287 (detailing the post-war interdependent nature of globalization). *See generally* STEINER & ALSTON, *supra* note 59, at 1351–53 (noting the development of post-war globalization).

[75] *See* Freeman, *supra* note 53, at 160 (discussing the creation of the Bretton Woods institutions); *see also* Shelton, *supra* note 9, at 287 (detailing the development of post-war non-state actors). *See generally* STEINER & ALSTON, *supra* note 59, at 1308–09 (noting that the World Trade Organization resulted at the end of the Uruguay Round agreements).

[76] *See* Shelton, *supra* note 9, at 284 (detailing the development of the World Trade Organization); *see also* STEINER & ALSTON, *supra* note 59, at 1334–42 (indicating the

resulting in greater economic wealth to all in the international system.[77]

The MNC is not a new phenomenon. The predecessor to the modern MNC dates back to the 15th century.[78] The modern MNC grew in numbers after the establishment of lenient trade regulations at the end of World War II.[79] In response to the imposition of an open global market, MNCs extended their initiatives into developing countries where abundant resources and cheap labor existed.[80] This expansion into developing countries resulted in substantial profits and growth.[81] As a result, MNCs accumulated considerable economic power.[82] The

human rights function of the World Trade Organization). *See generally* World Trade Organization, *at* http://www.wto.org (discussing the purposes of the organization) (last visited April 17, 2004).

[77] *See* Shelton, *supra* note 9, at 284 (discussing the objective of economic globalization as "improv[ing] economic well being through efficient market exchanges"); *see also* The World Bank Group, *at* www.worldbank.org (stating mission as fighting poverty and improving living standards for those in developing world) (last visited April 17, 2004); The International Monetary Fund, *at* http://www.internationalmonetaryfund.org/external/about.htm (stating organization was founded to promote international monetary cooperation, foster economic growth, and high levels of employment) (last visited April 13, 2004).

[78] *See* Stephens, *supra* note 1, at 45 (discussing history of transnational corporations and noting first business corporations existed in Britain in the 15th century and American transnational corporation dates back to late 1800s); *see also* Elisa Westfield, Note, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1076 (2002) (discussing increasing separation of globalizing economy and globalizing labor and employment). *See generally* Deva, *supra* note 13, at 1–2 (discussing various international mechanisms for regulating MNE human rights concerns).

[79] *See* Stephen G. Wood & Brett G. Scharffs, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV: Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 538 (2002) (arguing a "fundamental change" occurred after WWII when international trade increased "resulting in the emergence of a new private corporation, the transnational corporation ('TNC') or the multinational enterprise ('MNE')"); *see also* Stephens, *supra* note 1, at 56 (explaining that the modern MNC rapidly expanded after WWII because it transgressed international borders to produced and exchange goods and services). *See generally* Deva, *supra* note 13, at 6 (discussing criteria of what constitutes a MNC).

[80] *See* Ayoub, *supra* note 20, at 401 (discussing MNCs expansive role in lesser developed countries in the 1970s); *see also* Deva, *supra* note 13, at 8 (discussing human rights violations that MNC's have been accused of violating). *See generally* Westfield, *supra* note 78, at 1077 (noting focus in last two decades on MNC's rather then host countries in addressing human rights violations).

[81] *See* Ayoub, *supra* note 20, at 401 (stating higher profits resulted from paying workers very little while keeping prices high); *see also* Paul Redmond, *International Company and Securities Law: Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW. 69, 75 n.33 (2003) (discussing possibility of SEC requiring disclosure of social and environmental conditions of over seas operations). *See generally* Stephens, *supra* note 1, at 52 (discussing profits of MNC's).

[82] *See* Wood & Scharffs, *supra* note 79, at 539 (noting the gross sales of several MNCs was much more than GDPs of countries); *see also* Stephens, *supra* note 1, at 52 (listing examples of MNCs that are financially worth more than states). *See generally* Ayoub,

total number of MNCs is now near 35,000 in the world.[83] Thus, MNCs established themselves as dominant actors in international society.

III. THE EVOLUTION OF THE ATCA

The Second Circuit's landmark interpretation of the ATCA in *Filartiga*[84] in 1980 is viewed by many as opening the doors to ATCA litigation.[85] Since *Filartiga*, the majority of suits under the ATCA have primarily involved allegations of violations of international human rights.[86] ATCA litigation has evolved considerably over the last twenty years. Its application has expanded upon the class of defendants and by broadening interpretations of the definition of violations of the law of nations.[87]

This Note argues the development of the ATCA is consistent with the historical context after 1980. The end of the Cold War brought forth further globalization and increased trade between MNCs and states.[88] MNCs in turn gained more economic power within the international system from their interactions with

supra note 20, at 401 (noting increased influence MNC's had on organizing unions and influencing politics in host countries).

[83] *See* Wood & Scharffs, *supra* note 79, at 538–9 (noting that there may be between 35,000 to 37,000 multinational corporations as of early 1990s); *see also* Ayoub, *surpa* note 20, at 402 (discussing vast influence MNC's play in developing countries because of economic constraints).

[84] 630 F.2d 876 (2d Cir. 1980).

[85] *See* Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 104 (2d Cir. 2000) (noting litigants more frequently are seeking redress under ATCA with increased concerns for international human rights); Koh, *supra* note 4, at 2366 (calling *Filartiga* the "*Brown v. Board of Education*" for transnational public law litigants). *See generally* Stephens, *supra* note 43, at 6 (stating *Filartiga* court held official torture is "prohibited by the law of nations" and therefore triggers jurisdiction under the ATCA").

[86] *See Wiwa,* 226 F.3d at 88 (stating suit involved immigrants suing two foreign holding companies alleging human rights violations against them in retaliation for political opposition to companies' practices); Stephens, *supra* note 43, at 6 (discussing series of decisions since 1980 which develop jurisdictional reach under ATCA); *see also* Bradley, *supra* note 26, at 57 (noting ATCA suits predominantly involve claims of human rights violations).

[87] *See Wiwa,* 226 F.3d at 104–05 (discussing ratification in 1991 Act and its condemning of international human rights abuses); Koh, *supra* note 4, at 2371 (noting the expansion of transnational public law litigation). *See generally* Engle, *supra* note 13, at 105 (2004) (discussing wide range of human rights violations internationally).

[88] *See* Shelton, *supra* note 9, at 278 (explaining the ramifications of globalization upon international human rights law); *see also* Engle, *supra* note 13, at 105 (noting a number of industries, such as "flowers, textiles, oil, and diamonds" present themselves to labor exploitation). *See generally* Westfield, *supra* note 78, at 1077 (noting multinational enterprises often are operating in places where actually adjust their laws to entice foreign direct investment).

developing countries.[89] Their investments in such states resulted in human rights violations.[90] Inevitably, they too would be swept under ATCA litigation.

A. Filartiga v. Pena-Irala: The Landmark Decision

On March 29, 1976 Joelito Filartiga was kidnapped and tortured to death by Americo Norberto Pena-Irala in Asuncion, Paraguay.[91] Pena-Irala was Inspector General of Police in Paraguay at the time.[92] Joelito's torture and killing, was argued, took place as revenge for his father's political beliefs.[93] The Filartigas attempted to bring claims against Pena-Irala in Paraguay but were unsuccessful.[94] In 1978, after moving to the United States, the Filartigas learned of Pena-Irala's arrival in the United States, and filed suit in the Eastern District of New York.[95] The Filartigas brought a wrongful death action under the

[89] *See* Ayoub, *supra* note 20, at 401 (noting expansion into developing countries allows MNC's to pay their workers "a pittiance"); *see also* Engle, *supra* note 13, at 105 (stating "companies exploit third world labour because exploitation is profitable"). *See generally* Westfield, *supra* note 78, at 1079 (suggesting accountability for violations should lie in both the company's headquarters government as well as host country).

[90] *See* Ayoub, *supra* note 20, at 402 (noting once international media became aware of such practices, things had to change); *see also* Engle, *supra* note 13, at 105 (listing typical violations as indentured servitude, child labour, and slave labour). *See generally* Westfield, *supra* note 78, at 1081 (noting companies rationalize production abroad by taking advantage of varying costs of labor, capital and raw materials).

[91] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding whenever an alleged torturer is found and served with process by an alien within US borders §1350 provides jurisdiction); *see also* Filartiga v. Pena-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) [hereinafter "*Filartiga II*"] (reviewing facts of case on remand from Second Circuit). *See generally* Stephens, *supra* note 43, at 6 (stating 17 year old Filartiga was tortured in killed because of father's political beliefs).

[92] *See Filartiga*, 630 F.2d at 878 (stating body of Filartiga was shown to his sister at Inspector General's home); *see also Filartiga II*, 577 F. Supp. at 861 (stating Pena-Irala was former Inspector General). *See generally* Stephens, *supra* note 43, at 6 (discussing facts of case).

[93] *See Filartiga*, 630 F.2d at 878 (stating Filartiga's sister was chased after and harassed by Pena-Irala after being shown the body); *see also Filartiga II*, 577 F. Supp. at 861 (stating torture and killing was due to father's opposition to President Alfredo Stroessner's government). *See generally* Stephens, *supra* note 43, at 6 (noting Filartiga's father was opposed to country's military dictatorship).

[94] *See Filartiga*, 630 F.2d at 878 (explaining Filartiga's attorney was arrested and brought to police headquarters after commencing criminal action and shackled to a wall); *see also Filartiga II*, 577 F. Supp. at 861 (explaining jurisdiction of Court of Appeals). *See generally* Stephens, *supra* note 43, at 6 (discussing facts of case).

[95] *See Filartiga*, 630 F.2d at 879 (stating Pena was served while being held for immigration purposes at Brooklyn Navy Yard after overstaying visitors visa); *see also Filartiga II*, 577 F. Supp.at 861 (stating after remand back to Eastern District, Pena took no further action, leading to a default judgment after which question of damages was referred to Magistrate John L. Caden, which Plaintiffs filed objections to, bringing this matter to this court for determination). *See generally* Stephens, *supra* note 43, at 6 (stating Filartiga's father and sister sued for Pena for his torture and death).

ATCA.[96] The Filartigas claim under the ATCA was dismissed by the Eastern District for lack of jurisdiction.[97] The court also held that a violation of the law of nations did not include the law governing a state's own treatment of its citizens.[98]

On appeal, the Second Circuit reversed the district court's dismissal and found that the ATCA both granted federal courts jurisdiction and presented the Filartigas with a cause of action.[99] The court initially analyzed whether official torture violated international law.[100] For this determination, it noted that it was relevant to examine *current* international law rather than the international law that existed when the ATCA was first enacted.[101] In deciding whether acts of torture committed by government officials were violations of "customary international

[96] *See Filartiga*, 630 F.2d at 878 (discussing how the "Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala ...for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito"); *see also* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000) (bringing a claim under the Alien Tort Claims Act, the plaintiff alleged wrongful death among with other state tort claims). *See generally* Lu, *supra* note 33, at 534 (stating that the "Second Circuit's reversal of Filartiga in an opinion authored by Judge Irving R. Kaufman represents the birth of the ATCA as a means for alien plaintiffs to assert jurisdiction in U.S. courts for human rights violations worldwide").

[97] *See Filartiga*, 630 F.2d at 878 (stating that the district court dismissed the action for want of subject matter jurisdiction); *see also Filartiga II*, 577 F. Supp at 861 (stating district courts reasoning for believing it lacked jurisdiction). *See generally* Stephens, *supra* note 43, at 6 (stating procedural history of case).

[98] *See Filartiga*, 630 F.2d at 868 (noting courts reasoning); s*ee Filartiga II*, 577 F. Supp at 880 (discussing how the district judge "felt constrained by dicta contained in two recent opinions of this Court, ... to construe narrowly 'the law of nations,' as employed in §1350, as excluding that law which governs a state's treatment of its own citizens"). *See generally* Stephens, *supra* note 43, at 6 (stating court's reasoning).

[99] *See Filartiga*, 630 F.2d at 885 (discussing jurisdictional question); s*ee also Filartiga II*, 577 F. Supp. at 890 (stating that the court's holding gives effect to the jurisdictional provision of the First Congress). *See generally* Stephens, *supra* note 43, at 7 (stating basis for courts jurisdiction).

[100] *See Filartiga, 630 F.2d* at 880 (stating that the "threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations"); Ratner, supra note 37, at 95 (noting that "[t]he *Filartiga* court extensively inquired into 'the sources from which [Customary International Law] is derived' in deciding whether or not torture constituted a violation of the law of nations"). *See generally* Lu, *supra* note 33, at 534 (discussing how the critical issue was to define the "law of nations" under the ATCA).

[101] *See Filartiga,* 630 F.2d at 881 (stating that "[c]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"); *see also* Alan Frederick Enslen, Note, *Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with Its Decision in* Kadic v. Karadzic, 48 ALA L. REV. 695, 704–05 (1997) (analyzing the opinion in *Kadic v. Karadzic*, the author noted that "[t]he court once again relied on *Filartiga*, . . . in determining what constitutes 'international law,' one should base his judgment upon the law's evolution to date--and not upon a staunchly originalist viewpoint which may freeze the definition at a point in the past"). *See generally* Ratner, *supra* note 37, at 94 (noting that "the *Filartiga* court affirmed that specific norms of the law of nations are fluid and evolve over time").

law," the court surveyed various sources of international law.[102] Upon examining the practice of nations, judicial opinions, and the works of legal scholars, the court concluded that customary international law prohibited state sponsored torture of its citizens.[103] Therefore, Pena-Irala, acting under color of law, committed a violation of the law of nations under the ATCA and the Filartigas were entitled to compensatory and punitive damages.[104]

B. Elements of an ATCA Claim Post-Filartiga

The *Filartiga* court's interpretation and analysis of the ATCA[105] led to increased litigation under the ATCA, particularly in the area of human rights. Consequently, suits were brought under similar situations as in *Filartiga*, involving claims of customary international law violations by state officers.[106]

[102] *See Filartiga*, 630 F.2d at 880 (discussing how different international law has analyzed whether torture constituted violations); *see also Filartiga II*, 577 F. Supp. at 861 (reviewing findings of Second Circuit). *See generally* Stephens, *supra* note 43, at 4 (stating that standard under Filartiga has been failed to have been recognized).

[103] *See Filartiga*, 630 F.2d at 878 (holding that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties"); *see also* Ratner, *supra* note 37, at 94 (discussing how "the *Filartiga* court elaborated that a violation must be one of international concern, and not simply a norm that happens to be outlawed by several independent nations"). *See generally* Lu, *supra* note 33, at 534-45 (mentioning the various sources analyzed by the Supreme Court, it was concluded that although the Court noted that proof of the "general assent of civilized nations" needed to demonstrate a violation of the law of nations had to meet a stringent standard, the *Filartiga* court concluded that official torture satisfied this standard).

[104] *See Filargita II*, 577 F. Supp. at 860. On remand, the district judge awarded judgment for plaintiff Dolly M. E. Filartiga in the amount of $5,175,000 and for plaintiff Joel Filartiga in the amount of $5,210,364, a total judgment of $10,385,364. *Id.* at 867. The landmark decision in this case attracted virtually no attention until the mid 1990's. *See generally* Stephens, *supra* note 43 at 17.

[105] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (analyzing how Judge Bork examines that there is a minority view that argues ATCA does not grant federal courts jurisdiction and a cause of action); *see also* Curtis A. Bradley & Jack L. Goldsmith, III, *Human Rights On the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 320-332 (1997) (discussing how in recent times, it is argued that federal courts cannot ascertain customary international law because the United States political branches have not determined the correct definition of customary international law. Therefore, courts cannot label their findings as equivalent in status to federal common law). *See generally* Ratner, *supra* note 37, at 97 (noting that "[t]he majority of ATCA decisions have followed *Filartiga's* adoption of the [Customary International Law] of human rights as the appropriate standard for adjudicating alleged violations of the law of nations").

[106] *See* Xuncax v. Gramajo, 886 F. Supp. 162, 169 (D. Mass. 1995) (discussing how plaintiffs brought suit against the former Guatemalan Minister of Defense); *see also* Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996) (discussing how plaintiff brought action under the Alien Tort Claims Act against Ghana's Deputy Chief of

Plaintiffs subsequently brought suits against a variety of state defendants, including former heads of state[107] and, although generally unsuccessful, foreign states.[108] The definition of "the law of nations" was also broadened to include a variety of torts claimed as violations of the law of nations. [109] The following section outlines the basic ATCA claim against state officers.

1. Customary International Law Violations and State Action

As discussed above, the *Filartiga* court held that torture committed by state actors was a violation of customary international law.[110] Customary international law is defined as law that "results from a general and consistent practice of states followed by them from a sense of legal obligation."[111] Federal courts have defined customary international law in the same manner that the Second Circuit employed in *Filartiga*.[112] They have analyzed treaties, conventions, state practice, and opinions

National Security). *See generally* Kadic v. Karadzic, 70 F.3d 232, 238-39 (2d Cir. 1995) (discussing norms of international law).

[107] *See* In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 495 (9th Cir. 1992) (discussing how plaintiff brought suit against Ferdinand Marcos, former dictator of the Philippines); *see also* Republic of Philippines v. Marcos, 806 F.2d 344, 346-47 (2d Cir. 1986) (discussing plaintiff's appeal from grant of a preliminary injunction in favor of the Republic of the Philippines and the Former President and First Lady of the Philippines); Tachiona v. Magube, 234 F. Supp. 2d 401, 405 (S.D.N.Y. 2002) (analyzing how plaintiffs, citizens of Zimbabwe, brought suit against the Zimbabwe President and other Zimbabwe government officials).

[108] *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 380 (7th Cir. 1985) (affirming the decision to dismiss plaintiff's suit against the U.S.S.R.); *see also* Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995) (dismissing plaintiffs suit under the Alien Tort Statute against defendants including Abu Dhabi). *See generally* Argentine Republic v. Amerida Hess Shipping Corp., 488 U.S. 428, 431 (1989) (holding the Foreign Sovereign Immunities Act was the only basis for obtaining jurisdiction over a foreign state in U.S. courts).

[109] *See, e.g., Xuncax*, 886 F. Supp. at 168 (discussing how the plaintiffs brought claims for wrongful death, assault and battery, false imprisonment, and intentional infliction of emotional distress). *But see Frolova*, 761 F.2d at 370 (holding in favor of defendant against plaintiff's claims for mental anguish, physical distress, and loss of consortium). *See generally Kadic*, 70 F.3d at 238-39 (discussing how to determine international law).

[110] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding that deliberate torture by official authority violates universally accepted norms of international law).

[111] *See* Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 307-08 (2d Cir. 2000) (citing Restatement (Third) Foreign Relation Law § 102(2)).

[112] *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (examining how to recognize international law); *see also Kadic*, 70 F.3d at 238 (stating that "[b]ecause the Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of §1331"). *See generally* Ratner, *supra* note 37, at 85 (noting that "States must not only generally abide by the norm in practice, but must also feel constrained by international consensus not to deviate from this practice").

of legal commentators to arrive at the definition of current international law.[113] Thus, courts have recognized torture,[114] arbitrary detention,[115] disappearance,[116] and sexual assault[117] as violations of customary international law when acted upon by state officials.[118]

The *Filartiga* court also noted customary international law violations require proof of "state action" in order for a sufficient

[113] *See Filartiga*, 630 F.2d at 881. One of the primary ways that international law is determined is by looking to Article 38 of the Statute of the International Court of Justice (ICJ). There, the Court lists what the universal understanding of what is customary international law. The Statute requires the ICJ to look to sources such as international conventions, international customs, and general principles of law, judicial decision, and the works of legal commentators. Thus, the federal courts seem to apply Article 38 in their analyses. *See also* Ratner, *supra* note 37, at 95 wherein the author states that "[t]he Second Circuit's methodology mirrored the Supreme Court's approach to ascertaining whether a norm had attained the status of the law of nations, and relied on numerous international agreements for positive evidence of general international assent." *But see* In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) where the Ninth Circuit accepted Judge Bork's conclusion from *Tel-Oren* that no private cause of action can be implied from customary international law and instead municipal tort law should be applied.

[114] *See Filartiga*, 630 F.2d at 884 (stating that "having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists, we conclude that official torture is now prohibited by the law of nations."); *see also Kadic*, 70 F.3d at 240 (noting that "[w]e had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filartiga* purports to preclude such a result"). *See generally* Ratner, *supra* note 37, at 95-6 (discussing in detail how the Second Circuit has cited many sources when have determined torture to be a violation of the law of nations).

[115] *See* Alvarez-Machain v. United States, 266 F.3d 1045, 1052 (9th Cir. 2001) (stating that the ATCA reaches violations of customary international law, including arbitrary detention); Martinez v. City of L. A., 141 F.3d 1373, 1384 (9th Cir. 1998) (affirming the international prohibition against arbitrary detention); *see also* De Sanchez v. Banco Cent. de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (explaining that international law recognizes the right not to be arbitrarily detained).

[116] *See* Tachiona v. Mugabe, 234 F. Supp. 2d 401, 416 (S.D.N.Y. 2002) (describing practices universally outlawed by international law); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 373 (E.D. La. 1997) (noting that international law prohibits states from engaging in human rights abuses, including disappearance); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D.Mass. 1995) (finding disappearance to constitute fully recognized violation of international law).

[117] *See* Doe v. Unocal Corp., Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *28-29 (9th. Cir. Sept. 18, 2002) (recognizing that rape violates international law), *vacated and reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003); *Kadic*, 70 F.3d at 242-3 (explaining that rape committed in the course of hostilities violates international law); In re Extradition of Suarez-Mason, 694 F. Supp. 676, 682 (N.D. Cal. 1988) (describing rape as torture and a violation of international law).

[118] *See Beanel*, 969 F. Supp. at 373-374 (noting that with the exception of genocide, state action must be present in order for liability to fix for certain human rights abuses). *See generally Kadic*, 70 F.3d at 239 (expanding liability for some violations of international law from state actors to non-state actors); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794-795 (D.C. Cir. 1984) (observing that while most crimes require state action for ATCA liability to attach, there are several for which individual actors can be liable).

cause of action under the ATCA.[119] Federal courts have interpreted the "state action requirement" for violations of customary international law by looking to our domestic "color of law" jurisprudence.[120]

Acting under "color of law" occurs when one "acts together with state officials or with significant state aid."[121] Under this jurisprudence, federal courts utilize four different tests in determining whether state action exists under the ATCA: (1) the nexus test, (2) the public function test, (3) the symbiotic relationship test, or (4) the joint action test.[122] The nexus test requires proof of a substantially close "nexus" between the state and the alleged conduct in order for the court to trace the action back to the state.[123] The public function test is applicable where "a private entity performs a function traditionally the exclusive prerogative of the State."[124] The symbiotic relationship test may be used where the state has so far insinuated itself into a position of interdependence with a private actor, that "it must be recognized as a joint participant in the challenged activity."[125]

[119] *See Filartiga*, 630 F.2d at 880 (finding that acts of torture committed by state officials against one held in detention violates established norms of the international law of human rights and the law of nations). *See generally Kadic* 70 F.3d at 239 (explaining that liability for violations of international law applies to state, and in some instances, non-state actors); *Beanel*, 969 F.Supp. at 371 (discussing acts violative of international law when committed by state actors).

[120] *See Kadic*, 70 F.3d at 245 (calling "color of law" jurisprudence under § 1983 relevant to whether defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Claims Act); *see also Beanel*, 969 F. Supp. at 380 (applying all four § 1983 tests of state action to analyze conduct of corporate defendants under the ATCA); Doe v. Unocal Corp., 963 F. Supp. 880, 890-891 (C.D.Cal. 1997) (discussing applicability of § 1983 tests of state action to ATCA claims).

[121] *Kadic*, 70 F.3d at 245 (holding that subject-matter jurisdiction exists and that defendant may be found liable for genocide, war crimes, and crimes against humanity in his capacities as both private individual and state actor).

[122] *See* Johnson v. Rodrigues, 293 F.3d 1196, 1202 (10th Cir. 2002) (discussing four tests used to determine whether private parties should be deemed state actors); Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (describing four tests under the state action doctrine); *see also Beanal*, 969 F. Supp. at 376-377 (E.D. La. 1997) (considering four tests used to determine whether private actors have engaged in state conduct for purposes of § 1983).

[123] *See Johnson*, 293 F.3d at 1203 (explaining that under the nexus test, plaintiff must demonstrate a sufficiently close nexus between the government and the challenged conduct); *Gallagher*, 49 F.3d. at 1447-1448 (describing the nature of the inquiry in the nexus test); *see also* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (outlining the contours of the nexus test).

[124] *Beanal*, 969 F. Supp. at 379 (noting that state action can exist when private entities performs functions traditionally the exclusive prerogative of states).

[125] *Id.* at 378 (noting that state action can be established under the symbiotic relationship test if the state "has so far insinuated itself into a position of interdependence" with private parties that "it must be recognized as a joint participant in the challenged activity").

Lastly, the joint action test is met where an individual is a "willful participant in joint action with the state or its agents."[126]

Federal courts were next confronted with the issue of whether individuals acting in their individual capacities could be liable under modern international law.[127] At first, federal courts were hesitant to extend the ATCA's application to private actors,[128] but they soon redefined their interpretation of international law to adapt to the norm of non-state actor liability for certain breaches of international law.[129]

2. Non-State Actors and Violations of *Jus Cogens* Norms

In *Kadic v. Karadzic,* plaintiffs brought suit against Karadzic, leader of the self-proclaimed and non-recognized Srpska republic, located within Bosnia-Herzegovina.[130] The plaintiffs claimed to have suffered the torts of torture, rape, and murder as part of a genocidal campaign by Serbian military forces at the order of Karadzic.[131] The Southern District of New York dismissed for

[126] *Id.* at 379 (quoting Dennis v. Sparks, 449 U.S. 24, 27 (1980)).

[127] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792-793 (D.C. Cir. 1984) (discussing the potential application of international law to individuals for private acts). *See generally* Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (commenting that violation of the law of nations means "at least a violation by one or more individuals"); Adra v. Clift, 195 F. Supp. 857, 864-865 (D. MD. 1961) (finding misuse of passports in child custody disputes violative of international law).

[128] *See Tel-Oren,* 726 F.2d at 792-793 (holding that the Palestine Liberation Organization was not a state actor and thus not liable for torture under international law). *See generally* De Sanchez v. Banco Cent. de Nicaragua, 770 F.2d 1385, 1396-1397 (5th Cir. 1985) (observing that despite erosion of distinctions between injuries to states and to individuals, incorporation of human rights standards into the law of nations remained limited); Doe v. Karadzic, 866 F. Supp. 734, 739-740 (S.D.N.Y. 1994) (discussing the evolution of applications of international law to encompass acts by private actors against individuals), *rev'd,* 70 F.3d 232 (2d Cir. 1995).

[129] *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (holding that certain forms of conduct violate the law of nations whether undertaken by those acting under auspices of states or as private individuals; Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 309-319 (S.D.N.Y. 2003) (surveying application of international law to state actors, individual actors, and corporations); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 12-13 (D.D.C. 1998) (following *Kadic* in applying international law to private actors).

[130] *See Karadzic,* 866 F. Supp. at 736-737 (outlining facts giving rise to plaintiffs' claims); *see also* Enslen, *supra* note 101, at 698-701 (describing factual background of the Kadic v. Karadzic decision); Beth Ann Isenberg, Comment, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the* Karadzic *Actions,* 60 ALB. L. REV. 1051, 1059-1060 (1997) (offering background on *Kadic v. Karadciz*).

[131] *See Karadzic,* 866 F. Supp. at 736 (describing torts allegedly inflicted by Bosnian-Serb military forces under the command of defendant); Enslen, *supra* note 101, at 699 (outlining crimes and injuries allegedly committed at the direction of defendant); Isenberg, *supra* note 131, at 1059-1060 (describing claims for which plaintiffs sought relief).

lack of subject matter jurisdiction based on a finding that private actors could not violate the law of nations.[132]

On appeal, the Second Circuit reversed and found that individuals could be liable for certain violations of international law.[133] The Court first categorized the plaintiffs' claims into three categories: "genocide, war crimes, and other instances of inflicting death, torture and degrading treatment."[134] The court, analyzing international treaties and conventions, concluded that genocide and war crimes were *jus cogens* norms, which by definition could not be derogated by states *or private individuals*.[135] Further, the court reinforced the *Filartiga* holding that torture only violates international law if committed by state officers or those acting under color of law according to customary international law.[136] It concluded Karadzic was liable for torture even though he was not a state officer because the claimed acts were committed in pursuit of genocide and war crimes.[137]

[132] *See Karadzic*, 866 F. Supp. at 744 (dismissing § 1331 claim for lack of subject-matter jurisdiction actions absent an express right of action granted by Congress); Enslen, *supra* note 101, at 701 (describing district court's dismissal based on lack of subject matter jurisdiction under the ACTA); Isenberg, *supra* note 131, at 1060-1061 (analyzing reasons for district court dismissal for lack of subject matter jurisdiction).

[133] *See Kadic*, 70 F.3d at 239 (holding "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals"); Enslen, *supra* note 101, at 703-722 (describing Second Circuit's decision to reverse district court dismissal and hold individuals liable under international law); Isenberg, *supra* note 131, at 1062-1077 (analyzing Second Circuit decision to reverse and hold individuals liable for violations of international law).

[134] *Kadic*, 70 F.3d at 241 (quoting judicial categorization of claims presented before Second Circuit).

[135] *See id.* at 241-43 (examining post-World War II conventions and treaties regarding requirements for genocide and war crimes under international law); *see also* Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988) (specifying that "whoever" commits genocidal acts is punishable by statute without requiring person to be private or state actor); Flores v. S. Peru Copper Corp., 343 F.3d 140, 150 (2d Cir. 2003) (reiterating that war crimes and genocide violate international law whether committed by state actors or private individuals).

[136] *See Kadic*, 70 F.3d at 243 (holding that international law requires torture to be committed by state actors); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (finding that torturous acts carried out by state officials only will be violative of international norms); *see also Flores*, 343 F.3d at 150 (following *Kadic* holding that customary law is violated when executed by state actors).

[137] *See Kadic*, 70 F.3d at 244 (clarifying that although acts are torturous under customary international law, case must be remanded to determine if all statutory elements satisfied). *See generally* Demian Betz, Note, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 173 (2001) (mentioning how appellate court found Karadzic's actions torturous under international law); Enslen, *supra* note 101, at 695 (noting *Kadic* decision and its expansion on torture in realm of international law).

Thus, the ATCA was further broadened in scope by the Second Circuit to comply with modern international law.[138] The court recognized genocide and war crimes as *jus cogens* norms under international law. *Jus cogens* norms are defined as non-derogable norms that may be violated by both states and individuals.[139] This interpretation of the ATCA was consistent with the Nuremberg trials, which imposed individual liability upon German soldiers for committing acts of genocide.[140] Present treaties and conventions also acknowledge that individuals may be accountable for violations of *jus cogens* violations under international law.[141] Accordingly, modern international law was consistently defined by the Second Circuit in finding Karadzic liable. The holding in *Kadic* is also important for it is the basis of accountability used to find the next class of defendants accountable under the ATCA in the early 1990s, MNCs.[142]

[138] "The *Karadzic* decision was also groundbreaking in that the court held that certain international human rights norms were applicable to private actors as well as public actors." Ramasastry, *supra* note 15, at 120. The *Kadic* decision has since been cited in numerous federal courts cases that came after it. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 439 (D.N.J. 1999); Beanal v. Freeport-McMoRan, 969 F.Supp. 362, 371 (E.D. La. 1997).

[139] *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 697, 1155 U.N.T.S. 332, 344 [hereinafter "V.C.L.T."]. The V.C.L.T. defines a *jus cogens* norm as "a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Some legal scholars and courts have defined *jus cogens* norms to prohibit acts of genocide, piracy, slave trade, and crimes against humanity. *See, e.g.*, Alvarez-Machain v. United States, 331 F.3d 604, 613 (9th Cir. 2003); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 404 (1994).

[140] *See* Carl E. Bruch, *The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 VT. L. REV. 695, 730 (2001) (noting that Nuremberg courts rejected idea of sovereign immunity as protection from personal liability for genocidal acts). *See generally* Collingsworth, *supra* note 21, at 191 (commenting on principle developed by Nuremberg tribunal that private individuals can be liable); James McHenry, *Justice for Foca: The International Criminal Tribunal For Yugoslavia's Prosecution of Rape and Enslavement as Crimes Against Humanity*, 10 TULSA J. COMP. & INT'L L. 183, 188-89 (2002) (listing crimes that were charged at Nuremberg including war crimes and crimes against humanity).

[141] *See* V.C.L.T, *supra* note 139, at 344 (adopting standard for nations involved that private individuals are responsible for *jus cogens* violations, such as genocide or war crimes); *see also* International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., para. 4, U.N. Doc. S/RES/955 (1994) (creating agreement that individuals responsible for war crimes or genocide in Rwanda are accountable and must surrender). *See generally* United States v. Yousef, 327 F.3d 56, 94 (2d Cir. 2003) (acknowledging that customary international law may "vitiate" treaty that directly violates *jus cogens* norms).

[142] *See* William J. Aceves, *International Decision*: Doe v. Unocal, 92 AM. J. INT'L L. 309, 312-13 (1998) (recognizing importance of *Kadic* decision on account of emergence of MNCs worldwide); Kieserman, *supra* note 19, at 881-82 (noting how MNCs refuse to accept responsibility for horrendous acts of host nations by claiming inability to become socially

IV. MNC ACCOUNTABILITY UNDER THE ATCA

A. Application to MNCs

Application of the ATCA against an MNC was not successfully employed until the Ninth Circuit decided *Doe v. Unocal.*[143] Unocal, an American multinational corporation, owned a subsidiary in Myanmar.[144] Through their subsidiary, Unocal partook in a natural gas extraction project by setting up a pipeline in Myanmar.[145] Because the project was not welcomed by local population near the area, security was required and Unocal allowed the Myanmar military to be hired to provide security over the project.[146] Unocal was also aware of prior forced labor practices exercised by the Myanmar military. The plaintiffs were villagers from the adjacent area where Unocal's pipeline project was based.[147] The plaintiffs brought suit against Unocal under the ATCA for claims of forced labor, rape, murder, and torture they had been subjected to by the Myanmar military.[148] The

involved); *see also* Ramasastry, *supra* note 15, at 95 (identifying issue of accountability on part of MNCs for their involvement or support of acts that violate customary international norms, such as genocide or war crimes).

[143] Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *1 (9th. Cir. 2002), *reh'g granted*, 2003 U.S. App. LEXIS 2716, at *1 (9th Cir. 2003).

[144] *See id.* at *4-5 (discussing Unocal's participation in foreign nation of Myanmar); Doe v. Unocal Corp., 963 F. Supp. 880, 885 (C.D. Cal. 1997) (outlining Unocal's position in Myanmar and relationship with foreign government). *See generally* Ramasastry, *supra* note 15, at 132 (identifying Unocal as American multinational participating in joint venture with French multinational in Myanmar).

[145] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *6 (specifying exact region of Myanmar that Unocal and its accompanying partners were to lay down pipeline); *Unocal*, 963 F. Supp. at 885 (discussing in detail all aspects of extraction project and pipeline installation throughout Myanmar). *See generally* Aceves, *supra* note 142, at 310 (discussing Unocal's project in Myanmar, including development of natural gas fields and installing pipeline throughout country).

[146] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *6 (recognizing Unocal's rationale in hiring Myanmar military for security in region where pipelines were being laid down). *See generally* Betz, *supra* note 137, at 167-68 (discussing role of Myanmar military as security measure due to village opposition of regional labor practices); Alex Markels, *Showdown for a Tool in Rights Litigation*, N.Y. TIMES, June 15, 2003, § 3, at 11 (stating how Unocal needed to pay military for protection while building pipelines).

[147] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *11 (noting who brought claims against Unocal in this suit); *Unocal*, 963 F. Supp. at 883 (commenting on plaintiffs livelihood as farmers in Tenasserim region of Burma). *See generally* Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J.L. & SOC. PROBS. 35, 38-39 (1998) (describing both parties to claim).

[148] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *12 (listing grounds under which plaintiffs brought suit pursuant to ATCA); *Unocal*, 963 F. Supp. at 883 (noting claims of villagers in class action suit on behalf of all who suffered grave atrocities). *See generally* Markels, *supra* note 146, at 11 (highlighting threats and atrocities by Myanmar military towards villagers who eventually brought suit).

California district court granted Unocal's motion for summary judgment because it did not find that plaintiffs had shown Unocal had "actively participated" in the forced labor.[149]

The Ninth Circuit reversed and found Unocal could be liable for "aiding and abetting" the Myanmar military in committing violations of international law.[150] The court's analysis first began by defining forced labor as a violation of modern international law.[151] The court then cited to *Kadic* in explaining specific situations where private actors could be liable under the ATCA for violations of *jus cogens* norms, thereby not requiring proof of state action.[152] It determined forced labor was the modern day equivalent of slavery and, therefore, a violation of a *jus cogens* norm.[153] The court subsequently turned to international criminal law to define the aiding and abetting standard as "knowing, practical assistance, or encouragement that has a substantial effect on the perpetration of the crime."[154] Applying this aiding

[149] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *25 (summarizing District Court dismissal); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1306 (C.D.Cal. 2000) (explaining why Unocal not responsible for any claims brought under ATCA). *See generally* Tawny Aine Bridgeford, Note & Comment, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1034 (2003) (noting California district court's decision for not finding Unocal liable).

[150] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *55 (concluding that aiding and abetting is identifiable here as to Unocal, but genuine issues of material fact exist as to elements of claim for lower court to resolve); *cf.* Barrueto v. Larios, 205 F.Supp.2d 1325, 1333 (S.D. Fla. 2002) (noting that conspiracy to aid and abet is also violative of customary international norms). *See generally* Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 49-50 (reiterating Ninth Circuit's decision to remand aiding and abetting claim to district court).

[151] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *29 (referring to court's initial step in determining violation of international law existed); *see also* Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 440 (D.N.J. 1999) (acknowledging that forced labor is violation of customary international law). *See generally* Peter Moser, *Restitution Negotiations – The Role of Diplomacy*, 20 BERKELEY J. INT'L L. 197, 198 (2002) (noting that forced labor has been international violation since 1907).

[152] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *30 (recognizing *Kadic* as source for holding private actors liable for *jus cogens* violations); *see also supra* note 135 and accompanying text (discussing *Kadic* holding). *See generally* Aceves, *supra* note 142, at 312-13 (specifying how court expanded *Kadic* holding to private corporations in addition to private individuals).

[153] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *32 (finding forced labor does not require state action); *see also* Weidenfeller v. Kidulis, 380 F. Supp 445, 450 (E.D. Wis. 1974) (stating forced labor of particular classes of people constitutes thirteenth amendment violation). *See generally* Pollack v. Williams, 322 U.S. 4, 17 (1944) (explaining purpose of Thirteenth amendment was to implement market of "completely free and voluntary labor throughout the United States").

[154] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *35-36. The court determined that the standard for aiding and abetting in our domestic tort law was similar to that under international criminal law. It noted how several district courts had looked to international criminal law in determining which standard to use when analyzing international human

and abetting standard, evidence existed to create a material question of fact as to whether forced labor had been used in connection with the pipeline project.[155] The court did not find proof of "state action" was required in proving acts of murder and rape because these acts were committed in furtherance of forced labor, a *jus cogens* norm.[156] However, the court did note Unocal would only be liable for the crime of torture with a showing of "state action"[157] as required under the *Filartiga* holding. Thus, the international norm of individual responsibility was held to extend to MNCs.[158]

The *Unocal* decision is viewed as a step forward for human rights activists who have long advocated for corporate accountability for violations of human rights law.[159] Since the *Unocal* decision, other corporations have yet to be found accountable under the ATCA.[160] This decision has placed

rights law under the ATCA. *Id.* at 44-45. The court then looked to the decisions of the International Criminal Tribunal for Rwanda in determining the correct standard used in international law. *Id* at 45.

[155] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *51-53 (explaining how testimony of witnesses could lead factfinder to conclude *actus reus* requirement satisfied); Linda A. Malone, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV 365, 368 n.2 (2002) (stating allegations that corporation aided and abetted the military government in forced labor, torture and rape); *see also* John Quigley, *American Style in International Human Rights Adjudication*, 19 OHIO ST. J. ON DISP. RESOL. 249, 250 (2003) (describing allegations of plaintiffs as based on corporation facilitation).

[156] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *36-57 (concluding "active participation" standard inappropriate in this situation); *see also Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (holding state action is not requirement for liability pursuant to the ATCA); Malone, *supra* note 155, at 368 n.2 (explaining complaint based on the ATCA is exception to state action requirement in federal court).

[157] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *58 (noting record indicates issue of material fact regarding murder and rape charges); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (explaining broad and current interpretation of ATCA); Brian C. Free, Comment, *Awaiting* Doe v. Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinion in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467, 471 (2003) (describing scope of *Filartiga* holding as applying to current societal standards).

[158] *See* Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir. 2001) (stating jus cogens violation is not mandatory to satisfy standard); Natalie L. Bridgeman, *Human Rights Under the ATCA as a Proxy For Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 8 n.27 (2003) (explaining holding in *Unocal* extends to violations of current international standards that are not jus cogens violations); *see also* Free, *supra* note 157, at 472 (concluding ATCA claims are important components of corporate liability for human rights violations).

[159] *See* Malone, *supra* note 155, at 365 (noting human rights activists can provide remedy for human and environmental damages); *see also* Bridgeman, *supra* note 158, at 2 (stating that the ATCA has developed into feasible method for liability abroad with human rights violations); Free, *supra* note 157, at 472 (explaining human rights activists have sued MNCs under the ATCA).

[160] *See generally* Aldana v. Del Monte, No. 01-3399, 2003 U.S. Dist. Lexis 24343, at *2 (S.D.Fla 2003) (dismissing ATCA claim filed by Guatemalan citizens against defendants

corporations on notice because of the likelihood further suits will be filed against them in light of the ongoing human rights violations in countries with which they or their subsidiaries continue to contract with.[161]

B. Possible Applications to MNCs

Current application of the ATCA makes MNCs potentially liable for violations of international law under two standards: violations with proof of "state action" or violations of *jus cogens* norms. Legal commentators have also stated MNCs may be found to violate customary international law through the notion of "corporate complicity."[162] Corporate complicity occurs when MNCs are found acting as accomplices to violations of international law acted upon by the host states.[163] These commentators have identified three categories of corporate complicity,[164] which include direct complicity, indirect complicity,

alleging human rights violations). *But see* Bangor v. Citizens Communs. Co., No. 02-183-B-S, 2003 U.S. Dist. Lexis 16667, at *6 (D. Me 2003) (recommending court deny motion to dismiss claim against third party defendant for lack of personal jurisdiction); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 314 n.24 (S.D.N.Y. 2003) (concluding that even though *Unocal* decision was ordered for rehearing, there is "overwhelming precedent" for proposition that corporations are liable under the ATCA).

[161] *See Talisman,* 244 F. Supp. 2d at 314 n.24 (noting many courts have upheld claims of human rights violations under ATCA against multinational corporations); Bridgeman, *supra* note 158, at 4 (stating the ATCA is viable method for bringing claims against corporations for environmental abuses); *see also* Free, *supra* note 157, at 473 (commenting on expert predictions of increased litigation against corporations following *Unocal* decision).

[162] *See* Ramasastry, *supra* note 15, at 92 n.4 (noting the term corporate complicity was first used by the non-governmental organization Human Rights Watch); *see also* John Haberstroh, Note, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts,* 10 ASIAN L.J. 253, 280 (2003) (explaining how to establish private individual liability). *See generally* Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act,* 26 YALE J. INT'L L. 487, 493 (2001) (noting definition of complicity).

[163] *See* Ramasastry, *supra* note 15, at 100 (defining corporate complicity); *see also Talisman,* 244 F. Supp. 2d at 296 (stating plaintiff's claim alleging defendant's complicity with government); Forcese, *supra* note 162, at 509 (noting courts have found corporate complicity in situations similar to "color of law" matters).

[164] *See* Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses,* (Mar. 21, 2001), *available at* http://www.business-humanrights.org/Home (outlining and explaining three categories of corporate complicity); *see also* Bridgeford, *supra* note 149, at 1028 n.91 (noting direct complicity depends on whether corporation "knowingly benefits from human rights abuses"). *See generally* Ramasastry, *supra* note 15, at 101 (explaining categories Clapham and Jerbi have noted in their article on corporate complicity).

and "mere presence in the country, coupled with complicity through silence or inaction."[165]

1. *Jus Cogens* Violations

MNCs may be accountable for violations of *jus cogens* norms through direct complicity or by directly committing such violations under the *Kadic* holding.[166] There are a limited group of *jus cogens* norms, which exist under international law and are recognized by federal courts.[167] Such recognized *jus cogens* norms are those prohibiting acts of piracy, war crimes, genocide, crimes against humanity, and slavery.[168]

As was noted, the *Unocal* redefined forced labor as the modern day equivalent of slavery,[169] thereby expanding the possible application to MNCs in light of their use of labor abroad. It has been established that during World War II, MNCs profited from slave labor that occurred in their manufacturing plants abroad.[170] Further, *Unocal* holds that plaintiffs could bring suits

[165] Ramasastry, *supra* note 15, at 101 (listing this as the third category of corporate complicity).

[166] *See* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995) (holding state action is not requirement for liability pursuant to ATCA); Bridgeford, *supra* note 149, at 1028 n.91 (explaining direct complicity is based on foreseeable detrimental effects caused by assistance); *see also* Ramasastry, *supra* note 15, at 100 (specifying ways corporation may be liable for violating international law).

[167] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1994) [hereinafter "Restatement"] (listing *jus cogens* norms as those which states may exercise universal jurisdiction over); *see also Kadic*, 70 F.3d at 239, 240 n.3 (reviewing list of violations of international law); Free, *supra* note 157, at 471 (noting that since *Filartiga*, courts have allowed various abuses that constitute violations).

[168] *See* Restatement, *supra* note 167 (listing *jus cogens* norms as those which states may exercise universal jurisdiction over); *see also* Kadic, 70 F.3d at 239, 240 n.3 (reviewing list of violations of international law); Free, *supra* note 157, at 471 (noting that since *Filartiga*, courts have allowed various abuses that constitute violations).

[169] Doe v. Unocal Corp., Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th. Cir. Sept. 18, 2002), at *32 (finding forced labor does not require state action), *vacated and reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003); *see also Weidenfeller v. Kidulis*, 380 F. Supp 445, 450 (E.D. Wis. 1974) (stating forced labor of particular classes of people constitutes thirteenth amendment violation). *See generally* Pollack v. Williams, 322 U.S. 4, 17 (1944) (explaining purpose of thirteenth amendment was to implement market of "completely free and voluntary labor throughout the United States").

[170] *See* In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942-3 (N.D. Cal 2000). The district court dismissed the suit finding the 1951 Treaty of Peace with Japan settled any claims of reparations Allied nationals had against Japan and therefore waived any claims plaintiffs held. *Id.* at 949. *In re World War II* was decided prior to *Unocal* and plaintiffs did not invoke the ATCA because they were U.S. citizens. Arguably, foreign nationals of the Allied nations could bring forth suit under the ATCA in the Ninth Circuit against foreign corporations involved in such practices during WWII. *See also* Stefan A. Riesenfeld, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 74 n.162 (2002), for a discussion regarding

against MNCs for such forced labor violations.[171] This concept can further be extended to MNCs who use child labor in their foreign production plants[172] if federal courts choose to interpret child labor under the definition of forced labor. Moreover, MNCs may also be directly liable for committing violations of customary international law like torture, committed in furtherance of any *jus cogens* norms.[173] It is doubtful MNCs have directly committed violations of *jus cogens* norms since it is the host governments with whom they contract who are directly involved in the actual commission of violations.[174] However, it is possible that such regimes could commit a genocidal campaign while under contract with MNCs and therefore pass on liability to MNCs under the *Kadic* finding of individual accountability for acts committed in the furtherance of *jus cogens* violations.[175]

pharmaceutical industry involvement. For discussion about Japanese corporations use of forced labor, see Haberstroh, *supra* note 162, at 254-5.

[171] *See Unocal*, 2002 U.S. App. LEXIS 19263, at *83 (reversing district court judgment which granted summary judgment in favor of corporation for ATCA claims); *see also Talisman*, 244 F. Supp. 2d at 314 n.24 (concluding that even though *Unocal* decision was ordered for rehearing, there is "overwhelming precedent" for proposition that corporations are liable under ATCA); Free, *supra*, note 157, at 473 (commenting on expert predictions of increased litigation against corporations following *Unocal* decision).

[172] *See* Small Change, Bonded Child Labor in India's Silk Industry, Human Rights Watch India, (Jan. 2003) *available at* http://www.hrw.org/reports/2003/india (exposing how child labor is still rampant in India's silk industry, with children labeled "untouchables" predominantly involved); *see also* Bullard, *supra* note 17, at 175 (stating MNCs promote full time employment of underage children); Jenness Duke, *Enforcement of Human Rights on Multi-National Corporations: Global Climate, Strategies and Trends for Compliance*, 28 DENV. J. INT'L L. & POL'Y 339, 345 (2000) (discussing resulting effects when MNCs "rush" to low wage markets where child labor exists).

[173] *See Kadic*, 70 F.3d at 239 (disagreeing that laws of nation confine their reach only to state action); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOR. AFF. 81, 87 (1999) (discussing trend in recent cases stating MNCs may be held directly liable for violating norms of customary international law); *see also* Ramasastry, *supra* note 15, at 150 (listing types of crimes for which an MNC can be directly liable).

[174] *See* Ramasastry, *supra* note 15, at 92 (classifying most MNCs as accomplices to the host government); *see also* Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 404 (2002) (explaining how in recent civil actions, acts complained of were usually joint ventures between MNCs and foreign host governments). *See generally* Zia-Zarifi, *supra* note 173, at 86-87 (discussing interplay between MNCs and host governments).

[175] *See generally* Kadic, 70 F.3d at 238-39 (discussing how to determine what is international law); Enslen, *supra* note 101, at 705 (explaining how court determined what constitutes international law); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U.L. REV. 1289, 1295 n.26 (1997) (noting courts may use various sources to establish international law principles).

2. Customary International Law Violations and State Action

MNCs may violate customary international law under all three categories of complicity. MNCs may be accountable for aiding a foreign government and, therefore, acting as an accomplice or as a joint actor complicit in "state action" violating customary international law.[176] Proof of "state action" was successful under the joint action test in *Unocal*.[177] Consequently, plaintiffs may find it easier to prove "state action" under this test to show complicity.

One major obstacle for plaintiffs bringing suits against MNCs under the ATCA is pleading a recognized violation of international law.[178] For example, plaintiffs have been unsuccessful pleading claims of environmental harm as a violation of the law of nations. The Fifth Circuit has not found environmental law claims to have reached the status of customary international law in *Beanel v. Freeport McMoRan*.[179] Similarly, "cultural genocide" has yet to achieve the status of customary international law.[180] Arguably, because customary international law is continually evolving in light of state practice,

[176] *See* Ramasastry, *supra* note 15, at 100 (discussing ways in which MNCs may be accountable for violations). *But see* Gary Clyde Hufbauer & Barbara Oegg, *Reconciling Political Sanctions With Globalization and Free Trade: Economic Sanctions: Public Goals and Private Compensation*, 4 CHI. J. INT'L L. 305, 327 (2003) (positing that MNCs could end up not investing in business in developing countries if they find themselves punished from their liability); Lucinda Saunders, Note, *Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT'L L.J. 1402, 1454 (2001) (claiming evidence of MNCs' participation in violations of international law can be hard to obtain).

[177] *See* Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th. Cir. Sept. 18, 2002), at *107-12 (describing joint venture liability and that plaintiffs should proceed to trial under it), *vacated and reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003). *See generally* Ramasastry, *supra* note 15, at 146-49 (explaining state action test and international law); Erin L. Borg, Note, *Sharing the Blame for September Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad*, 20 ARIZ. J. INT'L & COMP. L. 607, 619-22 (2003) (discussing interplay of state action requirement and MNC liability).

[178] *See* Beanal v. Freeport-McMoRan Inc, 969 F. Supp. 362, 384 (E.D.La. 1997) (affirming district court's dismissal), *aff'd*, 197 F.3d 161 (5th Cir. 1999); Saunders, *supra* note 176, at 1453-54 (describing plaintiffs as having to plead "high factual threshold" to have continuation of case under the ATCA); *see also* Zia-Zarifi, *supra* note 173, at 123 (noting ATCA plaintiffs encounter steep factual barriers to recovery).

[179] 969 F. Supp. 363, *aff'd*, 197 F.3d 161 (5th Cir. 1999).

[180] *See id.* at 373 (discussing problems with claim of "cultural genocide"). *But see* Stefanie Ricarda Roos, *Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement Through the Prohibition of Genocide and Ethnocide?*, 9 HUM. RTS. BR. 14, 17 (2002) (opining that in certain contexts, "cultural genocide" may ascend to levels of customary international law). *See generally* Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (2004) (defining offense of genocide).

such violations may eventually be recognized as valid violations of international law.[181]

Successful claims of violations against MNCs of economic, social, and cultural rights are likely to come under the Universal Declaration of Human Rights (UDHR).[182] The UDHR, which specifically sets forth the principle that non-state actors are liable for violations of human rights,[183] has existed for over forty years, and parts of it are viewed as customary international law.[184] In light of state practice and the length of time it has existed, courts could arguably find the principles set forth under the UDHR are *jus cogens norms* or at the very least customary international law.[185] Further proof of the status of economic, social, and cultural rights as customary international law is exemplified in the International Covenant on Cultural and

[181] *See generally* Kadic v. Karadzic, 70 F.3d 232, 238-39 (2d Cir. 1995) (noting constantly changing and "evolving" international law); Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1979) (claiming courts must interpret international law in its evolved state); Roger D. Scott, Note & Comment, *Territorially Intrusive Intelligence Collection and International Law,* 46 A.F. L. REV. 217, 217 (1999) (exemplifying situations where international law has evolved).

[182] *See* Universal Declaration, *supra* note 59, at pmbl. (recognizing inherent dignity of members of "human family"); *see also* Rhoda E. Howard, *Capitalism and Human Rights,* 5 BUFF. HUM. RTS. L. REV. 283, 288 (1999) (exhibiting why multinational enterprises must behave with regard to human rights); Ramasastry, *supra* note 15, at 95-96 (stating MNCs have important role in protecting human rights).

[183] *See* Universal Declaration, *supra* note 59, at art. 30 (setting forth in Article 30 that any "State, group or person" may not engage in activity destructive of rights set forth in declaration); *see also* Shelton, *supra* note 9, at 284 (stating that Universal Declaration provides foundation for application of human rights law to non-state actors). *See generally* Ronald C. Slye, *International Human Rights Law in Practice: International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law,* 2 CHI. J. INT'L L. 59, 69-70 (2001) (explaining that application of human rights law to non-state activity is "growing area of inquiry").

[184] *See* Stephens, *supra* note 1, at 81 (stating that Universal Declaration is "now considered to be binding, in important part, if not in total"); *see also* Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law,* 25 GA. J. INT'L & COMP. L. 287, 319 (1995/1996) (recognizing how many see Universal Declaration as "contributing to the development of customary law of human rights binding on all states"). *But see* August Reinisch, Note & Comment, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions,* 95 AM. J. INT'L L. 851, 862 (2001) (claiming there is no consensus that rights in Universal Declaration represent established customary law).

[185] *See generally* Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused,* 90 AM. J. INT'L L. 235, 238 (1996) (stating Universal Declaration reflects some *jus cogens* norms to considerable extent); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law,* 87 AM. J. INT'L L. 42, 75 n.154 (1993) (saying that Universal Declaration principles "unquestionably" qualify as customary international law); Lisa L. Turner & Lynn G. Norton, *Civilians at the Top of the Spear,* 51 A.F. L. REV. 1, 75 (2001) (positing how many provisions of Universal Declaration reflect customary international law).

Political Rights (ICCPR).[186] The CESCR came into force over twenty years ago and has been ratified by 146 countries.[187] The CESCR establishes all people as having the right to paid labor and sanitary working conditions.[188] It has been noted that some MNCs' foreign factories operate under dangerous working conditions or pay low salaries.[189] Federal courts may use the CESCR as evidence of customary international law against low wages or poor working conditions and apply it to MNCs based on *Unocal*'s holding and the general trend of proscribing labor and human rights violations.

V. A JUSTIFICATION FOR MNC ACCOUNTABILITY UNDER THE ATCA

While it is evident that MNCs can be liable for violations of international human rights law, this Note further argues that it

[186] *See* International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter "ICESCR"]. The ICESCR provides substantive definitions of economic, social, and cultural rights including rights related to fair labor and livable conditions. The United States is a signatory to the ICCPR. A general overview of the ICESCR the Committee on Economic, Social, and Cultural Rights is *available at* http://www.unhchr.ch/html/menu6/2/fs16.htm#3 (last visited Apr. 18, 2004). However, some feel that ICESCR is "short about the foundations of human rights in moral and political thought." *See, e.g.*, James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association,* 3 EMPLOYEE RTS. & EMP. POL'Y J. 65, 66-67 (1999). For the most part, however, the ICESCR is viewed as advancing a significant change in international law. *See generally* Rick Sarre, *Seeking Jusitice: Critical Perspectives of Native People: The Imprisonment of Indigenous Australians: Dilemmas and Challenges for Policymakers,* 4 GEO. PUBLIC POL'Y REV. 165, 167 (1999).

[187] *See* Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (Nov. 2, 2003), *available at* http://www.unhchr.ch/pdf/report.pdf (listing ratifying countries); *see also* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent,* 96 AM. J. INT'L L. 531, 546-47 (2002) (telling which countries were among first to ratify ICCPR). *See generally* Thomas M. Frank, *Of Gnats and Camels: Is There a Double Standard at the United Nations?,* 78 AM. J. INT'L L. 811, 820-821 (1984) (discussing requirements of ICCPR).

[188] *See* ICESCR, *supra* note 186, at art. 7 (articulating such rights of people); *see also* Yuri I. Luryi, *Legal Problems of Vocational and Professional Training During the Soviet Period of Stagnation,* 42 CLEV. ST. L. REV. 607, 616 (1994) (quoting work rights mentioned in ICESCR); Neil A. Friedman, Comment, *A Human Rights Approach to the Labor Rights of Undocumented Workers,* 74 CAL. L. REV. 1715, 1729 (1986) (mentioning work rights and labor standards guaranteed in ICESCR).

[189] *See* Stephens, *supra* note 1, at 52 (noting that investigations have found Disney, Nike, and Levi Straus have factories where abuses such as "unpaid overtime, child labor, illegally low wages and dangerous working conditions" exist); Borg, *supra* note 177, at 609 (detailing unfair labor practices MNCs are accused of committing); *see also* Ryan P. Toftoy, Note, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?,* 15 ARIZ. J. INT'L & COMP. L. 905, 905-06 (1998) (setting forth international labor abuses in which MNCs engage).

is justified for MNCs to be held accountable under the ATCA for international law violations. The ATCA may only be applied when federal courts have jurisdiction over defendants. Consequently, the United States is not crossing its jurisdictional boundaries.[190] Additionally, the ATCA has been held to give plaintiffs a cause of action.[191] Also, as above, plaintiffs must plead a violation of international law.[192] Thus, certain activities have not been deemed violative international law norms. Consequently, the application of the ATCA will be persistent with current international law.[193] In applying the ATCA, federal courts are therefore not stepping outside of jurisdictional boundaries.[194] This is the legal justification; however, there are additional societal justifications for why MNCs should also be held accountable under the ATCA.

[190] *See generally* Zia-Zarifi, *supra* note 173, at 146 (opining that "[w]hile no American court has yet found an MNC liable under ATCA, I believe that such an outcome is certain in the near future"); Logan Michael Breed, Note, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1013-14 (2002) (stating U.S. courts only recognize limited claims under ATCA, leaving many human rights violations of MNCs outside its scope); Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 930 (1998) (claiming MNCs must be held liable for human rights violations and move towards such liability should be made under ATCA).

[191] *See* Abebe-Jira v. Negweo, 72 F.3d 844, 848 (11th Cir. 1996) (concluding that the Alien Tort Claims Act provides a federal forum for violations of international law); Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1354 (S.D. Fla. 2001) (noting private right of action for plaintiffs under ATCA); *see also* 28 U.S.C. 1350 (2004) (granting district courts original jurisdiction over civil actions by an alien tort committed in violation of United State law).

[192] *See id.* (stating that there must be a "violation of the law of nations); Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (noting that plaintiffs must plead violation of "international norms"); Hilao v. Estate of Marcos, 25 F.3d 1468, 1475 (9th Cir. 1994) (explaining that "actionable violations of international law must be of a norm that is specific, universal, and obligatory").

[193] *But see* Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 372–75 (2001) (discussing doctrinal problems with ATCA and international law). *See generally* John F. Carella, Comment, *Of Foreign Plaintiffs and Proper Fora, Forum Non Conveinens and ATCA Class Actions*, U. CHI. LEGAL F. 717, 722 (2003) (noting that "several aspects of international law support Congress's endorsement of the ATCA"); Lu, supra note, 33 at 548 (observing that United States courts must first interpret § 1350 before evaluating international law).

[194] *See* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1131 (C.D. Cal. 2002) (noting jurisdictional elements under ATCA); Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 548 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984) (listing three elements that must be present for jurisdiction to vest under § 1350, namely that the claim must be made by an alien, it must be for a tort, and the tort must be in violation for the law of nations or the treaties of the United States); *see also* 28 U.S.C. 1350 (conferring jurisdiction on district courts).

First, MNCs possess enormous power in terms of their wealth and size, exerting formidable control over host countries.[195] They are in the best position to see that human rights norms are followed. Furthermore, their stature equates them to that of states. Second, MNCs' conduct abroad is not governed by any international organization or host states.[196] In addition, voluntary corporate codes of conduct are inefficient as is evidenced with the presently continuing human rights abuses.[197] Lastly, MNCs as legal persons and global citizens, have moral and ethical duties in international society.[198] Consequently, the federal courts' application of the ATCA is a justified internalization of current international human rights norms upon MNCs.

[195] *See* Douglas M. Branson, *The Globalization of Corporate and Securities Law in the Twenty-first Century: The Social Responsibility of Large Multinational Corporations*, 16 TRANSNAT'L LAW 121, 130–33 (2002) (discussing the enormous size of multinational corporations); *see also* Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 285–87 (2001) (hypothesizing that globalization has conferred vast amounts of wealth on multinational corporations); Jennifer M. Siegle, Comment, *Suing U.S. Corporations in Domestic Courts For Environmental Wrongs Committed Abroad Through the Extraterritorial Application of Federal Statutes*, 10 U. MIAMI BUS. L. REV. 393, 394 (2002) (noting the MNCs are "important economic assets" which host countries do not want to lose).

[196] *See Developments in the Law: International Criminal Law v. Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2045 n.129 (2001) (suggesting setting up an international civil court to adjudicate human rights claims against MNCs); *see also* Paul, *supra* note 195, at 286–90 (contrasting United States lack of participation in international tribunals with marked increase of private plaintiffs seeking redress against multinational corporations in domestic courts). *See generally* Carella, *supra* note 193, at 122 (noting that while United States is not a member of International Criminal Court, they do recognize the international law doctrine of universal jurisdiction).

[197] *See* Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 312 n.165 (2003) (discussing failure of voluntary codes); Saunders, *supra* note 176, at 1436–37 (noting lack of serious standards to deal with MNCs); *see also* Steven Greenhouse, *Groups Reach Agreement for Curtailing Sweatshop*, N.Y. TIMES, Nov. 5, 1998, at A20 (summarizing code of conduct set up to curtail sweatshops).

[198] *See* Jacques de Lisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Ambushes Abroad*, 52 DEPAUL L. REV. 473, 492 (2002) (noting corporate responsibility and "human rights duties"); *see also* Anderson, *supra* note 13, at 468 (commenting that while a moral duty cannot be forced on a corporation, they should have a legal duty to respect human rights); Ratner, *supra* note 55, at 461–66 (discussing need for corporate responsibility for protecting human rights).

A. The Economic Power of MNCs

The end of the Cold War further opened the doors to globalization.[199] Trade liberalization led to MNCs further investing in newly independent states and lesser-developed countries.[200] MNCs are enormously wealthy and at times economically more powerful than developed countries.[201] In a recent survey comparing revenues of states and MNCs, only seven countries had larger economies than General Motors.[202] Such wealth arguably places MNCs at a huge advantage in their relations with developing countries.

A "liberal view" defines MNCs as powerful entities controlling the relations of developing countries.[203] Consequently, developing

[199] *See* FREEMAN, *supra* note 53, at 149 (stating "[t]he end of the Cold war was a victory of liberal capitalism over authoritarian socialism..."); *see also* Reed, *supra* note 1, at 221 (arguing the end of the Cold War has accelerated "the globalization of commerce and telecommunications"). See generally Ratner *supra* note 55, at 458 (discussing expansion of globalization after at the end of the Cold War).

[200] *See* Ellinikos, *supra* note 20, at 1 (noting American MNCs expanded operations to countries in Asia, Latin America and Eastern Europe); *see also* Reed, *supra* note 1, at 224–25 (discussing the growth and role of MNCs since the end of the Cold War). *See generally* Ruti G. Teitel, *Theoretical and International Framework: Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893, 895–97 (2003) (discussing nation building after the cold war).

[201] Unilever-Best has an annual turnover that exceeds the gross domestic product of most countries, including Kenya and Ecuador. *See* Branson, *supra* note 195, at 131. According to United Nation statistics, multinationals are wealthier than over one hundred twenty nation members of the United Nations. *See* Bruce Mazlish, *Perspectives on Globalization from Developing States: A Tour of Globalization*, 7 IND. J. GLOBAL LEG. STUD. 5, 11–12 (1999). The Corporate Globalization Fact Sheet notes that Venezuela's gross domestic product is less than Royal Dutch Shell's total revenues and that Wal-Mart's revenues are also larger than Indonesia's gross domestic product. *See* Corporate Globalization Fact Sheet, Corporate Watch, Mar. 22, 2001, *available at*, http://www.corpwatch.org/ issues/PID.jsp?articleid=378 (last visited Mar. 5, 2004) (Hereinafter "Fact Sheet").

[202] *See* Global Policy Forum, Comparison of Revenues Among States and TNCs, May 10, 2000 (showing that only seven countries, United States, Germany, Italy, the United Kingdom, Japan, France, and the Netherlands have larger economies than General Motors as of May 10, 2000), *available at* http://www.globalpolicy.org/socecon/tncs/tncstat2.htm (last visited Mar. 4, 2004); *see also* Stephens, *supra* note 1, at 57 n.59 (citing to *Global Policy Forum*). *See generally* Cassel, supra note 10, at 1979 (quoting fact that "Ford's economy is larger than Saudi Arabia's and Norway's").

[203] *See* THE MULTINATIONAL CORPORATION AND SOCIAL CHANGE, CHARTERS, CARTELS, AND MULTINATIONALS, Chapter 1 at 17 (defining "liberal view" as placing MNCs as their own financial enterprises with their own jurisdictions). *See generally* David Weissbrodt & Muria Kruger, *Current Development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 907–09 (2003) (discussing competing definitions of transnational and multinational corporations); Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740 (1970) (defining a multinational enterprise as "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy").

countries find MNC investment appealing in the hopes of bringing wealth to their countries.[204] To attract foreign direct investment, these governments strive to offer the cheapest labor and natural resources to MNCs.[205] They may also feel obligated to relax labor standards[206] and are less likely to reprimand violators of human rights laws for fear of losing MNC investment.[207] While these host states have a duty to enforce human rights norms, they will unlikely become involved in litigation that would detract foreign direct investment.[208] However, the absence of action against MNCs for violations of human rights law by host states does not detract from MNCs' duties under international law.

As a result of their power in relations with developing countries, MNCs can have a significant impact on human rights. MNCs are influential in ensuring countries they contract with abide and respect international law because they hold the power

[204] The dominant neo-liberal ideology has meant that developing countries are now more open than ever to foreign direct investment by MNCs...Developing countries, in order to attract foreign investment, come under pressure not only to reduce public expenditure but also to reduce the burden on MNCs in such areas as workplace safety and environmental protection.

FREEMAN, *supra* note 53, at 156; *see also* Reed, *supra* note 1, at 226; Kieserman, *supra* note 19, at 911.

[205] *See* Ellinikos, *supra* note 20, at 1 (arguing that American MNCs look for foreign states that are "willing to subject their people to slave and forced labor and exploit these foreign labor sources to reap large profits"); *see also* Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising*, 38 COLUM. J. TRANSNAT'L L. 603, 604 (2000) (commenting that as transnational corporations gain more power and influence, national governments lose power); Erin Elizabeth Macek, *Globalization, Governance, and Multinational Enterprises Responsibility: Corporate Codes of Conduct in the 21st Century*, 11 MINN. J. GLOBAL TRADE 101, 103 (2002) (noting that transnational corporations exercise "greater power and influence within certain countries than the respective national governments").

[206] *See* Shelton, *supra* note 9, at 295 (noting states' inclination to "ease labor standards, modify tax regulations, and relax other standards to attract foreign direct investment"); *see also* Branson, *supra* note 195, at 133 (observing that multinationals may seek to set up operations in countries with cheaper labor costs and low or no minimum wage requirements); Benjamin N. David, Note & Comment, *The Effects of Worker's Rights Protection in United States Trade Laws: A Case Study of El Salvador*, 10 AM. U.J. INT'L & POL'Y 1167, 1176 (1995) (discussing "low-wage" internationalism).

[207] *See* Ellinikos, *supra* note 20, at 26 (discussing the reasons why host governments will not enforce international labor laws against MNCs for fear of losing much their investments); *see also* Ratner, *supra* note 55, at 460 (discussing how the desire for foreign direct investment has led developing countries to adjust domestic laws); Ayoub, *supra* note 20, at 422 (noting that due to economic constraints, developing countries will not enforce international or domestic labor laws on MNCs).

[208] *See* Collingsworth, *supra* note 21, at 184 (stating that host states governments are "corrupt, unreliable, or non-functioning"); Deva, *supra* note 13, at 1–2 (observing that there is a problem when a MNC is more interested in foreign investment than in human rights); Bridgeford, *supra* note 149, at 1017–18 (noting that ATCA suits could impede foreign investment by multinational corporations).

of choosing where to invest.[209] They can forewarn developing countries that foreign direct investment will either be withdrawn or never take place unless human rights norms are respected. MNCs have the option of simply pulling out states that commit human rights violations.[210]

B. Lack of Effective Governance of MNC Conduct Abroad

1. The Ineffectiveness of Codes of Conduct

Codes of conduct arose as attempts to comply with international law norms.[211] Voluntary codes of conduct passed by international organizations became popular in the mid-1970s.[212] The United Nations attempted an international code of conduct with the U.N. Code of Code for Transnational Corporations in the 1980s.[213] However, the Code was not adopted because of problems faced in developing procedures governing enforceability and

[209] *See* Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 101 (stating that "transnational business practice can, and often does, have a direct and substantial impact on human rights conditions in a host country"). *But see* FREEMAN, *supra* note 53, at 157 (stating that MNCs are not in the business of human rights). *See generally* Engle, *supra* note 13, at 107 (noting MNCs worldwide economic influence).

[210] *See* Cassel, *supra* note 10, at 1973-74 (discussing several corporations' leaving Burma because of child labor violations); *see also* Stephens, *supra* note 1, at (noting "that transnationals have an ongoing, and at times devastating, impact on human rights around the world"). *See generally* Orentlicher & Gelatt, *supra* note 209, at 125 (discussing Levi Strauss' "Business Partner Terms of Engagement" by which the company imposes minimum standards of conduct for the areas to which they send investment funds).

[211] *See* Cassel, *supra* note 10, at 1969-70 (discussing early attempts at codification only dealt with very basic rights); *see also* Organization for Economic Co-Operation and Development, *Guidelines for Multinational Enterprises*, 15 I.L.M. 967, 967 (1976) (setting forth terms for a mid-70's attempt at setting a code). *See generally* Jane C. Hong, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations*, 19 WIS. INT'L L.J. 41, 52-56 (2000) (discussing corporate codes of conduct in foreign direct investment).

[212] *See* Cassel, *supra* note 10, at 1969-1971 (noting the attempts of passing corporate codes of conduct by international organizations in the early 1970s); *see also* Jorge F. Perez-Lopez, *supra* note 34 (discussing various codes of conduct which were proposed in the 1970s); Breed, *supra* note 190, at 1024 (discussing voluntary codes of conduct proposed in the 1970's and 1980's).

[213] *See* Ayoub, *supra* note 20, at 420 (noting the codes' lack of teeth in the event that member states fail to comply); *see also* Klaus A. Sahlgren, *Emerging Standards of International Trade and Investment: Multinational Codes and Corporate Conduct*, 80 AM. J. INT'L L. 253, 257 (1986) (noting the slow negotiations process which took place during the formulation of the UN code). *See generally* Astid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, *4* ANN. SURV. INT'L & COMP. L. 103, 129 (1997) (discussing the Code and its attempted regulation of MNCs in an environmental pollution context).

monitoring compliance.[214] A legally-binding international code applicable to MNCs does not yet exist. Arguably one will probably never come to fruition because of the difficultly in writing a code that a majority of MNCs would agree to sign.

Corporate codes recently became popular with MNCs as a response to criticism from the public and from non-governmental organizations for their practices abroad,[215] but have not proven effective in regulating human rights violations.[216] Corporate codes do not carry the threat of sanctions[217] nor are they steadily enforced.[218] Typically, these codes do not require an independent monitoring body to oversee compliance.[219] Though numerous

[214] *See* Ayoub, *supra* note 20, at 420-421 (discussing the failed United Nations Code of Conduct on Transnational Corporations); *see also* Boos-Hersberger, *supra* note 213, at 130 (noting the lack of "enforcement mechanisms" which made the U.N. Code ineffective); David Weissbrodt & Muria Kruger, *Current Development: Norms On The Responsibilities Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights*, 97 AM. J. INT'L L. 901, 907 (2003) (discussing the need for further development of enforcement mechanisms in such codes, in a human rights context).

[215] *See* Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 177-80 (1997) (listing examples of corporations that have set out standards for their contracting partners regarding labor conditions and worker rights); *see also* Laura Ho & Catherine Powell & Leti Volpp, 31 HARV. C.R.-C.L. L. REV. 383, 401-03 (1996) (noting manufacturers such as Wal-Mart and Lev's have implemented corporate codes of conduct). *See generally* Ayoub, *supra* note 20, at 402-04 (discussing the advent of corporate codes of conduct as a result of public criticism).

[216] *See* Wood & Scharffs, *supra* note 79, at 557-58 (noting commentators have argued corporate codes are "flawed in terms of content; they are flawed in terms of implementation; and they are flawed in terms of enforcement"); *see also* Macek, *supra* note 205, at 113 (stating that corporations who do not adopt codes from goodwill or because of worrying about image do not have the reasons to adopt or abide by codes). *See generally* Weissbrodt & Kruger, *supra* note 214, at 907 (discussing development of government-set industry "Norms" as an alternative to individual MNC codes to protect human rights).

[217] *See* Ayoub, *supra* note 20, at 403-04 (arguing codes of conduct do not have the effect of obliging subsidiaries and subcontractors of MNCs to abide by requirements); *see also* Saunders, *supra* note 176, at 1460 (noting that corporate codes of conduct are generally unenforceable as a result of their voluntary nature). *But see* Ayoub, *supra* note 20, at 420 (showing that a government-created UN code has similar enforcement problems).

[218] *See, e.g.*, Bob Ortega, *Conduct Codes Garner Goodwill for Retailers, But Violations Go On*, WALL ST. J., July 3, 1995, at A1 (discussing codes implemented by J.C. Penney, Wal-Mart, and Levi Strauss in the apparel industry that have not stopped labor violations from occurring in Central America because contracting foreign companies do not monitor for violations as required). *See generally* Sacharoff, *supra* note 190, at 936-37 (discussing self-regulation by MNC's and its necessarily arbitrary, ultimately ineffective nature); Saunders, *supra* note 176, at 1437 (noting that the codes of conduct are "generally voluntary and rarely enforced").

[219] *See e.g.*, Nike Code of Conduct, *at* http://www.nike.com/nikebiz/nikebiz.jhtml page=25&cat=compliance&subcat=code (last updated Jan. 2004) (setting for the company's compliance monitoring and assessment code, but failing to mention that an independent monitoring board is required under its code) (last visited Apr. 26, 2004); *see also* Sacharoff, *supra* note 190, at 936-37 (noting that the corporate codes of conduct are generally subject to approval only of the host nation, as such their structure is generally arbitrary). *See generally* Borg, *supra* note 177, at 643 (recognizing the flaws of current

corporate codes exist involving compliance with human rights, because they are voluntary, many America MNCs have yet to *implement* such codes.[220] Furthermore, MNCs do not find corporate codes appealing for fear other MNCs may not have enacted them.[221] A corporate code would place them at an economic disadvantage by possibly leading to a loss in profits from lost contracts with developing states.[222] Because the best and primary interests of corporations are shareholder profits, such decisions may logically result in avoiding implementation of corporate codes of conduct if an end result would be loss to shareholders and the corporation.

2. The Lack of International Governance Over MNC Conduct

International organizations governing MNCs conduct within human rights law do not exist.[223] For example, the International Monetary Fund (IMF) views its function in international law to be governed by economic issues only and not human rights.[224]

voluntary MNC corporate codes, and arguing for new law providing for monitoring and enforcement).

[220] *See* Cassel, *supra* note 10, at 1974 (noting that less than ten percent of U.S. based MNCs have adopted corporate codes); N. Morris, *Saving the Brand Name*, MACLEAN'S, Dec. 11, 1995, at 30 (discussing the surprisingly low number of American MNCs that have adopted voluntary Codes of Conduct). *See generally* International Labor Rights Fund, *North American Free Trade Agreement and Labor Rights*, 1995 (advocating adoption of a universal code of conduct), *available at* http://www.laborrights.org/publications/nafta.html (last visited Apr. 26, 2004).

[221] *See generally* Michael A. Sontoro, *Defending Labor Rights: On the Barricades and In The Boardroom*, at 307 (noting that increased labor costs would have to be passed to consumers, forcing the company to choose between ethics and profits), *available at* http://www.watsoninstitute.org /bjwa/archive/9.2/Essays/Santoro.pdf (last visited Apr. 26, 2004); Toftoy, *supra* note 189, at 906 (discussing pressures on MNCs that effectively discourage developments in labor rights in foreign direct investment situations); Robert J. Liubicic, *Corporate Codes Of Conduct And Product Labeling Schemes: The Limits And Possibilities Of Promoting International Labor Rights Through Private Initiatives*, LAW AND POLICY IN INTERNATIONAL BUSINESS, Sept. 1998, at 111 (discussing the negative indirect effects of enacting Codes of Conduct).

[222] *See id.* (proposing that American MNCs that adopt 'costly' labor standards may find themselves at a disadvantage in competition against non-US MNCs that do not adopt such standards); *see also* Liza Featherstone & Doug Henwood, *Economists vs. Students*, THE NATION, Feb. 2001, at 6 (arguing that the lost profits are generally easily recovered by these businesses, and that consumers generally do not mind increased price in exchange for labor rights for workers). *See generally* Redmond, *supra* note 81 (discussing the conflict between concerns of "profit maximization and those of human rights").

[223] *See* Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1211 (2002) (noting how WTO may have to play increasing role in regulating MNCs); Weissbrodt and Kruger, *supra* note 214, at 907 (advocating for the development of mandatory human rights labor codes), *See* Cassel, *supra* note 10, at 1969-1974 (discussing various "attempts" at putting international standards into place).

[224] *See* Shelton, *supra* note 9, at 291 (discussing how IMF guidelines only deal with economic issues and do not mention human rights); *see also* William H. Meyer & Boyka

Similarly, the International Labor Organization (ILO), an agency of the United Nations, can only bind state members which ratify their conventions.[225] The ILO therefore cannot be viewed as influential in guiding MNC conduct because of its lack of enforcement power on MNCs.[226] MNCs are not bound to any such guidelines. The lack of international sanctions permits MNCs to continue investing in developing countries without fear of apprehension by international organizations.[227] Unless MNCs are taking criminal action, they will not be accountable under international human rights law.[228]

Stefanova, *Human Rights, the UN Global Compact, and Global Governance,* 34 CORNELL INT'L L.J. 501, 505 (2001) (noting that the IMF is obligated to "respect", but not promote or fulfill human rights). *See generally* Rajesh Swaminathan, *Regulating Development: Structural Adjustment and The Case for National Enforcement of Economic and Social Rights,* 14 CONN. J. INT'L L. 267, 300 (1999) (discussing the IMF's involvement with economic regulation, but leaving labor rights to the local courts).

[225] *See generally* Michael J. Dennis, *CURRENT DEVELOPMENT: Newly Adopted Protocols to the Convention on the Rights of the Child,* 94 AM. J. INT'L L. 789, 794 (2000) (noting that countries which are not party to the ILO's conventions are not bound to it); Charles J. Morris, *A Blueprint For Reform Of The National,* 8 ADMIN. L.J. AM. U. 517, 524-5 (1994) (discussing the ILO's labor rights policies to which member nations are bound); Rupneet Sidhu, *Child Laborers: The World's Potential Future Labor Resource Exploited and Depleted,* 15 HASTINGS WOMEN'S L.J. 111, 115 (2004) (noting that the ILO became "the first specialized agency of the United Nations").

[226] *See* Collingsworth, *supra* note 21, at 184 (explaining ILO's lack of enforcement power); *see also Report of the Commission of Inquiry: Forced Labour in Myanmar (Burma),* ILO (July 2, 1998) (reporting on labor rights violations in Burma as a basis for persuasion of unbound MNCs to take action) (on file with ILRF), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm. *See generally* Lisa G. Baltazar, *Government Sanctions And Private Initiatives: Striking A New Balance For U.S. Enforcement Of Internationally-Recognized Workers' Rights,* 29 COLUM. HUMAN RIGHTS L. REV. 687, 702 (1998) (discussing the frustration with ILO enforcement measures as "understandable").

[227] *See* Baker, *supra* note 21, at 141 (noting lack of sanctions); Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace,* 35 VAND. J. TRANSNAT'L L. 457, 460 (2002) (noting lack of control over MNCs allows them to act as "independent states"); *see also* Mary Gray Davidson, *The Social Construction of Disability: Historical, Contemporary, and Comparative Views: The International Labour Organization's Latest Campaign to End Child Labor: Will it Succeed Where Others Have Failed?,* 11 TRANSNAT'L L. & CONTEMP. PROBS. 203, 222 (2001) (noting lack of sanctions as a cause for continued child labor practices in soccer ball industry).

[228] *See* Sacharoff, *supra* note 190, at 938 (discussing the "obstacles" preventing the holding of MNCs liable under international law, noting that many MNCs are often "above the law"). *But see* 42 U.S.C. § 1983 (2004) (providing for a cause of action for deprivation of civil rights against a private actor who acts "under color of law", applicable in this sense to MNCs which can be considered de-facto state actors); Alien Tort Claims Act, 28 U.S.C. § 1350 (providing civil remedies against MNCs in these situations); Sacharoff, *supra* note 190, at 954-55 (discussing the possibility of holding MNCs liable as de-facto state actors in § 1983 actions).

C. The Ethical Duties of MNCs as Global Citizens

MNCs, as global citizens, are members of international society. Their interactions with states and individuals have ramifications.[229] As global citizens, and from these interactions, MNCs owe ethical duties particularly in the area of human rights.[230] Proponents of foreign direct investment argue that MNCs bring economic wealth and further human rights through economic stability.[231] Indeed, MNCs are substantially responsible for increasing revenue in developing markets, but at times it has been at the expense of the rights of citizens. By increasing gross domestic products of developing countries, MNCs do not abrogate their duty to abide by international law norms.[232] It is illogical to argue the simple creation of an economic right negates respecting an individual's human rights.

Some commentators argue MNCs have one duty: to make a profit.[233] In turn, MNCs will adapt to "socially responsible

[229] *See generally* Betz, *supra* note 137, at 188-89 (discussing how human rights organizations are using federal courts to compel MNCs to either control the behavior of their military security forces or cease entering into such ventures all together); Stephens, *supra* note 1, at 46 (noting harsh ramifications of IBM's involvement with Nazi party); Breed, *supra* note 190, at 1008 (pointing out that the economic power and geographic scope enjoyed by American MNCs provides them with frequent opportunities to interfere with the enjoyment of a broad range of human rights).

[230] *See* de Lisle, *supra* note 198, at 492 (noting multinational corporations, and not just governments or individual international criminals, have human rights duties); *see also* Sydney M. Cone, III, *The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 3 (2001) (stating expressly that multinational enterprises are part of civil society). *See generally* Anderson, *supra* note 13, at 466 (discussing the adoption and subsequent impact of corporate ethical policies).

[231] *See* Shelton, *supra* note 9, at 291-92 (explaining argument which justifies MNC investment as bringing forth economic stability and greater wealth to developing countries); *see also* Michael D. Pendleton, *A New Human Right - The Right to Globalization*, 22 FORDHAM INT'L L.J. 2052, 2052 (1999) (proposing positive contributions of globalization argue for its acceptance as a new human right). *See generally* Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 42-45 (1996) (discussing how economic power can be utilized to sanction human rights violators more effectively).

[232] *See generally* Tara Bunker, *Environmental Upgrade: The Potential for Chile to Use Market Incentives in Preparing for NAFTA Accession*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 165, 192-93 (1997) (acknowledging that the presence of MNCs in Chile and the large amount of foreign capital invested there tend to favor a market incentive system, helping Chile to generate more revenue); deLisle, *supra* note 198, at 492 (discussing MNCs and their operation under international law); Dennis, *supra* note 225, at 380-81 (discussing whether there is a "right to development" and the UN's role in targeting official development assistance).

[233] *See* Stephens, *supra* note 1 (noting Milton Friedman's essay which referred to business's social responsibility as increasing its profits); *see also* Redmond, *supra* note 81 (stating the economic objective of the business corporation is the maximization of corporate profit and shareholder gain). *See generally* P.W. Singer, *Peacekeepers, Inc.*,

behavior" as a response to criticism that may hurt their end profit.[234] Nevertheless, it is doubtful MNCs would argue they are not bound to respect the same human rights norms, which govern states and individuals. MNCs are aware of the effects they have on human rights.[235] If they were not aware, voluntary corporate codes would never have arisen because consumers would not have known human rights violations were committed. Why MNCs adapt their behaviors is irrelevant because they are aware of their duties within international society and *must* adapt in order to comply with these duties. If they did not have duties under international law, then such backlash to their behaviors abroad would never have arisen.[236]

POL'Y REV., Jun. 1, 2003, at 59 (examining proposals for privatized peacemaking and recognizing that security goals of clients are often in tension with private firms' aim of profit maximization, resulting in considerations of the good of the private company that are not always identical with the public good).

[234] *See* Stephens, *supra* note 1 (discussing William Safire's argument of corporate motivations behind "socially responsible behavior" are based on responses to potential profit gains or losses); *see also* Joel L. Hodes & Ellen M. Bach, *Corporate America's Response to the AIDS Crisis: What Price Glory?*, 61 ALB. L. REV. 1091, 1110-12 (theorizing that if profit is a critical motivator of American businesses, then a goal of policymakers should be to demonstrate to those businesses how HIV/AIDS will affect their profit margins). *See generally* Abagail McWilliams & Donald Siegel, *Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?*, 21 STRATEGIC MGMT. J. 603, 603-07 (May 2000) (examining the issues concerning the relationship between corporate social responsibility and economic performance).

[235] *See* Breed, *supra* note 190, at 1009-12 (discussing the broad scope of corporate human rights violations). *See generally* Cassel, *supra* note 10, at 1970-71 (noting the concept of *self-imposed* corporate responsibility in the form of a code of conduct was first popularized in the 1970s and 1980s as a response to the movement to end apartheid in South Africa through divestiture) (emphasis added); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 157-59 (1997) (noting corporate awareness stemming from recent consumer pressure on U.S. companies to ensure that they do not market the products of forced, convict, or child labor demonstrate the increasing sensitivity of companies and the public to significant human rights problems present in many of the countries in which TNCs operate).

[236] *See* Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 485 (2001) (examining the human rights implications of the activities of large MNCs, arguing that related concerns must be addressed effectively to avoid a growing societal backlash against foreign investment in both developed and developing states); *see also* L. Kim Tan, *Critics Slam China Status*, BOSTON HERALD, Nov. 29, 1999, at 28 (discussing the WTO protests in Seattle and the argument that the WTO should be stopped because it has consistently ruled in favor of multi-national corporations and against environmental, health, safety and labor laws). *See generally* Larry Rohter, *Hondurans in 'Sweatshops' See Opportunity*, N.Y. TIMES, July 18, 1996, at A1 (noting that while under Honduran law children may begin working at 14, most garment factories dismissed all workers under 16 due to a fear of U.S. consumer backlashes).

VI. CONCLUSION

International law by nature must continually evolve as a response to interactions between both state and non-state actors. Since World War II, the international legal structure has expanded to include states, international organizations, non-governmental organizations, individuals, and MNCs.[237] All of these actors are now subject to international law. International law norms are externalized and internalized by interactions between all actors in the international system. Human rights norms have been externalized since the enactment of the UDHR and later state practices respecting such rights.[238] The United States has recently taken part in furthering such norms by internalizing them through application of the ATCA.[239] Holding MNCs accountable under the ATCA will aid in furthering the goals of international law, particularly human rights norms.[240]

[237] *See* Reed, *supra* note 1, at 222 (recognizing states have certain duties with respect to its citizens under international law); *see also* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1830 (2002) (arguing that absent an incentive toward compliance, resources devoted to the creation and maintenance of international legal structures are wasted); Raj Aggarwal, *The Finance and Taxation Decisions of Multinationals*, J. INT'L. BUS. STUD., Mar. 22, 1990, at 170 (noting the myriad number of regulations, legal constraints, and public policies such as direct or derivative capital controls set up by capital-exporting or capital-importing countries, price controls and other legal constraints, in support of the theory of an expansive international legal structure).

[238] *See* Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities*, 32 COLUM. HUMAN RIGHTS L. REV. 565, 575-76 (2001) (pointing to numerous attempts to codify human responsibilities in a single document that followed the enactment of UDHR). *See generally* Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 63 (1998/1999) (stating that representing norms and claims of universal and fundamental dimension, international human rights acquire impact through popular organizing and demand); Book Note, *The Future of International Human Rights: Commemorating the 50th Anniversary of the Universal Declarations of Human Rights*, 1 CHI. J. INT'L L. 489, 490 (noting the argument that the UDHR's existence within, and administration by, a framework of nation-states undermines the proper universal character of human rights).

[239] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (finding that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations); *see also* Koh, *supra* note 4, at 2366 (noting huge impact *Filartiga* had on international rights). *See generally* Beth Stephens, *Problems of Proving International Human Rights Law in the U.S. Courts:Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191, 192 (1995/1996) (noting the *Filartiga* court's holding that torture by a state official against one held in detention "violates established norms of the international law of human rights" and thus constitutes a tort "in violation of the law of nations," actionable under the Alien Tort Claims Act).

[240] *See generally* Betz, *supra* note 137, at 164, 169-85 (examining the history of ATCA litigation and how MNCs have become targets of the statute); Collingsworth, *supra* note 21, at 196 (noting potential of "advancing human rights law by using the ATCA aggressively"); Breed, *supra* note 212, at 1006 (acknowledging many human rights

The United States is internalizing a norm that came into existence over forty years ago. It is the United States' duty to respect the human rights of citizens. When egregious human violations occur against citizens, and if the United States has federal jurisdiction against the violators of such rights, then application of the ATCA is justified.

MNCs are some of the most powerful actors within international society.[241] This is primarily a result of globalization. Globalization has enabled MNCs to transgress international borders and profit from their relations with developing countries.[242] Unfortunately, human rights abuses occurred at the hands of the military regimes of such countries, and MNCs did not take action to stop such violations from taking place for fear of losing profits.[243] However, the aftermath of World War II established individual liability for violations of international law.[244] Consequently, under this norm, MNCs can

advocates believe the current trend of litigation under the ATCA is the proper method of controlling American MNCs).

[241] *See* Shelton, *supra* note 9, at 273 (discussing rising power of non-state actors and decrease in power of governments); *see also* Duke, *supra* note 172, at 362 (noting the future of human rights protections seems to include a shift in the focus of human rights responsibility from state actors to the increasingly more powerful corporate actors); Breed, *supra* note 212, at 1008 (stating MNCs power and control over resources in developing countries combine to turn MNCs into powerful ambassadors for the United States, who frequently interact with both the governments and the populations of developing countries).

[242] *See* Teitel, *supra* note 6, at 357-58 (discussing globalization and international law); *see also* Ayoub, *supra* note 20, at 397 (pointing out that as a result of increased economic globalization during the last quarter century, many MNCs locate their manufacturing plants in economically developing regions, searching for cheap labor and low regulatory costs in order to produce their products at the lowest cost available, thereby maximizing their sale profits). *See generally* Duke, *supra* note 172, at 340 (opining that Developing countries entice MNCs with low wages and an increasingly more skilled and productive workforce).

[243] *See* Stephens, *supra* note 1, at 46 (noting IBM's involvement with Nazi party was based on profits and didn't require human rights violations to be a factor in decision making process); *see also* Kelley, *supra* note 236, at 508 (hypothesizing that MNC trading practices have put money into the hands of brutal and undemocratic military regimes, and even provide funds that rebel forces use on weapons, prolonging bloody civil wars). *See generally, e.g.*, 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, 57-59, 66-68 (1998) (describing the dependence of Myanmar's military leadership on direct foreign investment to fund their illegitimate and highly repressive regime).

[244] *See* Koh, *supra* note 4, at 2359 (noting expansion of international law to various actors); *see also* Thames, supra note 33, at 153 (examining whether a court can find private individual liability via the ATCA for a claim of forced labor). *See generally* Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 340-44 (discussing the development of the notion of individual liability under international law).

be held accountable for doing absolutely nothing to stop such atrocities from taking place.[245]

MNCS have the power to effect change because of their dominant role within international society and in the domestic relations of developing countries.[246] If MNCs only view relations in terms of profit, they should be hesitant to allow violations to go unaddressed for fear of having to pay out large sums of money under the ATCA. It would be much simpler for MNCs to ensure such violations no longer take place by taking matters into their own hands. MNCs may therefore require compliance with corporate codes of conduct and require outside inspectors to ensure compliance.[247]

By finding MNCs accountable under the ATCA, MNCs will be forced to react to the possible legal implications for their conduct abroad. Application of ATCA is just one step in ensuring respect for human rights. It is a further step in enforcing international law, a law that applies to all peoples, states, and non-state actors.

[245] *See generally* Deva, *supra* note 13, at 45 (advocating the requirement of *mens rea* be satisfied both by act or omission; "either intention or knowledge to violate human rights, or the failure to take reasonable steps to avoid such a violation, should be sufficient to impose criminal liability on MNCs"); Ramasastry, *supra* note 15, at 104-05 (asserting Human Rights Non-Governmental Organizations' (NGOs) argument that when MNCs become aware of systematic or continuous human rights abuses, they have an affirmative obligation to raise these issues with the government and to attempt to exert influence); Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal The Answer?*, 42 WM. & MARY L. REV. 619, 632 (2000) (criticizing courts that stretch acceptable bounds by fitting corporate inaction under "color of authority," especially in *Unocal*, where the corporations were only passively involved in human rights violations).

[246] *See* Shelton, *supra* note 9, at 273 (noting rising power of non-state actors); *see also* Breed, *supra* note 190, at 1008 (describing MNCs as powerful ambassadors for the United States, who frequently interact with both the governments and the populations of developing countries). *See generally* Duke, *supra* note 172 (examining the shift in the focus of human rights responsibility from state actors to the increasingly more powerful corporate actors).

[247] *See* Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 ENVTL. L. 33, 43 (1994) (examining various codes of corporate conduct and their efficacy). *See generally* Cassel, *supra* note 10, at 1964 (noting development of corporate codes of conduct in the 1970's); Breed, *supra* note 190, at 1024 (acknowledging the concept of self-imposed corporate responsibility in the form of a code of conduct was first popularized in the 1970s and 1980s as a response to the movement to end apartheid in South Africa through divestiture).