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Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses

Barnali Choudhury[*]

I. INTRODUCTION

At one time, the only social responsibility of a business was to increase its profits.[1] During this period, businesses prized dictatorships for their ability to provide stable environments[2] and consumers were not concerned with either where or by whom the shoes they wore were made. However, the increase in globalization changed perceptions. Multinational corporations ("MNCs") began to benefit immensely from globalization and those outside of the MNC environment started to realize that an MNC's profit gains brought about a corresponding responsibility to manage any adverse effects of producing those gains.[3] Suddenly, a company's success was measured by factors other than its bottom-line. In addition, the reputation of a company thought to be involved in some form of human rights abuse could suffer irreparable damage and consumers began to demand detailed information on corporate activities.[4]

The rise of the accountability movement resulted in an increased awareness of the relationship between business and human rights.

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[1] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

[2] JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 110 (1998).

[3] For example, as noted by U.N. Secretary General Kofi Annan: "Transnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects." Kofi A. Annan, *Help the Third World Help Itself*, WALL ST. J., Nov. 29, 1999, at A28.

[4] Chris Avery, *Business and Human Rights in a Time of Change*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 17 (M.T. Kamminga & S. Zia-Zarifi eds., 2000).

However, the movement has been unable to prompt the development of an effective mechanism to ensure that MNCs are held responsible for any transnational adversities they cause, particularly where the host state is unable or unwilling to address the problems. Nevertheless, several alleged victims of corporate abuse have turned to litigation in U.S. domestic courts as one means of attempting to hold corporations accountable. Individuals have brought cases against the Royal Dutch/Shell Group, Chevron Corp., ExxonMobil Corp., Pfizer Inc., the Coca-Cola Company, and The Gap, for such violations as torture, forced labor and gross human rights breaches.[5] The basis for these claims was, in most cases, the Alien Tort Claims Act ("ATCA"), a U.S. statute that permits foreign citizens to sue in U.S. courts for violations of international law.[6]

Yet, individuals using the ATCA to hold MNCs accountable for human rights violations have not met with considerable success. Although jurisprudence has established that the ATCA can be applied to individuals and corporations, no case concerning corporations has been determined on its merits. Additionally, in *Sosa v. Alvarez*, the first ATCA decision considered by the U.S. Supreme Court, the Court took a cautious approach in interpreting and defining the scope of the ATCA.[7] It noted that the ATCA was to be used only for a "relatively modest set of actions alleging violations of the law of nations"[8] and it advocated the restraint of federal court discretion in creating any new causes of action under the ATCA.[9] Moreover, in a footnote, the Court remarked that determining a cause of action under the ATCA also includes considering whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued if the defendant is a private actor such as a corporation or individual.[10] Under this reasoning, the ATCA does not necessarily have jurisdiction over corporations.

The Supreme Court's restrictive approach to the ATCA also provides less credence to the ATCA as an effective mechanism for ensuring corporate accountability. Moreover, the Court's denouncement of the creation of any new causes of action hampers its usefulness, as MNC actions that stray beyond the accepted grounds will not be susceptible to

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[5] INT'L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 104 (2002), *available at* http://www.ichrp.org; SARAH JOSEPH, TRANSNATIONAL HUMAN RIGHTS LITIGATION AGAINST CORPORATIONS 155–169 (2004).

[6] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

[7] Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004).

[8] *Id.* at 2759.

[9] *Id.* at 2761–62.

[10] *Id.* at 2766–67.

court action. In fact, the very existence of the ATCA's reach to corporations may be threatened due to reports that the Bush administration intends to restrict the ambit of the ATCA.[11]

Given these potential restrictions, the purpose of this article is to examine other mechanisms or modes for attributing liability to corporations for human rights violations. The article is presented in three parts. In the first part, domestic solutions are considered, including civil and criminal remedies in the United States and other countries. In addition, the ATCA is more thoroughly examined, as it is, in spite of its problems, the most utilized means for attaching liability to corporations. The second part examines potential international solutions including the possible role of the International Criminal Court, the creation of specialized tribunals and codes of conduct developed by several international organizations. Finally, the article concludes with a suggested approach for the most effective means of ensuring corporate accountability.

II. DOMESTIC SOLUTIONS

One domestic approach for addressing corporate accountability is to have state courts extend their jurisdiction to violations committed abroad. Certain states have promulgated extraterritorial legislation similar to the ATCA that extends the arm of the state beyond its territory. Other states have allowed parties to rely on domestic law and argue their complaints before domestic courts if a substantial connection is found between the state and the parties to the action. Both modes are considered in the following section.

A. Extraterritorial Jurisdiction

Although many have supported the idea of combating corporate abuses committed beyond a state's territory, only one other country besides the United States has opened the doors of its courts to allow non-residents to sue corporations for alleged violations of human rights. In 1999, Belgium introduced the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law ("the Act").[12] The purpose of the Act was

[11] For example, in 2003, U.S. President George W. Bush passed an executive order providing blanket legal immunity to oil companies doing business in Iraq. This order suggests the prohibition of legitimate lawsuits, including ATCA actions, by individuals injured by American oil companies in Iraq. *See* Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003), *reprinted in* EARTH RIGHTS INTERNATIONAL, *Executive Order 13303: Instituting Immunity* (Aug. 13, 2003), *at* http://www.earthrights.org/news/institutingimmunity.shtml.

[12] For an English translation of the Act, see Stefaan Smis & Kim Van der Borght, *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 I.L.M. 918 (1999).

to define three categories of grave breaches of humanitarian law, and to integrate these breaches into the domestic law of Belgium: genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions and their Additional Protocols I and II.[13] One of the most novel aspects of the Act was its recognition of the "universal competence" of the Belgian courts to deal with breaches of the Act irrespective of the place where the crime was committed, the nationality of the accused, or the nationality of the victim.[14] In fact, the Act required no ties between the alleged crime and Belgium.

The Act was used as a basis to investigate Totalfinaelf, a French company, regarding allegations of its complicity in engaging Burmese workers into forced labor in Myanmar and to prosecute several notable individuals for their involvement in the war in Iraq.[15] The latter set of prosecutions prompted the United States to pressure Belgium into amending its law. Belgium succumbed and the Act was amended to exercise jurisdiction only over Belgian citizens or long-term residents.[16] As a result the power of the Belgian courts to exercise universal competence has now been eliminated. Thus, the ATCA remains the primary mechanism for exercising extraterritorial jurisdiction and, accordingly, is examined below in greater detail.

In 1789, the U.S. government promulgated the ATCA as an attempt to prevent the United States from becoming a safe haven for pirates.[17] Today, the ATCA has been reformulated to hold that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[18] The ATCA thus contains three requirements: (1) the substance of the matter must be a civil tort action; (2) the action must be brought by an alien; and (3) the matter must concern a violation of the law of nations or a treaty of the United States.[19]

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[13] *Id.*

[14] *Id.*

[15] Prosecutions were launched against Bush, British Prime Minister Tony Blair, and other related individuals. *See Universal Incompetence*, ECONOMIST, June 28, 2003, at 54.

[16] *Belgium Amends War Crimes Law*, BBC NEWS, Aug. 1, 2003, *available at* http://news.bbc.co.uk/2/hi/europe/3116975.stm.

[17] This is but one theory postulated to explain Congress' intentions in enacting the ATCA. This theory is supported by Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (holding that the idea of applying the law of nations reference in the ATCA to the acts of private individuals is supported by the prohibition against piracy cases that existed around the time Congress enacted the ATCA). For other possible theories as to why Congress enacted the ATCA, see Peter Schuyler Black, *Kadic v. Karadzic: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281, 281–2 (1996).

[18] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

[19] Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293, at *10 (S.D.N.Y. Feb. 22, 2002). Although these three requirements provide the basis for an ATCA claim

Neither of the first two requirements poses a substantial problem of interpretation. Among the long list of possible torts, the courts have accepted that the torts of genocide, forced labor, war crimes, and torture are torts within the meaning of the ATCA.[20] In addition, the requirement that the action be brought by an alien only requires that an individual other than a U.S. national bring the claim.

However, the courts have had problems interpreting the definition of "the law of nations." In *Filartiga v. Pena-Irala*, [21] the first case to resurrect the ATCA, the court noted that the law of nations involves the demonstration of a wrong by means of express international accords.[22] In finding that torture was a violation of the law of nations, the court further determined that universal condemnation in numerous international agreements and the renunciation of it, in principle or in practice, by almost all the world states, would also evidence a violation of the law of nations.[23] Several years later, a second court further defined an international tort as being "definable, obligatory (rather than hortatory), and universally condemned" and this test became the standard evidence of a violation of the law of nations.[24] In *Sosa*, the Supreme Court reinforced this definition, arguing that international norms which form the basis for an ATCA claim must be specific or find their genesis in customary international law.[25]

In addition to problems defining the law of nations, ATCA litigation has also encountered difficulties defining the scope of ATCA liability. In *Tel-Oren v. Libyan Arab Republic*,[26] the D.C. Circuit refused to attribute

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(that is they establish subject matter jurisdiction), claimants must also satisfy numerous procedural and substantive requirements. *See Developments in the Law – International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2036 (2001) [hereinafter *Corporate Liability*].

[20] *See, e.g.*, Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002); *Kadic*, 70 F.3d at 238; Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980); Iwanova v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

[21] *Filartiga* involved the torture of Joelito Filartiga in Paraguay by the then Inspector General of Police, Americo Norberto Pena-Irala. Although Pena-Irala admitted to the torture, the Paraguayan courts denied the Filartiga family the right to file a lawsuit against him. Two years later, Pena-Irala traveled to New York where he was arrested for an expired visa. While in the custody of the U.S. Immigration and Naturalization Service, the Filartiga family initiated an action against Pena-Irala under the ATCA. The case was initially dismissed for lack of subject matter jurisdiction and Pena-Irala returned to Paraguay. On appeal, however, the U.S. Court of Appeals for the Second Circuit ruled in favor of the Filartiga family, and they were subsequently awarded damages of more than $5 million. *Filartiga*, 630 F.2d at 876.

[22] *Id.* at 888.

[23] *Id.* at 880.

[24] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

[25] *Sosa*, 124 S.Ct. at 2761–62, 2765–67 (2004).

[26] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). *Tel-Oren* involved an attack by the Palestine Liberation Organization ("PLO") on a civilian Israeli bus, where

international law liability to a private actor, finding that there was insufficient consensus in international law on this matter. In contrast, eleven years later in *Kadic* v. *Karadzic*,[27] the Second Circuit confirmed the holding in *Filartiga*, finding that torts of an international character committed by private actors could violate international law. The finding in *Kadic* was then used by claimants to argue that a corporation, as a legal private actor, could also violate international law and in *Unocal*, the Ninth Circuit accepted this argument.[28]

However, the *Unocal* decision does not necessarily define the current state of this issue. In *Sosa*, the Supreme Court recognized that the scope of ATCA liability for a corporation was important in a determination of a proper claim under the ATCA, citing the contrasting findings in *Tel-Oren* and *Kadic*. Nevertheless, it did not provide further comment on the matter, allowing the contrasting dicta to govern the issue. In addition, subsequent to the Ninth Circuit's holding in *Unocal*, the decision was vacated and appealed to an *en banc* panel of the Ninth Circuit.[29] However, in December 2004 the parties settled before a decision could be rendered.[30] Thus, the scope of ATCA liability as it relates to a corporation currently remains in flux.

In addition to the limits placed on it by the Supreme Court's holding in *Sosa* on the type of torts that can form its basis and the problems defining the scope of ATCA liability for corporations, the ATCA also suffers from a number of other shortcomings. First, most of the jurisprudence in this area has imposed the additional requirement of state aid. That is, a successful claim must demonstrate that the corporation has acted in concert with a state actor or with state aid.[31] Thus, corporate abuses committed without a state component will, most likely, not be justiciable under the ATCA. Second, the ATCA can only be utilized where a U.S. court can establish personal jurisdiction over the defendant.[32] U.S. courts will generally exercise personal jurisdiction only where a "sufficient connection" exists between the court and the defendant, and this can raise insurmountable

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members of the PLO tortured and killed many of the civilians. The court ruled that international terrorism was not justiciable, individuals could not violate international law and torture did not violate the law of nations.

[27] *Kadic*, 70 F.3d at 239–41.

[28] *Unocal*, 395 F.3d at 932.

[29] *Id.* at 978.

[30] Press Release, EarthRights International, *Unocal to Compensate Burmese Villagers* (Apr. 2, 2005), *at* http://www.earthrights.org/news/press_unocal_settle.shtml.

[31] *Kadic*, 70 F.3d at 239–40; Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 410 (2002).

[32] *Corporate Liability*, *supra* note 19, at 2038; Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000).

hurdles for plaintiffs.[33]

Finally, several claimants have met with the ultimate ATCA hurdle: *forum non conveniens.*[34] In determining this issue, courts consider whether an adequate alternative forum exists for the effective adjudication of the dispute, which can involve the weighing of certain "private interest" and "public interest" factors.[35] These may include the ease of access to sources of proof, the process and cost of obtaining witnesses, administrative duties, and the idea that localized controversies benefit from being "decided at home."[36] However, the Second Circuit has noted that a dismissal of an ATCA action under *forum non conveniens* would frustrate Congress' intent in establishing the ATCA forum for aliens.[37] Accordingly, it will not dismiss ATCA actions lightly.[38] Nevertheless, the host of problems with the ATCA has forced certain claimants to develop other means of attributing liability to corporations, which will be examined in the next section. Moreover, as the ATCA is generally used to attack U.S. corporations, claimants interested in pursuing remedies against foreign corporations have had to turn to domestic remedies in the home state of the corporation.[39] As a result, claims have been brought in the courts of Australia, Canada, and England, and these states' responses will also be considered in the next section.

B. Civil Litigation Remedies Beyond the ATCA

In addition to the ATCA in the United States, claimants in both the United States and foreign nations can initiate actions against corporations for abuses committed abroad based on commonplace torts. Thus, the torts of wrongful death, battery, negligence, and intentional infliction of emotional distress, can encapsulate human rights abuses such as executions, torture, hazardous waste spills and inhuman treatment.[40] A closer look at

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[33] *See generally e.g.*, *Corporate Liability*, *supra* note 19, at 2028; *Wiwa*, 226 F.3d at 94.

[34] *See, e.g.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

[35] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft Corp. v. Reyno, 454 U.S. 235, 250–61 (1981).

[36] *Id.*; *see also* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (2002).

[37] *Wiwa*, 226 F.3d at 105; *Jota*, 157 F.3d at 159.

[38] *Wiwa*, 226 F.39 at 106.

[39] Plaintiffs must demonstrate a substantial connection between the defendant corporation and a U.S. court in order for the court to exercise jurisdiction over the defendant. *See Corporate Liability*, *supra* note 19, at 2025 (2001); *Wiwa*, 226 F.3d at 88.

[40] Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, *in* TORTURE AS TORT 62 (Craig Scott ed., 2000). *See also* Dagi v. The Broken Hill Proprietary Co., [1997] 1 V.R.

particular domestic civil remedies offered by jurisdiction follows.

1. The United States

Remedies for abuses committed abroad are highly developed in the United States. In addition to the ATCA and civil suits based on commonplace torts, the United States also offers abuse victims protection under the rubrics of transitory torts, the Torture Victim Protection Act ("TVPA"),[41] and the Racketeer Influenced and Corrupt Organizations ("RICO")[42] statute.

U.S. state courts have the ability to extend their jurisdiction for transitory torts. Under the doctrine of transitory torts, civil actions for torts are considered transitory when "the tortfeasor's wrongful acts create an obligation which follows him across national boundaries."[43] Plaintiffs have used transitory torts to form the basis of their claims against corporations for hazardous spills, environmental damage, and poisonings by pesticides.[44] However, most claims that use transitory torts as their basis have been dismissed on grounds of *forum non conveniens*.[45]

Human rights abuse victims can also seek shelter under the TVPA. The TVPA provides a civil cause of action to both aliens and U.S. citizens for acts of torture and extra-judicial killings committed by individuals acting under the actual or apparent authority of a foreign government.[46] Generally, the TVPA is thought to include corporations, which can be the "individuals" committing the tortuous or murderous acts.[47] Yet, as it requires the individuals to be acting in concert with a government, its ambit excludes acts committed by corporations without state aid.

One further statutory basis for corporate abuse claims is the RICO

428; Third Amended Complaint for Damages and Injunctive and Declaratory Relief for Plaintiff, Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002) (No. 96-6959), *available at* http://www.earthrights.org/unocal/fedcomplaint.shtml.

[41] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

[42] Racketeer Influenced and Corrupt Organizations, 18 U.S.C §§ 1961–68 (2000).

[43] Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 63 (1981).

[44] *See, e.g., In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part* 809 F.2d 195 (2d Cir. 1987); Sequihua v. Texaco, Inc. 847 F. Supp. 61 (S.D. Tex. 1994); Dow Chemicals v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990).

[45] Malcolm J. Rogge, *Towards Transnational Corporate Liability in the Global Economy: Challenging the Doctrine of Forum non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L. L.J. 299, 302, 323 (2001).

[46] *Id.*

[47] *See* Sinaltrainal v. Coca Cola Co., 256 F. Supp 2d 1345, 1359 (S.D. Fla. 2003); Estate of Rodriguez v. Drummond, 256 F. Supp 2d 1250, 1266 (N.D. Ala. 2003). *But see* Beanal v. Freeport-McMoran Inc., 969 F. Supp. 362 (E.D. La. 1997).

statute, which Congress enacted to target organized crime. However, its definition of "racketeering" is so expansive that it can be used to encapsulate corporate human rights claims as well.[48] Thus, in *Wiwa v Royal Dutch Petroleum Co.*,[49] the plaintiffs relied on aspects of the definition of racketeering in RICO to argue that the corporation had engaged in bribery, murder, and extortion.[50] The court allowed the plaintiffs' RICO claims, finding that the company's racketeering activities, if proven, would have effects on the U.S. economy sufficient to justify jurisdiction.[51]

2. *Canada*

Unlike the many avenues created by the United States for addressing extraterritorial corporate abuses, Canada continues to offer its victims only traditional torts as a basis for their claims. Moreover, Canada is extremely restrictive in its approach towards extending extraterritorial jurisdiction, requiring that a "real and substantial connection" must exist with the forum.[52] As a result, several corporate transnational abuse cases in Canada have been dismissed on grounds of *forum non conveniens*.

For example, in *Recherches Internationales Québec v. Cambior Inc.*,[53] the Quebec Superior Court was presented with a class action against a Quebec corporation initiated by 23,000 victims of an environmental spill from a gold mine in Guyana. The court dismissed the action for *forum non conveniens* noting that Guyana was a more convenient forum for the action since the parties and the action had a closer connection to Guyana.[54] However, it did note that if it felt that the Guyanese legal system was inadequate, it would have had "little hesitation" in accepting jurisdiction of the victims' complaints.[55]

Similarly, in *Bouzari v. Iran*,[56] in which the claimant sued the Iranian government in an Ontario court for his abduction, imprisonment and torture by Iranian agents, the court found that there was an insufficient real and

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[48] RICO defines racketeering in part to mean: "(a) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year." Racketeer Influenced and Corrupt Organizations, 18 U.S.C § 1961(1) (2000).

[49] *Wiwa,* 2002 U.S. Dist. LEXIS at 3293 (further proceedings after remand).

[50] *Id.* at *66–85.

[51] *Id.* at *71. However, RICO is unlikely to usurp the ATCA's role as the first choice in the United States for addressing transnational abuses due to the courts' willingness to accept jurisdiction over a broader range of violations under the ATCA.

[52] *See, e.g.*, Bouzari v. Iran, [2004] 71 O.R.3d 675 ¶ 31.

[53] Recherches Internationales Québec v. Cambior Inc., [1998] Q.J. No. 2554.

[54] *Id.* ¶¶ 72–77.

[55] *Id.*

[56] *Bouzari*, [2004] 71 O.R.3d at 675.

substantial connection between the wrongdoing that gave rise to the litigation and the forum. However, both the Ontario Superior Court and the Ontario Court of Appeal refused to determine the claim on jurisdictional grounds and dismissed the case instead on grounds of Iran's sovereign immunity.[57] Nevertheless, the Ontario Superior Court noted that the rules dictating the "real and substantial test" could be modified in cases where the claim is for torture.[58] The Court of Appeal also confirmed the ability to modify the "real and substantial connection test," noting that the hallmark of the test is its flexibility. Moreover, the Court found that because the test is ultimately guided by order and fairness, it can meet the special challenges of a case.[59] The *Bouzari* decision thus opens the door to a more flexible approach in using the real and substantial connection test to determine jurisdiction for extraterritorial human rights abuse cases.

The court in *Wilson v. Servier* has also approached the application of the real and substantial test with some degree of flexibility.[60] The case involved a class action by plaintiffs based in Ontario for medical problems allegedly caused by drugs which were distributed by the Canadian subsidiary of a French pharmaceutical company. The court allowed the plaintiffs' claims against the French company, finding that "but for" the French company, the drugs in question would not have been marketed in Canada, which accordingly established a real and substantial connection to the forum.[61]

However, procedural hurdles other than *forum non conveniens* remain for claimants bringing actions in Canadian courts for corporate abuses committed abroad. In *Tolofson v. Jensen*,[62] the Supreme Court of Canada enacted a choice of law rule for torts committed in a jurisdiction other than that in which the action was being brought. The case involved interprovincial rather than international issues, with the Court concluding that the law of the site of the tort would be the governing law.[63] In doing so, the Court disregarded British law and the U.S. doctrine on transitory torts, which holds that the law of the forum applies in adjudicating wrongs committed in another country if the wrong is "unjusticiable" in the country

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[57] *Id.*

[58] *Id.* ¶ 19.

[59] *Id.* ¶ 30. For example, in *Bouzari*, the Court of Appeal for Ontario expressed concern over dismissing Bouzari's claim on jurisdictional grounds because it would unfairly leave him without a forum for justice. Nevertheless, the court was reluctant to modify the real and substantial test, most likely because the laws protecting Iran's sovereign immunity clearly prevented the Ontario courts from exercising jurisdiction in this case.

[60] Wilson v. Servier Canada, Inc., [2000] 50 O.R.3d 219.

[61] *Id.* ¶¶ 14, 21.

[62] Tolofson v. Jensen, [1994] 3 S.C.R. 1022.

[63] *Id.* at 1050.

in which the wrong is committed.[64]

Tolofson sets a highly limiting precedent for extraterritorial corporate abuse cases. If the site of the tort where the abuse was committed does not recognize the act committed as being wrong, the corporation will escape liability. Although the Supreme Court noted that exceptions to the tort choice of law rule would be made in international cases to avoid injustice, it also stated that the exception would be limited to only a few cases.[65] Thus, the Supreme Court's dicta on exceptions to the tort choice of law rule may encapsulate egregious corporate abuses, but the law of the site in which the tort was committed will still govern corporate acts that do not cross the egregious threshold.

3. Australia

As in Canada, Australia has not had extensive involvement in extraterritorial corporate abuse litigation. This is somewhat surprising given Australia's lenient approach to exercising its jurisdiction over extraterritorial matters.

Australian states can exercise jurisdiction on extraterritorial claims if there is a nexus between the extraterritorial act and the jurisdiction.[66] Moreover, as long as the foreign corporation conducts business in the Australian state, it is susceptible to personal jurisdiction.[67] Furthermore, Australia has adopted a rather plaintiff-deferential formula for determining the *forum non conveniens* issue. Under Australian law, the plaintiff's choice of forum is given deference unless the plaintiff is bringing the suit in an oppressive or vexatious manner, or if allowing the claim in the selected forum will amount to an injustice to the defendant and the alternative forum will not occasion an injustice to the plaintiff.[68] A later case has also confirmed that *forum non conveniens* will dismiss an action only if the Australian forum will bring about an injustice that is oppressive, prejudicial, or vexatious in terms of serious trouble and harassment.[69] Accordingly, it is very difficult for a defendant in Australia to have a claim against it dismissed for reasons of *forum non conveniens*.

Thus, in *Dagi v. The Broken Hill Proprietary Company Ltd.*,[70] where

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[64] *Id.* at 1052.

[65] *Id.* at 1054.

[66] Australian courts interpret the required nexus rather leniently. Damages suffered partly within Australia, being a resident of Australia, or receiving medical treatment in Australia all demonstrate the required nexus. *See* JOSEPH, *supra* note 5, at 122.

[67] *Id.* at 123.

[68] Oceanic Sun Line Special Shipping Co. v. Fay (1988) 165 C.L.R. 197; Voth v. Manildra Flour Mills Pty, Ltd. (1990) 171 C.L.R. 538.

[69] Regie Nationale des Usines Renault SA v. Zhang (2002) 210 C.L.R. 491, 521.

[70] Dagi v. The Broken Hill Proprietary Co., [1997] 1 V.R. 428.

the victims sued the defendant, an Australian company, for injuries resulting from the discharge of by-products from a mine the company owned in Papua New Guinea, the defendants did not raise the issue of *forum non conveniens*. Instead, the court proceeded to examine the merits of the case. Although the court refused to exercise jurisdiction over most of the victims' claims,[71] it did note that it had jurisdiction over actions in negligence if:

> [F]irst, the circumstances giving rise to the claim are of such a character that, if they occurred within Victoria, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and second, by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to, and at the time of judgment continue to give rise to, a civil liability of the kind which the plaintiff claims to enforce.[72]

The *Dagi* claim was found not to have met this test; however, the court held that the negligence claims in the other related actions based on the plaintiffs' loss of amenity or enjoyment of the land and waters were justiciable.[73] The dispute eventually resulted in an out-of-court settlement.[74]

4. England

Unlike Canada and Australia, which have had limited experience in addressing corporate human rights abuses committed abroad, England has experienced a series of disputes in which workers in Africa have attempted to attribute liability to English corporations. Generally, plaintiffs' claims are derived using either customary international law, which is a part of the English common law, or the Private International Law Miscellaneous Provisions Act of 1995, which governs transnational tort cases.

English courts will also willingly adjudicate on corporate abuses committed abroad if there is not another "available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action." [75] Considerations taken into account in assessing the appropriate

[71] *Dagi*, [1997] 1 V.R. at 443. The court rejected many of the claims on the grounds of the Mozambique principle, which essentially states that a court does not have jurisdiction to entertain an action for the determination of the title to, or the right to possession of, any immovable situate on a foreign land. *See* British South Africa Co. v. Companhia de Moçambique, [1893] A.C. 602 (H.L.) (appeal taken from Eng.).

[72] *Dagi*, [1997] 1 V.R. at 443.

[73] *Id.*

[74] Peggy Rodgers Kalas, *International Environmental Dispute Resolution and The Need For Access By Non-State Entities*, 12 COLO. J. INT'L. ENVTL. L. & POL'Y 191, n.55 (2001).

[75] Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 476 (H.L.); Connelly v.

forum include the interests of the parties, the nature of the subject matter and the likelihood of achieving "substantive justice" in the other forum.[76]

Nevertheless, even if the other forum is clearly the more appropriate choice, the courts have noted that they retain the discretion to keep the action in England if justice requires it.[77] Because of this expansive test, the English courts have allowed South African workers injured by an English-owned mine in South Africa, a British worker injured on the job in Namibia, and South Africans living near an English-owned mine in South Africa, to all successfully sue the English companies in England.[78]

Although in two of the above cases a forum outside of England was deemed more appropriate due to the location of the witnesses, the injury sustained, and the evidence, the courts selected England as the appropriate forum for the disputes because of financial considerations. Thus, in *Connelly v. RTZ Corporation PLC and Another*,[79] the court found that the nature and complexity of the case warranted either legal aid or a contingency fee arrangement, both of which were unavailable in Namibia, where the injury took place.[80] As a result, "substantial justice" required that England be the selected forum for the dispute.[81]

The *Connelly* decision was reinforced in *Lubbe v. Cape Plc.*[82] In *Lubbe*, thousands of plaintiffs who either worked in or lived near an asbestos mine in South Africa, or were somehow associated with the transport of the product, sued the English company whose subsidiary companies operated the mine.[83] As in *Connelly*, the evidence pointed to South Africa as the appropriate forum for the dispute, and initially the English courts dismissed the action in England on *forum non conveniens*.[84] However, observing that the class action initiated by the plaintiffs required efficiency, cost-effectiveness, professional lawyer supervision, expert advice, and evidence, the House of Lords held that only England could be the appropriate forum for the dispute. The House of Lords was concerned that South Africa did not provide legal aid, contingency fees or other financial arrangements to afford the plaintiffs the possibility of obtaining

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RTZ Corp. Plc., [1997] 4 All E.R. 335 (H.L.).

[76] *Id.*

[77] *Id.*

[78] *See, e.g.*, Ngcobo v. Thor Chemicals Holdings Ltd., [1995] T.L.R. 10 (Eng. C.A.); Sithole v. Thor Chemicals Holdings Ltd. [1999] T.L.R. 110 (Eng. C.A); *Connelly*, [1997] 4 All E.R. at 335; Lubbe v. Cape Plc. [2000] 4 All E.R. 268 (H.L.).

[79] *Connelly*, [1997] 4 All E.R. at 335.

[80] *Id.*

[81] However, Connelly's claim was subsequently struck down by the courts on limitation grounds. Connelly v. Rio Tinto Zinc Corp. Plc., [1998] A.C. 584 (Q.B.).

[82] Lubbe v. Cape Plc., [2000] 4 All E.R. at 268.

[83] *Id.*

[84] *Id.*

what was needed for the action.[85] The English Court's reliance on financial considerations as an overriding factor suggests that England has taken great strides to join the United States in having its national courts adjudicate injuries sustained in foreign jurisdictions.

C. Criminal Litigation

Given that MNCs have been accused of engaging in acts such as torture, murder, and abduction, criminal prosecutions of corporations in domestic courts may be another possible alternative for attributing liability for extraterritorial abuses. Moreover, criminal prosecutions provide victims with the remedy of imprisonment which is not offered by any other solution and may be the strongest means of holding wrongdoers accountable.

Generally, most states allow for the criminal prosecution of corporations, although the jurisdiction over these crimes is mostly limited to crimes committed within a state's territory.[86] Nonetheless, extraterritorial corporate abuses that are planned or directed from an office within the state's territory would likely fall under a state's criminal jurisdiction so long as the planning/directing agents or employees represent the directing mind of the corporation or are acting for the benefit, or on behalf of, the corporation.[87]

However, most states have also made allowances for extraterritorial jurisdiction for egregious crimes. For example, Australia exercises criminal jurisdiction over individuals who have engaged in slave trade outside of Australia;[88] Canada extends its jurisdiction over the crimes of genocide, crimes against humanity, or war crimes which are committed outside of Canada;[89] the United Kingdom provides redress in its courts for the crimes of genocide and crimes against humanity committed by U.K. citizens either in the U.K. or abroad.[90]

It is interesting that the crimes of forced labor, genocide, and those crimes that fall under the ambit of crimes against humanity, which are recognized by several states as being of sufficient importance to warrant extraterritorial jurisdiction, are equivalent to the limited scope of applicable

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[85] *Id.*

[86] *See* Criminal Code, R.S.C., ch. C-46, § 6(2) (1985) (Can.); Stephen Powles et al., *A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions – United Kingdom* (2003), *at* http://www.fafo.no/liabilities/UK.pdf (showing that the criminal jurisdiction of English courts is primarily based upon the location of the accused within the jurisdiction).

[87] *See* FAFO & INT'L PEACE ACAD., *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004), *at* http://www.fafo.no/liabilities (for Executive Summary, Commentary, and National Surveys).

[88] Criminal Code Act, 1995, § 270.3(2) (Austl.).

[89] Crimes Against Humanity and War Crimes Act, R.S.C., ch. 24, § 8 (2000) (Can.).

[90] International Criminal Court Act, 2001, c. 17, § 51(1) (Eng.).

torts recognized by the U.S. Supreme Court as being actionable under the ATCA.[91] Thus, criminal litigation for extraterritorial abuses may parallel the restrictive approach the U.S. Supreme Court has taken in interpreting civil liability under the ATCA.

III. INTERNATIONAL SOLUTIONS

Two problems associated with domestic solutions for addressing extraterritorial corporate abuses are, one, that the method of attributing liability to corporations differs from state to state and, two, that a corporation, which could be found "guilty" in one jurisdiction, may escape liability altogether in another. An international solution for addressing corporate wrongs would avoid these problems and would instead ensure a harmonized approach across states in determining corporate liability for abuses. However, as the experience with the creation of the International Criminal Court ("ICC") has demonstrated, forging a common treaty that is satisfactory to all states in the world is a difficult process.[92] Moreover, given the allegations that the Bush administration is interested in curtailing the ATCA[93] and its disinclination to sign the Rome Statute of the ICC,[94] it is likely that the United States will exhibit a similar reluctance to join any other international solution that attempts to govern corporate conduct. Nevertheless, despite U.S. refusal to join the Rome Statute, the ICC is enjoying some success and it is possible that an international solution to address corporate wrongs would enjoy similar success.

The next section examines three possible solutions at the international level for addressing transnational corporate liability. The first solution involves extending the jurisdiction of the ICC. Currently, the ICC does not provide coverage under its ambit to victims of corporate crimes. However, its structure and textual language make it a viable ground for extension of its jurisdiction.

A second solution would be to submit the victims' claims against a corporation to a specialized international tribunal with expertise in criminal, business, and human rights law. Several precedents already exist in the areas of criminal, business, and human rights law that suggest that their spheres of expertise could extend to include jurisdiction over corporate

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[91] *See supra* Part II.A.I.

[92] *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 146 (M.T. Kamminga and S. Zia-Zarifi eds., 2000).

[93] *See supra* note 11.

[94] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* 37 I.L.M. 1002 (1998), *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

accountability claims.

The final solution to consider is corporate codes of conduct. Currently, several international organizations, most notably the United Nations, maintain codes of conduct that are aimed at governing globalized corporate behavior. The structure and effectiveness of these international codes of conduct will be examined.

A. The International Criminal Court

1. The History of the ICC's Attempt at Jurisdiction Over Legal Persons

On July 17, 1998, the Rome Statute, which created the ICC, was adopted by an overwhelming majority of states.[95] One notable exception was the United States, which continues to refuse to sign the Rome Statute. At present, there are approximately 139 signatories to the treaty, 99 of which have also ratified it.[96]

In its definition of crimes, the ICC includes genocide, murder, torture, and kidnapping.[97] However, the ICC's jurisdiction over these crimes is limited to those crimes that have occurred in the territory of a state party or where the accused is a national of a state party.[98] In addition, Article 25(1) of the Rome Statute mandates that the ICC's jurisdiction only be over natural persons, not legal persons.

During negotiations of the Rome Statute, the participating states contemplated including legal persons under the ambit of the ICC. The French delegation put forward a proposal suggesting that criminal organizations, such as those mentioned in the Nuremberg trials, should be identified as illegal and closed down or dissolved.[99] Weeks of negotiations followed and the parties put together a draft text on legal persons.[100] The draft text contained language that allowed the ICC to have jurisdiction over legal persons, other than states, when the crimes were committed on behalf of, or by agents or representatives of, the legal person.[101] In the end, however, the final working paper produced by the consulting states changed the focus from legal persons to juridical persons to highlight the importance

[95] *Id.*

[96] *See* COALITION FOR THE ICC, *Currently the Rome Statute of the ICC has 139 Signatories and 99 Ratifications*, *at* http://www.iccnow.org/countryinfo/worldsigsandratifications.html (last visited Oct. 19, 2005).

[97] Rome Statute, *supra* note 94, at arts. 6–7.

[98] *Id.* at art. 12; *see id.* at art. 13(b) (noting that the ICC can also exercise jurisdiction over a crime if the Security Council refers the alleged crime to an ICC Prosecutor).

[99] Clapham, *supra* note 92, at 146.

[100] *Id.*

[101] *Id.* at 144.

of individual prosecutions over prosecutions of legal entities.[102] A juridical person was defined as a corporation with the objective of seeking a profit or benefit, and excluded states and non-profit organizations.[103] The working paper allowed for charges to be brought against a juridical person only if the natural person controlling the legal entity committed the crime on behalf of and with the consent of the legal entity and if the natural person was convicted of the crime charged.[104] Nevertheless, the parties were still unable to agree on the text of the provision and eventually the French delegation withdrew its proposal.[105] As a result, the ICC's jurisdiction does not extend to corporations.

2. Proposed Extensions of ICC Jurisdiction

Amendments to the Rome Statute become a possibility after the statute has been entered into force for seven years.[106] Either consensus or a two-thirds majority is needed for any amendments[107] and the statute also mandates a review of the statute in its entirety seven years after entry into force.[108] Thus, amendments to the jurisdiction of the ICC cannot be considered before July 2009.

Nevertheless, the ICC may still provide an adequate forum for the adjudication of corporate abuse claims if its jurisdiction is extended to include legal persons. The French proposal to extend jurisdiction to legal persons was withdrawn due to time constraints, disagreements over whether to include language to cover terrorist organizations, procedural problems, and the general notion of corporate criminal responsibility being an unfamiliar idea.[109]

However, reconsidering the extension of ICC jurisdiction to legal persons during the mandatory review in 2009 might alleviate many of the problems identified. First and most importantly, sufficient time could be allowed for all state parties to consider the issue of including legal persons in the jurisdiction of the ICC. Second, to ensure the extension of jurisdiction to legal persons, the statute's definition of "legal persons" should pertain only to profit-making organizations and exclude states, state

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[102] *Id.*

[103] *Id.*

[104] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Working Paper of the Committee on General Principles of Criminal Law on Article 23, Paragraphs 5 and 6*, U.N. Doc. A/Conf.183/C.1/WGGP/L.5/ Rev.2 (July 3, 1998).

[105] Clapham, *supra* note 92, at 157.

[106] Rome Statute, *supra* note 94, at art. 121(1).

[107] *Id.* at art. 121(3).

[108] *Id.* at art. 123(1).

[109] Clapham, *supra* note 92, at 157.

agencies, non-governmental organizations, or any organizations with predominantly political aims. Broadening the focus of "legal persons" to include organizations other than those with a primary aim towards profits will probably not pass the muster of many states due to concerns over their own sovereignty and their trepidation about unintentionally including the acts of territories that are struggling for self-determination. Furthermore, the possibility of states becoming more familiar with the concept of corporate criminal responsibility as a whole by 2009 seems reasonable given the multitude of actions targeting transnational corporate abuses promulgated by alleged victims in a variety of different fora.

Extending the ICC's jurisdiction to "legal persons" is only the first step towards using it as a forum for attaching liability to corporations for transnational wrongs. Provided that a multitude of persons comprise a corporation, the parties must also determine how to attribute liability to a corporation. That is, they must determine which natural person's actions can be attributable as an act of the corporation. One solution would be to use the "directing mind" theory. Under this theory, only criminal acts by individuals, who are delegated the governing executive authority of the corporation, or who have the power to act in the name of the corporation, are attributable to the corporation if they act within the scope of their authority and in the interest of the corporation.[110] This exempts a corporation from liability for any acts committed by lower level employees, which restricts its susceptibility to criminal liability for petty acts while ensuring that the corporation is still accountable for acts on a larger scale, the normal realm for human rights violations. In addition, this solution does not require that an individual employee be found guilty for the condemned act. Under the first proposal for extension of the ICC's jurisdiction over legal persons, this had been a required element.[111]

To properly encapsulate corporate liability under the ICC, the definition of crimes should also be expanded to include environmental damage. Thus, where the corporation's resultant act leads to widespread and significant environmental damage that affects the life and/or well being of plant, animal, or human health, the commission of a crime should be established.

Finally, the penalties for guilty persons also need to be modified in order to appreciate the distinction between a natural and a legal person. Currently, the ICC's penalty options are either imprisonment or fines.[112] However, imprisonment is not a viable penalty for a corporation unless the directing mind of that corporation is also separately found guilty.

[110] *See* FAFO, *supra* note 87 (using variations of the "directing mind" theory to attribute liability to corporations in Canada, the United Kingdom, Norway, and France).

[111] Clapham, *supra* note 92, at 144.

[112] Rome Statute, *supra* note 94, at art. 77.

Moreover, whereas a monetary fine may result in hardship for a natural person, it may be an insignificant penalty for a wealthy corporation. As a result, penalties for "guilty" corporations should include substantial monetary fines that are based on a percentage of the corporation's pre-tax profits or its gross revenue, and, for the most heinous of offenses, dissolution of the corporation.

Extending the jurisdiction of the ICC to legal persons is a complex procedure that will undoubtedly be met with opposition from business entities. Moreover, given the divergent views of the ICC's current members and its already failed attempt at extending the jurisdiction to legal persons, future negotiations on this matter are sure to be fraught with difficulty. Nevertheless, success in this realm is possible, as ICC members have already demonstrated from their ability to cooperate and compromise with the Rome Statute. Furthermore, given that an extension of ICC jurisdiction could achieve a milestone in the area of corporate accountability, it may be worth the likely problem-plagued process.

B. Specialized Tribunals

The preponderance of tribunals handling criminal prosecutions, human rights complaints, and international business grievances acknowledges the potential for individual *ad hoc* or specialized tribunals as another appropriate forum for combating transnational corporate abuses. Additionally, as a transnational corporate abuse claim involves elements of criminal law, human rights law, and aspects of commercial law, it is useful to examine the existing tribunals that offer expertise in these areas.

The relative success of the International Criminal Tribunals addressing the atrocities committed in both Yugoslavia and Rwanda demonstrates a tribunal's ability to effectively address criminal wrongs.[113] Moreover, the flurry of activity by human rights tribunals, such as the European Court of Human Rights,[114] the African Commission on Human and Peoples' Rights, the Inter-American Commission and Court of Human Rights, and the United Nations Human Rights Committee,[115] all of which manage disputes ranging from treatment of transgendered individuals to a person's right to

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[113] *See* GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES 1 (2002) (discussing the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia).

[114] *See* Brian Walsh, *International Human Rights Before Domestic Courts: Remarks*, 70 ST. JOHN'S L. REV. 77 (1996).

[115] *See* OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *Overview of Procedure, at* http://www.unhchr.ch/html/menu2/8/over.htm (last visited Oct. 19, 2005) (showing that under the United Nations Human Rights Committee approach, individual complaints are made to the Human Rights Committee which then assesses a complaint based on the written information provided, with the result that it may lead to a change in a state's laws based upon the Committee's assessment).

protection based on political opinion,[116] suggests that tribunals are also effectively managing broad-based human rights complaints. Finally, international arbitral panels, particularly those in which individuals have brought complaints against states, such as the actions promulgated under the rubric of the International Center for the Settlement of Investment Disputes ("ICSID"), are particularly adept at handling the business aspects of transnational commercial disputes.[117]

The construction of a tribunal specializing in transnational corporate abuses can be accomplished by combining the individual expertise of the criminal, human rights, and international commercial tribunals. First, similar to all three types of tribunals, a charter document or treaty is needed to lay down the obligations and duties of transnational corporations, detail breaches of those obligations and duties, and specify the penalties for any subsequent breaches. This is probably the most complex and problematic aspect of this model because an international consensus will be needed in order to draft such a constituent document. Furthermore, many of the problems faced by the parties to the ICC in drafting its constituent treaty will likely reappear during this process. Nonetheless, each criminal, human rights, and international commercial tribunal mentioned above has managed to achieve consensus in order to form a constituent document, which suggests that similar success can be achieved in the formulation of a document for the construction of a transnational corporate abuse forum.

Once the substantive aspects of the tribunal have been delineated in the constituent treaty, it will be necessary to outline the procedural aspects of the tribunal. This raises several questions. Similar to the international criminal tribunals, should lawyers be provided to the alleged victims or should the victims resort to private counsel, as is the practice of the European Court of Human Rights and ICSID tribunals? Should the rules of procedure be based on common law or civil law, or should a hybrid approach of the two forms be used, as is done in international commercial arbitral tribunals? Will this newly-created tribunal be based on universal jurisdiction, or will it only accept claims from parties who are parties to the constituent treaty? Can individual complainants bring a claim directly to the tribunal, or must they rely on their state to bring a claim on their behalf? These are only a few of the many procedural issues that will need to be determined in creating a forum for addressing corporate abuses.

Although precedents from numerous highly-specialized tribunals combating criminal, human rights, and transnational business violations can form the basis of a specialized tribunal for addressing transnational corporate abuses, the biggest problem with the success of this model lies in

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[116] *See* Jazairi v. Canada, U.N. CCPR, Hum. Rts. Comm'n, Comm. No. 958/2000, U.N. Doc. CCPR/C/82/D/958/2000.

[117] *Id.*

states being unable to achieve a consensus on several of the substantive and procedural elements of the model. However, with continued negotiations and ample time for state concerns to be addressed, a specialized tribunal can arguably be a viable alternative forum for addressing transnational corporate abuses.

C. Codes of Conduct

Both the Organization for Economic Co-operation and Development ("OECD") and the United Nations ("U.N.") have attempted proactively to combat the problematic aspects of international business practices with guidelines for recommended business conduct. The next sections examine these in greater detail.

1. OECD Guidelines

In 2000, the OECD revised its Guidelines for Multinational Enterprises ("the Guidelines").[118] The Guidelines are recommendations to multinational enterprises providing "voluntary principles and standards for responsible business conduct consistent with applicable laws."[119] A key aspect of the Guidelines, which led to its adoption by the 30 member states of the OECD and three additional states,[120] is that they are voluntary and not legally enforceable.

The Guidelines begin with the delineation of general policies encouraging multinational enterprises to contribute to economic, social, and environmental progress with the aim of achieving sustainable development while respecting the human rights of those affected by the multinational enterprise's activities.[121] They then outline specific obligations under the headings of employment and industrial relations, environment, and bribery, among others.

Implementation of the Guidelines is by way of National Contact Points ("NCPs"), governmental representatives, or co-operative bodies in each state that has adopted the Guidelines.[122] The NCP's role is to further the objectives of the Guidelines and report annually on its state's progress to the Committee on International Investment and Multinational Enterprises,

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[118] ORG. FOR ECON. CO-OPERATION & DEV., *The OECD Guidelines for Multinational Enterprises* (revised 2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf [hereinafter OECD Guidelines].

[119] *Id.* at 15.

[120] NATIONAL CONTACT POINT, CANADA, *Canada and the OECD Guidelines for Multinational Enterprises: Promoting Corporate Social Responsibility*, *available at* http://www.ncp-pcn.gc.ca/multinational-en.asp (last updated Oct. 3, 2002).

[121] OECD Guidelines, *supra* note 118, at 19.

[122] *Id.* at 35.

the umbrella agency overseeing the Guidelines.[123]

Complaints against multinational enterprises for violations of the Guidelines are made to the NCP, which makes an initial assessment.[124] Upon completion of the initial assessment, the NCP responds to the complaining party and determines whether the issues merit further consideration.[125] If it deems the issue not worthy of subsequent consideration, the NCP gives reasons for its decision. However, if it decides to consider the issue further, the NCP helps the party attempt to resolve the issue, which may involve the NCP offering or facilitating access to consensual and non-adversarial procedures, such as conciliation or mediation.[126]

Although the non-binding and voluntary nature of the Guidelines facilitated their adoption by a multitude of states, these two factors also detract from the effectiveness of the Guidelines. Principally, this is because multinational enterprises are not required to adhere to the Guidelines and there are no sanctions for a failure to do so. Moreover, a complaint by a victims group against a multinational enterprise for alleged violations of the Guidelines must first be assessed by the NCP, a state representative. Thus, for those victims of human rights violations where the state has acted in concert with a multinational enterprise, turning to the NCP for assistance could be meaningless. In addition, there is no appeal from the NCP's initial assessment decision. Thus, if the NCP deems an issue to be meritless, victims have no further recourse under the Guidelines. Similarly, if the NCP cannot help the parties resolve their issue, even through conciliation or mediation, the Guidelines do not provide any further direction. Finally, the Guidelines do not address any of the procedural issues faced by the U.S. courts in ATCA actions, which would be relevant here.

As a result, although the Guidelines take a step forward in laying out a code of conduct for multinational enterprises to adhere to in their transnational business activities, without some form of enforcement mechanism, the Guidelines are more commendable in theory than in practice.

2. U.N. Norms

In August of 2003, the U.N. Sub-Commission for the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to

[123] *Id.* at 32.
[124] *Id.* at 36.
[125] *Id.*
[126] *Id.*

Human Rights ("Norms").[127] The Norms propose human rights standards for transnational corporations and other business enterprises, and delineate a methodology for businesses to incorporate numerous corporate social responsibilities. The Norms also recognize the general obligation placed upon corporations to "promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."[128] In addition, the Norms, which do not have the same status as a U.N. treaty, also recognize specific obligations including workers' rights, environmental protection, the right to equal opportunities, and the right to security of person.[129]

The obligations enumerated in the Norms are derived from existing international human rights instruments including the Charter of the United Nations,[130] the Universal Declaration of Human Rights,[131] and other notable international human rights instruments.[132] As a result, an impression is created that the Norms merely restate existing international human rights law that already applies or should apply to corporate conduct.[133] However,

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[127] U.N. ESCOR, 55th Sess., 22d mtg., at Agenda Item 4, U.N. Doc. E/CN.4/Sub2/2003/12/Rev.2 (2003) [hereinafter *Norms*].

[128] *Id.* at pmbl.

[129] *Id.* ¶¶ 1–14.

[130] U.N. CHARTER, *available at* http://www.un.org/aboutun/charter.

[131] *Universal Declaration of Human Rights*, G.A. Res. 217(III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, UN Doc. A/810 (1948).

[132] The Norms also reference by name, among others, the following human rights instruments: Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Slavery Convention, Sept. 25, 1926, 26 Stat. 2183, 60 U.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, *corrigendum adopted* Dec. 16, 1966, 1059 U.N.T.S. 451; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *reprinted in* 28 I.L.M. 1456 (1989); Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, *reprinted in* 31 I.L.M. 818; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, Europ. T.S. No. 150, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/150.htm; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, *available at* http://www.olis.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br(97)20.

[133] Carolin F. Hillemanns, *U.N. Norms on the Responsibilities of Transnational Corporation and Other Business Enterprises with Regard to Human Rights*, 4 GERMAN L.J. 1065, 1070 (2003).

it is argued that the added benefit of the Norms comes from its introduction as an implementation mechanism to ensure the observation of the obligations set out in the Norms by corporations.[134]

The implementation mechanism contemplated by the Norms sets out a three-part process. First, corporations are expected to adopt, disseminate, and implement internal rules of operation in compliance with the Norms and then periodically report on and take other measures to fully implement the Norms.[135] Second, activities of corporations are subject to transparent and independent periodic monitoring and verification by the U.N. and "other international and national mechanisms already in existence or yet to be created," which are mandated to consider input from stakeholders, likely arising from complaints of violations of the Norms.[136] Finally, states are expected to "establish and reinforce the necessary legal and administrative framework" to ensure implementation of the Norms by corporations.[137] Failure to abide by the Norms requires the corporations and business entities to provide reparations to those affected. The Norms indicate that damages should be assessed by national courts and/or international tribunals, but fail to specify which courts or tribunals.[138]

The Norms provide a thorough listing of the types of duties and obligations by which corporations engaging in transnational activities should abide. In this way, the Norms take a step forward in the area of corporate social responsibility by addressing all potential adversities of a business transaction and by specifically focusing attention upon the rarely attended-to environmental aspects of corporate activity. However, the Norms still suffer from a number of shortcomings. Most notably, the suggested enforcement mechanism lacks potency. The Norms do not suggest a viable framework for their implementation, relying instead upon unspecified national or international mechanisms to subject corporations to periodic monitoring. In fact, these unspecified mechanisms may not even be in existence and may need to be created for the specific purpose of monitoring. Moreover, guidelines are not given for the calculation of damages for violations of the Norms, nor are the courts or international tribunals specified, and the applicable law is referenced only as national or international law. In addition, the implementation mechanism gives a role to states in creating the framework for ensuring compliance with the Norms but ignores the fact that states often act in complicity with corporations

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[134] Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493, 498–99 (2004).

[135] *Norms*, *supra* note 127, ¶ 15.

[136] *Id.* ¶ 16.

[137] *Id.* ¶ 17.

[138] *Id.* ¶ 18.

engaged in human rights abuses.[139] The implementation mechanisms of the Norms are thus at odds with victims suffering from abuses committed by corporations acting in concert with the state. Finally, the Norms do not provide any direction on procedural issues such as determining which national court or international tribunal has jurisdiction over an alleged violation of the Norms. Thus, where an American corporation operating in Burma is accused of violating the Norms in Burma, do the U.S. courts or the Burmese courts have jurisdiction and how is this determined? Additionally, in determining *forum non conveniens*, which jurisdiction's rules are used? Finally, can the Burmese citizens initiate an action against the corporation directly or must the Burmese government bring the claim on its citizens' behalf? Without guidance on these and other procedural issues related to initiating actions against transnational corporations, the effectiveness of the Norms is lessened considerably.

However, in contrast to the OECD Guidelines and the U.N.'s first attempt at addressing human rights concerns as they relate to business initiatives by way of the United Nations Global Compact,[140] the Norms' legalistic nature and proposed enforcement mechanism result in a vast improvement over other codes of conduct. Yet, the problems associated with its implementation mechanism detract from its overall effectiveness. Nevertheless, the uproar caused by various commercial non-governmental organizations over the "legalistic approach" of the Norms suggests that, implementation mechanism problems aside, the Norms may still have an effect on the actions of transnational corporations.[141]

IV. PROPOSED SOLUTION TO ENSURE CORPORATE ACCOUNTABILITY FOR TRANSNATIONAL ABUSES

Thus far, this article has canvassed various mechanisms for attributing liability to corporations, both domestic and international, and has attempted to identify the advantages and disadvantages of each of the existing

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[139] *Kadic*, 70 F.3d at 239–40; Hall, *supra* note 31, at 410.

[140] The Global Compact is intended to ally companies with labor, U.N. agencies, and civil society to support its ten core principles under the headings of human rights, labor standards, environment and anti-corruption. For more information, see U.N., *The Global Compact*, *at* http://www.unglobalcompact.org.

[141] The International Organization of Employees and the International Chamber of Commerce are some of the non-governmental organizations ("NGOs") that oppose the Norms. *See Joint Written Statement submitted by the International Chamber of Commerce and the International Organization of Employers, Non-governmental Organizations in General Consultative Status*, U.N. ESCOR, 55th Sess., at Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/NGO/44 (2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.NGO.44.En [hereinafter *Joint Statement*]. *See also Shell Leads International Business Campaign Against UN Human Rights Norms*, CEO Info Brief (March 2004), *available at* http://www.corporateeurope.org/norms.html.

mechanisms. This section builds upon the identified mechanisms and argues for the creation of a new international mechanism that draws upon the advantages of several of the aforementioned domestic and international mechanisms.

Given the state-to-state variation of domestic mechanisms for attributing liability to corporations for transnational abuses, it seems likely that an international mechanism is more suited to ensuring corporate accountability for transnational abuses. However, domestic mechanisms such as the ATCA or the use of domestic criminal law offer certain advantages over an international solution. First, as they require approval only by one government, domestic mechanisms are much easier to introduce and control. In addition, since a domestic mechanism often relies on pre-existing legislation, once a court decides that the legislation or principle can be used to hold corporations liable for extraterritorial abuses, it sets a precedent that can be used by other plaintiffs.

Nevertheless, domestic solutions suffer from many procedural problems, which were identified earlier in Part II. In addition, domestic solutions require national court judges to interpret international law in determining a plaintiff's claim, an area in which they may have limited experience. Furthermore, most civil and criminal domestic mechanisms offer redress only to plaintiffs with a tie to the domestic state, leaving all plaintiffs who cannot satisfy the jurisdictional requirement with limited options. Finally, the ATCA, which is arguably the most successful of the domestic solutions, is in jeopardy as a result of interpretation by the U.S. Supreme Court and also as a result of the Bush administration's distaste for the Act. For these reasons, a domestic mechanism, on its own, cannot ensure corporate accountability for transnational abuses in the same manner that an international mechanism might be able to.

One possible effective international mechanism is the use of the ICC by way of extending its jurisdiction over legal persons. The ICC possesses an existing multilateral treaty that could be amended, as suggested above, to incorporate the introduction of legal persons. In addition, its court structure ensures that violations of the treaty will be enforced. However, the greatest failing of the ICC as a means of ensuring corporate accountability for extraterritorial abuses is the lack of U.S. participation. The United States' continued failure to sign the Rome Statute would likely exempt all U.S. corporations from the jurisdiction of the ICC even if its jurisdiction were extended to legal persons.[142] Given that many of the world's corporations

[142] It is unclear whether the ICC has jurisdiction over non-state parties without their consent. *Compare* Michael P. Scharf, *The ICC's Jurisdiction Over The Nationals Of Non-Party States: A Critique Of The U.S. Position*, 64 LAW & CONTEMP. PROB. 67, 70 (2001), *with* Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855 (1999).

are American, U.S. absence from the ICC leaves victims of abuse at the hands of U.S. corporations without any means of redress.[143] Moreover, the value of the ICC is its expertise over criminal acts. It does not have any expertise in dealing with businesses or business transactions that result in these acts. Curtailing corporate criminal liability requires both a methodology that dictates, informs, and guides a corporation's transnational business activities and an enforcement mechanism that punishes improper conduct. The ICC only contains an enforcement mechanism, making the ICC an ineffective international solution for ensuring corporate accountability.[144] Conversely, the lack of effective enforcement mechanisms in the codes of conduct proposed by the OECD and the U.N. detracts from their effectiveness.

A. A Multilateral Treaty/Tribunal Approach

To properly ensure corporate accountability for transnational abuses, a multilateral solution both outlining corporate obligations and possessing an enforcement mechanism is needed. This solution has two components. First, a multilateral treaty specifying the human rights obligations of corporations is necessary. Alternatively, a multilateral code of conduct, such as the Norms, can be used to establish the duties and obligations of corporations in relation to human rights. At a minimum, either the constituent treaty or the code of conduct must identify human rights violations which are recognized by customary international law. For example, the Norms prescribe a minimum list of egregious violations of human rights that would fulfill a base requirement for any constituent treaty or code of conduct.[145] However, a constituent document should also specifically require the protection of economic, social, cultural, and environmental rights. Thus, although the Norms recognize the corporations' need to protect economic, social, cultural, and environmental rights

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[143] However, as long as the ATCA continues to exist, it is likely that victims of transnational abuses caused by U.S. corporations will be able to use the ATCA, so long as the alleged human rights violations fit within the violations recognized by the U.S. Supreme Court.

[144] The likelihood of the United States signing the Rome Statute is unclear, even with a change in administration. *See* Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205, 1249 (2004).

[145] The Norms identify the following egregious human rights abuses: war crimes; crimes against humanity; genocide; torture; forced disappearance; forced or compulsory labor; hostage-taking; extrajudicial, summary or arbitrary executions; and other violations of humanitarian law and international crimes against the human person. *Norms*, *supra* note 127, at art. 3.

generally,[146] they do not, for example, specifically call for the protection of indigenous peoples or prohibit egregious environmental damage that causes harm to plant, animal, or human health.

Similar to the controversial negotiations surrounding the creation of the ICC, negotiating a multilateral treaty or code of conduct delineating the human rights obligations of corporations may be difficult. Moreover, it is possible that the United States will abstain from joining any resulting treaty for the same reasons it refused to sign the Rome Statute. Perhaps for that reason, the Norms, which would only require minimal amendments as outlined above, may garner more widespread support from states.

However, the second component of this solution, the institution of an effective enforcement mechanism, is likely to be the most problematic aspect of this solution. The nongovernmental organizations contesting the Norms are most concerned with the binding nature and enforcement aspects of the Norms, not the delineation of corporate obligations.[147] Similarly, one ground for U.S. opposition to the Rome Statute was the fear that U.S. military troops would be wrongly ensnared in the ICC's enforcement mechanism.[148] Thus, any enforcement mechanism will need to be sensitive to state needs while ensuring that the mechanism still remains effective.

One approach would be to have the constituent treaty or norms outlining corporate obligations as they pertain to the prevention of transnational abuses enforced at a specialized tribunal similar to the one described in Part III(B) of this article. This tribunal could constitute the enforcement arm of the constituent treaty or code of conduct. Under this approach, individual plaintiffs citing a violation of the constituent treaty or code of conduct could initiate an action against the allegedly offending corporation at the tribunal. Experts in business, human rights, and criminal law could comprise the list of adjudicators, and the tribunal could either be a permanent or an *ad hoc* body, the latter of which would substantially reduce all associated costs. These and other procedural issues, including sanctions for offenses, the definition of a corporation, and costs, could be negotiated and determined by the participating states.

A second approach would be to use domestic mechanisms to enforce the obligations laid out in the constituent treaty or code of conduct. Using

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[146] *See id.* at arts. 12, 14.

[147] For example, the International Chamber of Commerce and the International Organization of Employers note that "the binding and legalistic approach of the draft norms will not meet the diverse needs and circumstances of companies and will limit the innovation and creativity shown by companies in addressing human rights issues in the context of their efforts to find practical and workable solutions to corporate responsibility challenges." *See Joint Statement*, *supra* note 141.

[148] GLOBAL POLICY FORUM, *US Opposition to the International Criminal Court*, *at* http://www.globalpolicy.org/intljustice/icc/usindex.htm; Jonathan F. Fanton, *US Obstructs Global Justice*, L.A. TIMES, Mar. 29, 2005, at B11.

this approach, states would only be obliged to use existing domestic mechanisms or create internal mechanisms to address this issue. Accordingly, in the United States, U.S. domestic rules would still govern the procedural aspects of a transnational abuse claim against a corporation, but U.S. courts could interpret and utilize the constituent multilateral treaty or code of conduct to determine the substantive aspects of the claim. The advantage to this approach is that states have greater control over whom and in what manner they exercise the enforcement mechanism. Thus, for states that do not recognize corporate criminal responsibility, they could choose not to establish this concept, concentrating instead on establishing a corporation's civil liability.[149] However, the biggest disadvantage to this approach is the variety of approaches to enforcement of the constituent treaty or norms from nation to nation. Thus, a plaintiff injured by a corporation in State A may not receive the same level of redress that a plaintiff injured by the corporation in State B may receive. For this reason, the use of a specialized tribunal as the enforcing arm of a constituent treaty or norms outlining corporate responsibilities for transnational harms is preferred.

A third approach would be to use domestic mechanisms to the extent their internal state laws permit and, if a remedy cannot be offered domestically, to use the specialized tribunal to fill in any remedial gaps. Thus, a victim would be required to exhaust all domestic mechanisms before resorting to the specialized tribunal, or alternatively, prove to the tribunal, as a preliminary matter, that domestic means cannot offer an adequate remedy. The advantage to this approach is that it limits the costs associated with establishing a specialized tribunal by limiting its caseload and by allowing it to be established on an *ad hoc* or as-needed basis. The approach also works to deter vexatious or frivolous actions against corporations, as the domestic mechanisms would filter these claims out. However, the exercise of jurisdiction by the specialized tribunal in cases where it is determined that no adequate domestic remedy exists could be seen as an affront to a state's sovereignty, as the tribunal's ruling implies that a state cannot adequately manage corporate abuses within its territory, on its own. This may make states more reluctant to adopt this model.

B. Jurisdiction

Problems with a multilateral approach may also arise from the constituent treaty or code of conduct's approach to jurisdiction. Under the Rome Statute and other international treaties, jurisdiction is exercised over only those who have ratified the treaty or who have consented to it.[150] This

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[149] *See* Clapham, *supra* note 92.

[150] For example, the Rome Statute dictates that a state that is a party to the statute accepts ICC jurisdiction. *See* Rome Statute, *supra* note 94, at art. 12(1). Alternatively, a state that is

is the most preferable approach to jurisdiction as it imposes obligations only upon those who have indicated a willingness to be bound by those obligations. However, should the United States, or any other state which is home to a significant number of multinational corporations, indicate an aversion to signing a constituent treaty outlining corporate responsibilities for transnational harms or an unwillingness to be bound by an international code of conduct, the effectiveness of this approach to jurisdiction will be lessened. As a result, there may remain a number of multinational corporations over which jurisdiction cannot be exercised.

An alternative approach would be to exercise jurisdiction over the locus of the human rights violations. Thus, if the territory in which the violation occurred belongs to a state who is a party to the multilateral treaty or code of conduct, the tribunal would have jurisdiction over the violation even if the perpetrating corporation belonged to a state that was not a party to the treaty or code of conduct. This form of territorial jurisdiction is a rather conservative approach to jurisdiction and is one basis used by the ICC to exercise jurisdiction over criminal offenses. However, in contrast to the ICC's approach, the use of territorial jurisdiction without a state's consent would be necessary under this model under circumstances where transnational corporate abuse claims involve the state acting in concert with the corporation to commit the violation.[151]

Significant state participation and ratification of a multilateral treaty or code of conduct outlining corporate responsibilities for transnational harms is essential to the effectiveness of this model. The participation of only a handful of states in this model would detract from the legitimacy of the treaty and the tribunal and would not reflect the will of the preponderance of states; instead, it would reflect the will of a few states who are willing to police the world's corporations. Moreover, significant state participation allows the use of jurisdiction based on treaty ratification or territorial jurisdiction and reduces the need for universal jurisdiction.

However, without the commitment of a substantial number of states, universal jurisdiction would be essential for implementing this model. Universal jurisdiction would allow a tribunal to exercise jurisdiction over corporations who are nationals of states that are not signatories to the constituent treaty or who have averred to being bound by an international code of conduct. However, as exemplified by the Belgian experience, this approach is highly controversial. States who are not a party to the constituent treaty or code of conduct will be very reluctant to have their corporations be bound by obligations to which they did not consent. In addition, the use of universal jurisdiction may also suffer from problems of

not a party to the statute can consent to ICC jurisdiction. *Id.* at art. 12(2).

[151] In the past, several corporate abuse claims have implicated the state. For the first case implicating a state for acting in concert with a corporation, see *Unocal*, 395 F.3d at 932.

enforcement. Generally, the enforcement of decisions of international tribunals is supported by the cooperation of individual states, which facilitates the enforcement of these decisions, often treating them as if they were the decisions of domestic courts.[152] However, a U.S. court will likely refuse to enforce a judgment rendered under this model against the assets of a corporation in its jurisdiction if the United States is not a party to the constituent treaty or code of conduct that created the tribunal. Nevertheless, as many victims of corporate abuse are interested in public shame over monetary redress, a judgment against the corporation, even without enforcement, will still highlight the plight of the victims and bring negative international attention upon the corporation. This is at least a first step towards curbing corporate human rights violations.

C. Benefits of the Model

The establishment of a constituent treaty or international code of conduct in conjunction with a specialized tribunal as its enforcement arm would provide several important benefits. First, the multilateral solution would create an additional legal avenue for victims of corporate human rights violations. Domestic remedies, which exist in certain countries, could be used to supplement the multilateral solution. The multilateral approach would lend "increased international legitimacy" to the domestic remedies.[153] Second, the multilateral approach grants all victims, regardless of whether their state provides redress in domestic courts, an opportunity to combat their harms. In addition, this approach provides a uniform solution because it ensures that two victims do not receive different levels of redress as a result of living in different states. Finally, the creation of a multilateral treaty or code of conduct with an enforcement mechanism highlights the importance of combating transnational abuses as a global, and not a localized, problem. It also places greater pressure on corporations to conduct their business operations in a more socially conscious manner, whether or not their home state is a party to the treaty or code of conduct. The multilateral approach also globally propagates the stigma that is attached to businesses engaging in transnational abuses.

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[152] For example, a judgment rendered by an ICSID Tribunal is enforced as a domestic judgment in the domestic courts of signatories to the ICSID's constituent treaty. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 54(1), 17 U.S.T. 1270, 575 U.N.T.S. 159, 194. In addition, the Rome Statute prescribes that state parties "shall give effect to fines or forfeitures ordered by the Court." Rome Statute, *supra* note 94, at art. 109.

[153] *Developments in the Law - International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2048 (2001).

V. CONCLUSION

Corporate accountability for transnational abuses remains a complex problem that continues to plague both victims and states. Domestic solutions are an important step towards combating this problem, but they remain an inadequate solution due to national variations, restrictive approaches to defining human rights violations, and procedural problems. The ATCA continues to surpass other domestic mechanisms as a result of its more liberal approach to many of the substantive and procedural problems afflicting domestic mechanisms in other states. However, its short list of recognized human rights violations, in addition to attempts by the U.S. Supreme Court and the Bush administration to curb its ambit, suggests that there needs to be a more appropriate mechanism for addressing a corporation's transnational human rights abuses.

Holding corporations responsible for transnational abuses is a problem that extends beyond the borders of a single state. Thus, the answer to this problem cannot lie primarily in an expansion of the ATCA or other domestic mechanisms. A multilateral solution, such as the combination of a multilateral treaty or code of conduct with an effective enforcement mechanism, is likely to be the most effective manner of addressing this problem on a global scale.

International agreement on the definition of corporate obligations will increase the effectiveness of this multilateral solution. Thus a treaty or international code of conduct agreed to by most of the world's states is essential. Moreover, an effective enforcement mechanism is also critical to ensure the compliance of those corporations who continue to defy the obligations delineated for them in the constituent treaty or code of conduct. Domestic enforcement mechanisms are the first line of defense in combating corporate abuses but they must, at a minimum, be supplemented by an international specialized tribunal, which can fill in remedial gaps by providing redress to victims in states without enforcement mechanisms or to those who are not offered an adequate domestic remedy. An even more effective solution is to have an international specialized tribunal usurp the role of domestic enforcement mechanisms when dealing with transnational corporations and render it the primary vehicle for addressing transnational corporate abuses. This would allow the tribunal a greater role in the realm of corporate social responsibility, reinforcing the world commitment to promoting corporate accountability.

Good corporate citizenship is essential in the twenty-first century. An exclusive focus on profits or the bottom line is no longer enough to sustain a corporation's goodwill in the eyes of the public. However, a corporation's failure to act responsibly does not necessarily lead to the same devastating effects as its victims may experience. As a result, a corporate accountability mechanism is needed to ensure that wayward corporations

are encouraged to choose good corporate citizenship over a more economical, yet irresponsible, option. The global nature of the problems with corporate accountability demands a global solution. Thus, collective state action remains the only means of establishing a mechanism that ensures corporate abusers are punished, their victims are adequately redressed, and above all, that such conduct is prevented from reoccurring.