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# PROFITS AND PRINCIPLES: PROMOTING MULTINATIONAL CORPORATE RESPONSIBILITY BY AMENDING THE ALIEN TORT CLAIMS ACT

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In today's fast-moving global economy, new and profitable investment opportunities increasingly arise in some of the world's most destitute nations.<sup>1</sup> Regrettably, "capital follows the promise of high returns" and is often heedless of human rights records.<sup>2</sup> Thus, U.S. multinational corporations<sup>3</sup> (MNCs) in search of lower costs and increased profits often forge

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1. See PETER MARBER, FROM THIRD WORLD TO WORLD CLASS: THE FUTURE OF EMERGING MARKETS IN THE GLOBAL ECONOMY 87-104 (1998) (analyzing the development of corporate economic opportunities in emerging nations); see also DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD 229-37 (1995) (characterizing the recent increase in competitive global capitalism as a "race to the bottom" because "[s]ocial responsibility is inefficient in a global free market").

2. MARBER, *supra* note 1, at 217. *But cf.* Martha M. Hamilton, *Shell's New World View: At Helm of Oil Titan, Moody-Stuart Sees Profit in Principles*, WASH. POST, Aug. 2, 1998, at H1. In 1998, Royal Dutch/Shell Group, the world's largest publicly traded oil company, published a new statement of principles asserting its commitment to sustainable development and "fundamental human rights in line with the legitimate role of business." *Id.* While the purpose of business has typically been generating society's wealth, corporations may have a broader and more varied role to play in today's globalized community. *See id.* For this reason, Shell is reshaping its view of corporate social responsibility. *See id.* Some observers assert, however, that Shell's rhetoric is merely a public relations campaign designed in response to worldwide criticism of the corporation's abysmal record of accomplishment on human rights and environmental issues in Nigeria. *See* David A. Love, Editorial, *A New Leaf in Nigeria?*, WASH. POST, Aug. 22, 1998, at A17; see also Editorial, *Remember Shell, Boycott Shell*, MULTINATIONAL MONITOR, Dec. 1997, at 5 (asserting that Shell failed to change its policies in Nigeria, even in the face of world-wide condemnation); *Corporations and Human Rights* (visited Oct. 18, 1998) <<http://www.hrw.org/hrw/about/initiatives/corp.html>> (accusing Shell of intransigence because the corporation increased financial investment and defensive public relations on behalf of the Nigerian government following activist Ken Saro-Wiwa's execution). For a discussion of Shell's role in the Saro-Wiwa execution, see *infra* note 5 and Part II.E.1.

3. See BLACK'S LAW DICTIONARY 1015-16 (6th ed. 1990) (defining a multinational corporation as "a firm which has centers of operation in many countries" or "which does business in many countries but is based in only one country"). This Comment does not distinguish between multinational and transnational corporate structures. Multinational corporations tend to maintain strong national identities, while transnational corporations endeavor to do away with considerations of nationality by developing vertically integrated supplier networks with inter-linked global operations. *See* KORTEN, *supra* note 1, at 125.

economic alliances with some of the "most barbarous and illegitimate regimes on earth."<sup>4</sup> Contending that they cannot interfere with the local conflicts and internal politics of foreign nations, MNCs claim they are not responsible for the abusive conduct of their foreign host-governments.<sup>5</sup>

Today, however, MNCs are nearly "alone in possessing the size, technology, and economic reach necessary to influence human affairs on a global basis."<sup>6</sup> Notwithstanding the international legal status of nations,<sup>7</sup> MNCs often have more control over human, natural, and financial resources than do the sovereigns that supposedly regulate them.<sup>8</sup> For example, the limited extraterritorial application of U.S. law permits capital-hungry host countries to entice U.S. corporations by offering settings nearly free of labor, safety, and environmental regulations.<sup>9</sup> Corporations choosing to operate in those countries are free, therefore, to engage in profitable practices that would be illegal if carried out in the United States.<sup>10</sup> MNCs are further able to evade accountability for abusive overseas investment activities because international law traditionally focuses

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4. John Vidal, *A Dirty Business Bogged Down in a Moral and Political Mire*, GUARDIAN, Aug. 15, 1998, at 5.

5. See *id.*; see also Andy Rowell, *Shell Shocked: Did the Shell Petroleum Company Silence Nigerian Environmentalist Ken Saro-Wiwa?*, VILLAGE VOICE, Nov. 21, 1995, at 20. Shell claimed that it could not get involved in the affairs of a sovereign state and refused to exercise its influence over the Nigerian military junta to prevent the execution of activist Ken Saro-Wiwa. See *id.* Shell later admitted, however, to paying members of the Nigerian army, including a Lieutenant Colonel implicated in the torture and trial of Saro-Wiwa. See Andrew Rowell, *Shell Cracks: Petroleum Company Acknowledges Payments to Nigeria's Murderous Military*, VILLAGE VOICE, Dec. 17, 1996, at 30.

6. THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 31 (1989) (arguing that the enhanced character of multinational corporate power contributes to ethical controversies in global operations).

7. See generally LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 13-28 (1968) (analyzing the significance and limitations of law in international relations). Professor Henkin asserts that "[e]xcept as limited by international law or treaty, a nation is master in its own territory." *Id.* at 18.

8. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8-9 (1993) (discussing significant problems for traditional international law arising from the growth of modern corporate power).

9. See generally Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996) (discussing anomalies and inconsistencies in the extraterritorial application of U.S. laws and arguing that domestic law should bind U.S.-based corporate operations overseas).

10. See *id.* at 124-25, 139, 144 (noting that corporations may "lose some of their competitive advantage" if Congress gave extraterritorial effect to domestic health, safety, environmental, and labor laws).

on relations between states, not private actors.<sup>11</sup> As a result of the absence of internationally enforceable environmental and labor standards, the relationship between the host-state and foreign investors in emerging nations is essentially unregulated.<sup>12</sup> Thus, some commentators observe that MNCs “have grown beyond the control of national governments and operate in a legal and moral vacuum.”<sup>13</sup>

Unfortunately, the nexus between sustainable development and human rights is emerging only slowly and grudgingly as a priority for global corporate management.<sup>14</sup> There is no comprehensive mandatory international code of corporate conduct targeting human rights practices.<sup>15</sup> In-

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11. Cf. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 230-31 (2d ed., Aspen Law & Bus. 1993). Professor Janis reports that in its earliest inception the law of nations applied to both individuals and states. *See id.* at 227-28. Jeremy Bentham coined the term “international law” in his influential 1789 treatise, *Introduction to the Principles of Morals and Legislation*. *See id.* at 228 (citing J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Burns and Hart eds., 1970)). Although Bentham stated that he was merely giving a new name to the law of nations, he actually redefined the scope of the law to deal “exclusively [with] the rights and obligations of states *inter se* and never [with] the rights and obligations of individuals.” *Id.* at 230-31 (same). This Comment uses the terms “international law” and “law of nations” interchangeably.

12. *See* Gibney & Emerick, *supra* note 9, at 123-25.

13. Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 2 (1995).

14. *See* Frank Vogl, *More and More, Industries Must Incorporate Social Issues in Management for Success* (visited Aug. 19, 1998) <[http://www.earthtimes.org/aug/businessethicsmoreandmoreaug7\\_98.htm](http://www.earthtimes.org/aug/businessethicsmoreandmoreaug7_98.htm)> (on file with the *Catholic University Law Review*).

15. *See* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 159 (1997). Professor Frey describes corporate responsibility for human rights as an “emerging continuum” shaped by “the relationship between the [MNC’s] activities in a country, and the degree to which human rights are respected in that country.” *Id.* at 154. She divides corporate self-regulation, through codes of conduct, into three types: 1) vendor standards regarding forced, child, and convict labor, 2) standards targeting support for civil and political rights, and 3) investment criteria. *See id.* at 177-80. While finding the existing corporate codes of conduct “grossly inadequate,” Professor Frey argues that “[e]xisting standards reflect that corporations believe the further removed they are from human rights abuse, the lesser their degree of responsibility to act.” *Id.* at 154, 180. Therefore, Professor Frey classifies corporate entanglements in human rights violations as 1) direct active involvement, 2) passive involvement where the corporation benefits from governmental abuses it is capable of preventing, 3) intervention in situations for which the company is not responsible but in which it may effectively assert influence, and 4) awareness that host countries are pervasively violating human rights but that these violations are unrelated to the MNC’s operations. *See id.* at 180-87. This Comment envisions ATCA liability for the first two classifications encompassing direct and passive involvement in human rights violations. Cf. *infra* Part II.D (comparing the contours of corporate liability in recent ATCA cases).

Voluntary corporate codes, if adhered to, provide an alternative to giving domestic law

ternational efforts to hold MNCs accountable have been limited to non-binding aspirational codes that are ineffective in the face of collusion between host-governments and MNCs who condone each other's substandard treatment of workers and the environment.<sup>16</sup> Regional efforts to link trade initiatives with human rights have been similarly unsuccessful.<sup>17</sup> Likewise, domestic congressional sanctions restricting corporate investment in foreign nations with poor human rights records have been

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extraterritorial effect or legislating standards of conduct for multinational operations. For an excellent survey of voluntary corporate codes of conduct, see Leslie Wells, Note, *A Wolf in Sheep's Clothing: Why Unocal Should Be Liable Under U.S. Law For Human Rights Abuses in Burma*, 32 COLUM. J.L. & SOC. PROBS. 35 (forthcoming Spring 1999) (manuscript at 38-44, on file with the *Catholic University Law Review*). For a review of recent initiatives in the area of voluntary corporate codes, see *Corporations and Human Rights*, *supra* note 2. Human Rights Watch observes that, while there is a growing interest in human rights among consumer-sensitive clothing and footwear companies, simple pronouncements of corporate codes of conduct have neither ended the most egregious abuses nor significantly improved corporate attitudes toward independent monitoring of human rights practices. *See id.*

16. *See* Frey, *supra* note 15, at 165-67 (tracing the history, and ultimate collapse, of negotiations related to the United Nations Code of Conduct on Transnational Corporations); *see also* Development and International Economic Co-operation: Transnational Corporations, UN Doc. E/1990/94 (letter from the Chairman of the reconvened special session of the Commission on Transnational Corporations to the President of U.N. ESCOR and annex proposing a code of conduct for transnational corporations that was never adopted); *cf.* Kofi A. Annan, Editorial, *An Appeal to World Business*, BOSTON GLOBE, Feb. 1, 1999, at A15. United Nations Secretary General Kofi Annan urged businesses "not . . . to wait until every country has introduced" progressive labor laws and environmental standards before implementing responsible corporate practices in developing countries. *Id.* Instead, Annan challenged MNCs to use their considerable influence with emerging nations to advance human rights, labor, "and environmental standards by their own conduct of business," and to avoid, particularly, complicity in human rights abuses. *Id.* In the on-line version (but not in the print edition) of his editorial, Annan observed further that "the private sector's influence is much greater than [the United Nations' influence in promoting global values] because the prosperity of a country can depend on its investment decisions." Kofi Annan, *An Appeal to World Business*, BOSTON GLOBE, (Feb. 1, 1999) <[http://www.boston.com/dailyglobe2/032/oped/An\\_appeal\\_to\\_world\\_business+.shtml](http://www.boston.com/dailyglobe2/032/oped/An_appeal_to_world_business+.shtml)> (on file with the *Catholic University Law Review*).

17. *See* SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER*, 192-98, 226-29 (1996) (discussing the inability of Western nations to pursue their political and human rights agendas among Eastern nations).

limited to only a few countries<sup>18</sup> and criticized as counter-productive.<sup>19</sup>

Consequently, human rights advocates turned recently to federal civil litigation in an effort to exert legal pressure on U.S.-based MNCs doing business with some of the world's most brutal governments.<sup>20</sup> Insisting

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18. See, e.g., Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (imposing sanctions on persons exporting certain goods or technology that would enhance Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources in an effort "to deny Iran the ability to support acts of international terrorism"); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (seeking the downfall of Fidel Castro's communist government and to facilitate transition to a democratically elected government by deterring foreign investment in Cuba); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (sanctioning apartheid by prohibiting loans, investments, and certain other activities with respect to South Africa).

19. See John Imle, Editorial, *Keep Door Open In Myanmar*, J. COM., Feb. 28, 1997, at 6A (arguing that unilateral economic sanctions have historically harmed the people of targeted countries without having a significant impact on their governments or leaders). Mr. Imle is the President of the Los Angeles based Unocal Corporation. See *id.* Part II of this Comment discusses Unocal's entanglement with human rights violations in Burma. See also *Chevron Chairman Calls for Major Reforms to U.S. Economic-Sanctions Policy at National Foreign Trade Council Forum* (Nov. 6, 1998) <<http://usaengage.org/news/981106pr.html>> (reporting on Chevron corporation chairman Ken Derr's views that sanctions damage domestic job creation and international relations). American politicians have used sanctions as domestic political fodder. See, e.g., Michael Gillis, *Nigerians Provide Fitzgerald a Boost*, CHI. SUN-TIMES, Oct. 30, 1998, at 6. Gillis reports that Caucasian Republican Senate candidate Peter Fitzgerald criticized his African-American Democratic incumbent opponent, Senator Carol Moseley-Braun, for her opposition to sanctions against Nigeria. See *id.* Fitzgerald brought the son of executed Nigerian activist Ken Saro-Wiwa to America to criticize Moseley-Braun several days before congressional elections. See *id.* Moreover, the Nigerian-American Political Action Committee endorsed Fitzgerald, rather than Moseley-Braun, solely because of his views on sanctions against the Nigerian military regime. See *id.*

20. See *infra* Part II (discussing recent corporate ATCA cases). See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 2-3 (S.D.N.Y. Sep. 25, 1998) (alleging complicity between Royal Dutch Shell Corporation and the Nigerian Government in the execution of activist Ken Saro-Wiwa and other violent acts against members of the Ogoni tribe); *National Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (alleging complicity between Unocal and the military government of Burma in perpetrating torture, forced labor, and slavery); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (alleging complicity between Freeport-McMoRan Corporation and the Indonesian Government in perpetrating genocide, environmental harms, and violent acts on indigenous tribe), *dismissed with prejudice*, No. CIV.A.96-1474, 1998 WL 92246 (E.D. La. Mar. 3, 1998); *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (alleging complicity between Unocal and the military government of Burma in perpetrating torture, forced labor, and slavery); *Alomang v. Freeport-McMoRan, Inc.*, No. 96 CIV.A.96-2139, 1996 WL 601431 (E.D. La. Oct. 17, 1996) (alleging complicity between Freeport-McMoRan Corporation and the Indonesian Government in perpetrating genocide, environmental harms, and violent acts on indigenous workers) *cert. denied* No. 98-C-1352, 1998 WL 770744 (La. July 2, 1998); *Alomang v. Freeport-McMoRan, Inc.*, 718 So. 2d 971 (La. Ct. App. 1998), *aff'd on reh'g*, 1998 La. App. LEXIS 2119 (La. Ct. App. Mar. 4, 1998), *cert. denied*, No. 98-C-1352, 1998 La. LEXIS 2308 (La.

that corporations either improve their international standards and practices or answer to American juries for their complicity with abusive regimes, human rights advocates are suing MNCs for human rights violations perpetrated by their foreign government partners.<sup>21</sup>

While these human rights plaintiffs allege various grounds for jurisdiction and liability, the primary statutory authority for these suits is the ancient and once obscure Alien Tort Claims Act (ATCA or the statute).<sup>22</sup> The ATCA provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>23</sup> In addition

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July 2, 1998) (same). Several press accounts also document the recent spate of corporate ATCA litigation. See, e.g., Dominic Bencivenga, *Human Rights Abuses: Suits Attempt to Extend Liability to Corporations*, N.Y.L.J., Sep. 4, 1997, at 5 (analyzing the *Unocal* case and its implications for corporate governance); James Ledbetter, *Think Globally, Sue Locally*, VILLAGE VOICE, Nov. 26, 1996, at 18 (discussing renewed use of the ATCA to force corporations to withdraw financial support from repressive foreign regimes); Tony McAuley, *Rights Group Prepares to Sue Chevron Over Nigeria Deaths* (visited Oct. 12, 1998) <<http://cnn.com/WORLD/africa/9810/12/BC-CHEVRON-NIGERIA.reut/index.html>> (reporting on planned suit against Chevron for complicity with Nigerian Government in committing human rights violations).

21. See Stewart Yerton, *World Will Watch Lawsuits' Outcome*, NEW ORLEANS TIMES-PICAYUNE, May 11, 1997, at F1, available in 1997 WL 4220456; *supra* note 20 (listing corporate ATCA cases filed to date); discussion *infra* Parts II.B-E (analyzing claims against Frerport-McMoRan, Unocal, Shell, and Chevron).

22. 28 U.S.C. § 1350 (1994); see Joseph D. Pizzurro & Nancy E. Delaney, *New Peril for Companies Doing Business Overseas: Alien Tort Claims Act Interpreted Broadly*, N.Y.L.J., Nov. 24, 1997, at S5 (reviewing the emergence of modern ATCA litigation). For a comprehensive review of virtually every aspect of human rights litigation under the ATCA, to date, see generally, BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996). Courts have taken three approaches to ATCA suits: 1) permitting suits for a few heinous acts that violate international law, 2) granting an implicit right to sue and applying federal common law, and 3) interpreting it as a forum shifting statute for transitory torts and applying the forum state's choice of law rules which should ultimately apply the law of the situs. See *id.* at 120; see also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366-69 (1991) (describing major cases brought under the ATCA).

23. 28 U.S.C. § 1350. The ATCA has no explicit legislative history. See William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 495 (1986) (“There is no significant mention of [the ATCA] in either the records of the congressional debates or the correspondence of the senators who drafted the legislation.”). Congress provided originally that the district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. Subsequent technical changes to the statutory language to reflect the management of exclusive federal jurisdiction have not changed the substantive meaning of the ATCA. See Casto, *supra*, at 468 n.4 (1986). This Comment does not discuss the role of treaties in establishing ATCA subject matter jurisdiction. For a discussion of what constitutes a tort “in violation of a treaty of the United States” see STEPHENS & RATNER, *supra* note 22, at 58-61.

to damages, at least one plaintiff has asserted ATCA jurisdiction in search of injunctive relief to prevent corporate defendants from continuing with foreign development projects.<sup>24</sup> One plaintiff's attorney summarized this strategy by saying, "[i]f sheer morality doesn't do it, maybe hitting the pocketbook of companies will make a difference."<sup>25</sup>

Only one ATCA suit against a private corporate defendant, however, has survived even a motion for summary judgment.<sup>26</sup> This dearth of sus-

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24. See *Unocal*, 963 F. Supp. at 883 (seeking damages, injunctive, and declaratory relief that would prevent corporate defendant from continuing with the development of natural gas pipeline project).

25. Bencivenga, *supra* note 20, at 5 (quoting Jennifer Green, an attorney with the Center for Constitutional Rights in New York). But see STEPHENS & RATNER, *supra* note 22, at 216-24 (discussing the difficulties encountered, to date, in enforcing ATCA judgments). Stephens and Ratner note that, with the exception of a "paltry \$400," "the multi-million dollar judgments in prior ATCA cases have gone uncollected." *Id.* at 218. Those judgments, however, were against private individual defendants with minimal assets in the United States. See *id.* Corporate defendants with assets in the United States may not be quite as judgment proof.

26. See *Unocal*, 963 F. Supp. at 897-98 (C.D. Cal. 1997) (denying in part corporate defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim). Courts have dismissed many corporate ATCA claims for lack of subject matter jurisdiction. See *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir. 1984); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *Abiodun v. Martin Oil Serv., Inc.*, 475 F.2d 142 (7th Cir. 1973); *Bigio v. Coca-Cola Co.*, No. 97 Civ. 2858, 1998 WL 293990 (S.D.N.Y. June 5, 1998); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (dismissing also for failure to state a claim), *dismissed with prejudice*, No. CIV.A.96-1474, 1998 WL 92246 (E.D. La. Mar. 3, 1998); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991); *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613 (S.D.N.Y. 1983); *B.T. Shanker Hedge v. British Airways*, No. 82-C-1410, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill. Dec. 27, 1982); *Trans-Continental Inv. Corp., S.A. v. Bank of the Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980); *Alomang v. Freeport-McMoRan, Inc.*, No. 96-9962 (Civ. Dist. for the Parish of Orleans Div. H-12 1997) (dismissing also for exception to venue), *aff'd on reh'g*, 718 So. 2d 971 (La. Ct. App. 1998), *cert. denied*, No. 98-C-1352, 1998 La. LEXIS 2308 (La. July 2, 1998). Second Circuit courts have dismissed several corporate ATCA cases on forum non conveniens grounds. See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 1-2 (S.D.N.Y. Sep. 25, 1998); *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994) (dismissing also for failure to join the Ecuadorian government and a state entity as indispensable parties), *vacated*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (holding that the district court erred in dismissing the case without requiring the corporate defendant to accept jurisdiction in Ecuador). Finally, courts have dismissed several corporate ATCA cases on other procedural grounds. See *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988) (dismissing ATCA claim for lack of personal jurisdiction and insufficient evidence); *National Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (dismissing claims against Unocal by the Burmese Government in exile for lack of standing, while permitting the Federation of Trade Unions of Burma to amend its complaint against the corporation); *Alomang v. Freeport-McMoRan, Inc.*, No. CIV.A.96-2139, 1996 WL 601431 (E.D. La. Oct. 17, 1996) (remanding to state court a class action suit similar to *Beanal v. Freeport-McMoRan*); *Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico*



tainable cases against private defendants flows from a combination of vague statutory language and judicial interpretations imposing a state action requirement for most claims.<sup>27</sup> Ultimately, this conflict over the meaning and application of the statute weakens the effectiveness of ATCA litigation in two ways. First, the statute fails to define actionable claims with sufficient precision to serve as the basis for a well-pleaded complaint or provide meaningful guidance for lawful transnational corporate conduct.<sup>28</sup> Second, courts apply inconsistent judicial interpretations of American constitutional standards to determine whether U.S.-based MNCs are liable for the actions of foreign sovereigns affecting their own nationals.<sup>29</sup> Thus, because our domestic law does not incorporate specific "alien torts" or regulate the relationship between U.S.-based corporations and their foreign host-governments, MNCs can evade liability for their role in overseas human rights violations.<sup>30</sup>

This Comment discusses the ATCA liability of MNCs for human rights violations by their foreign government partners and argues that Congress should enact legislation to clarify the evolving standard of conduct currently incorporated into the statute. Part I of this Comment examines the legal and historical underpinnings of modern ATCA jurisprudence. In Part II, this Comment analyzes the weaknesses of the ATCA's jurisprudential framework as applied to private corporate defendants in hu-

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S.A., 528 F. Supp. 1337 (S.D.N.Y. 1982) (dismissing business related ATCA claim on grounds of foreign sovereign immunity).

27. See discussion *infra* Parts II.B.2, II.C.2, and II.D.

28. See generally discussion *infra* Parts II and III (describing the inconsistent judicial approach to liability for corporate conduct related to human rights abuses overseas).

29. Courts apply "color of law" jurisprudence derived from a domestic civil rights statute, 42 U.S.C. § 1983 (1994), to test for state action in ATCA claims. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995); *Unocal*, 963 F. Supp. at 890; *Freeport-McMoRan*, 969 F. Supp. at 375-76. The cases deciding whether private action may be fairly ascribed to the state "have not been a model of consistency." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)). Application of § 1983 in corporate ATCA litigation has been similarly inconsistent. Compare *Unocal*, 963 F. Supp. at 890-91 (finding state action in the absence of any allegations that the corporate defendant actually committed human rights abuses), with *Freeport-McMoRan*, 969 F. Supp. at 374-80 (finding no state action although the corporate defendant allegedly committed human rights abuses and a "close" business relationship existed between the corporation and the foreign host-government). See also *infra* notes 154-68 and accompanying text (discussing the application of § 1983 to ATCA litigation); *infra* notes 220-40 and accompanying text (analyzing the application of § 1983 tests in *Freeport-McMoRan*); *infra* Part II.D (criticizing results flowing from the inconsistent application of § 1983 "color of law" jurisprudence in corporate ATCA cases).

30. See, e.g., *Beanal v. Freeport-McMoRan, Inc.*, No. CIV.A.96-1474, 1998 WL 92246 (E.D. La. Mar. 3, 1998) (dismissing with prejudice plaintiff's third amended complaint for failure to state a claim).

man rights cases arising from business practices in non-Western cultural settings. Part II argues also that inconsistent judicial interpretation of the statute and its attendant "universal norms" undermines the effectiveness of the ATCA in both guiding global corporate conduct and providing a remedy for victims of human rights abuses. Part III of this Comment proposes that judge-made federal common law be augmented by amending the ATCA to incorporate specific claims into U.S. domestic law, rather than basing jurisdiction solely on the narrow and subjective legal fiction of universal norms. Finally, this Comment concludes that whether or not developing nations agree, the United States must recognize that corporate involvement in human rights abuses "apart from being morally repugnant . . . is simply not necessary for the successful conduct of business here or overseas."<sup>31</sup>

#### I. THE ONCE AND FUTURE ATCA: INCORPORATING INTERNATIONAL OBLIGATIONS INTO DOMESTIC LAW

It is unclear what Congress intended the ATCA to accomplish.<sup>32</sup> Plaintiffs and human rights advocates view the ATCA as incorporating within it an ever-expanding range of potential claims.<sup>33</sup> Corporate defendants argue, however, that Congress did not intend for the statute to reach claims based on violations of international law arising out of a business relationship between a foreign host-government and a private corporate defendant.<sup>34</sup> Accordingly, commentators view the ATCA either as a limited part of an anachronistic scheme to regulate the interaction of domestic law and foreign relations, or as an ever-expanding means of advancing the cause of international human rights.<sup>35</sup> ATCA claims, thus, confront federal district courts with the task of imbuing a single archaic

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31. S. REP. NO. 95-114, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101 (internal quotations omitted). Treasury Secretary Blumenthal made this statement while testifying about the criminalization of foreign corporate bribery and, consequently, the need for the Foreign Corrupt Practices Act of 1977. *See id.*

32. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) ("Historical research has not as yet disclosed what section 1350 was intended to accomplish."); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 463 (1989) (providing an excellent overview and comparative analysis of various historical perspectives on the ATCA).

33. *See* STEPHENS & RATNER, *supra* note 22, at 53-54.

34. *See, e.g.,* *Freeport-McMoRan*, 969 F. Supp. at 366-67; *Unocal*, 963 F. Supp. at 890.

35. *Compare* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 446-47 (1995) (asserting that Congress intended the ATCA to provide jurisdiction only over prize cases), *with* Burley, *supra* note 32, at 493 (positing an open-ended approach to meeting the nation's expanding international obligations, both legal and moral).

and indeterminate statutory sentence with sufficient meaning to be relevant in the context of modern transnational human rights litigation.<sup>36</sup>

*A. More Symbol than Substance: The Evolution of the Law of Nations in the Context of the Alien Tort Claims Act*

Scholars disagree over the Framers' comprehension of the scope of the law of nations and "their general attitude toward compliance with the obligations it imposed."<sup>37</sup> One of the most conservative interpretations<sup>38</sup> limits alien tort actions to three principle offenses recognized as violating the law of nations in 1789: 1) violation of safe-conducts, 2) infringement of the rights of ambassadors, and 3) piracy.<sup>39</sup> In contrast, a more expansive view of the ATCA posits an open-ended statute reflecting the Framers' desire to balance national self-interest with their understanding of the nation's evolving moral and legal duties as a member of the international community.<sup>40</sup>

*1. "[N]o one seems to know [from] whence it came."<sup>41</sup>*

Although Congress originally adopted the ATCA as a provision of the

36. Cf. Casto, *supra* note 23, at 486, 495. While characterizing the statutory language as "cryptic" and observing the dearth of legislative history, Professor Casto found "significant clues" to the ATCA's purpose in the legislative history of the Judiciary Act of 1789. *See id.* Scholars debate, however, the interpretation of those "clues." *See infra* notes 37-49 and accompanying text (discussing conflicting historical interpretations of the ATCA's origin).

37. Burley, *supra* note 32, at 463.

38. *See generally* Sweeney, *supra* note 35 (arguing that the ATCA applies only to prize cases). Joseph Sweeney offers perhaps the most conservative interpretation of the ATCA, and his narrow reading of the statute would render it superfluous in modern human rights litigation. Sweeney contends that at the time Oliver Ellsworth, a colonial Connecticut lawyer, drafted the ATCA, the statutory language "tort only" "could mean nothing but the wrongs committed by American captors in violation of the law of prize." *Id.* at 476. For a critique of Sweeney's view of the ATCA see, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 223-24 (1996).

39. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (quoting Blackstone, "a writer certainly familiar to colonial lawyers" in 1789 when Congress enacted the statute).

40. *See* Burley, *supra* note 32, at 482-84. Professor Burley notes, however, that, even at the beginning of the Republic, Alexander Hamilton and Thomas Jefferson disagreed over the precise substance of the nation's moral and legal duties, particularly the distinction between the duties of individuals and the obligations of states. *See id.* at 484-85.

41. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (referring to the uncertain legislative genesis of the ATCA).

First Judiciary Act of 1789, existing legislative and historical sources tell us little about its purpose.<sup>42</sup> Several competing theories identify the ATCA as part of an overall scheme to protect national security and provide federal oversight in cases involving the denial of justice to aliens mistreated by U.S. citizens.<sup>43</sup> Each of these approaches identifying the genesis of the ATCA highlights the role of the statute in guaranteeing federal, rather than state, control over matters involving foreign relations and international law.<sup>44</sup>

One theory underscores a series of international scandals arising out of torts committed in the United States against foreign diplomats, as the impetus for the ATCA.<sup>45</sup> The absence of federal jurisdiction over these tort claims asserted by foreign diplomats constrained litigation to state courts, thereby dangerously circumscribing the Federal Government's ability to intervene in matters that affected potentially both foreign rela-

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42. See, Burley, *supra* note 32, at 463 (opining that "definitive proof of the intended purpose and scope of the [ATCA] is impossible"). But see Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 72 (1985) (concluding that the ATCA's origin and intent are not obscure, but flow from the drafters' concern regarding federal oversight of foreign relations).

43. Compare Casto, *supra* note 23, at 488-96 (theorizing that Congress originally intended the ATCA to provide for the protection and security of foreign diplomats), and *Tel-Oren*, 726 F.2d at 814-15 (Bork, J., concurring) (asserting that congressional intent to enact the ATCA for the protection of ambassadors is "plausible historically"), with Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 64 (1988) (arguing that Congress enacted the ATCA because mistreatment of any alien, not merely diplomats, could lead to war), and Randall, *supra* note 42, at 20-21 (asserting that Congress enacted the ATCA in response to concerns that denial of justice to aliens might offend foreign nations and give rise to war). But cf. Burley, *supra* note 32, at 475 (contending that the ATCA reflects congressional recognition of the nation's broader obligation to promote and enforce international law that directly regulates individual conduct).

44. Cf. *Fort v. Suarez-Mason*, 672 F. Supp. 1531, 1540 n.6 (N.D. Cal. 1987) (recognizing that Congress apparently intended the ATCA to facilitate federal oversight of matters related to international law).

45. See Casto, *supra* note 23, at 491-93. While Professor Casto opines "that section 1350 should be construed as liberally as possible," he contends that attacks on French Consul General Marbois in Philadelphia in 1784, and on a member of the household of Dutch Ambassador Van Berckel motivated Congress to enact the ATCA. See *id.* at 472, 491-96. The Pennsylvania Supreme Court eventually convicted Marbois's attacker (who was also French) of a crime in violation of the law of nations, which it held to be incorporated into state law. See *Republica v. De Longchamps*, 1 U.S. (Dall.) 111, 115 (1784). The delay in justice, however, created an international uproar centered on the ambassador's inability to obtain redress in America's federal courts. See Casto, *supra* note 23, at 492-99. Professor Casto argues, however, that Congress created the ATCA as "an open-ended statute" modeled on transgression against diplomats, yet broad enough to be responsive to "all foreseeable and unforeseeable violations by individuals of the law of nations." *Id.* at 500.

tions and national security.<sup>46</sup> Recognizing that the international community would hold the national, not state, government accountable for the conduct of American citizens, the Framers created the ATCA to transfer jurisdiction over alien torts to federal courts.<sup>47</sup>

A broader view, however, suggests that the Framers' apprehension about the denial of justice extended beyond ambassadors and diplomats, to the plight of any alien mistreated by U.S. citizens at home or abroad.<sup>48</sup> This assessment views the ATCA as "a direct response to what the Founders understood to be the nation's *duty* to propagate and enforce those international law rules that directly regulated individual conduct."<sup>49</sup>

2. "*We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'*"<sup>50</sup>

The precise scope of what torts the Framers intended to fall within the reach of the statute remains unclear.<sup>51</sup> In 1781, foreshadowing and perhaps explaining the ATCA, the Continental Congress passed an expansive resolution urging the states to provide remedies for several specific offenses against the law of nations.<sup>52</sup> In addition to the "most obvious" offenses concerning safe conducts, diplomatic protection, and treaty vio-

46. See D'Amato, *supra* note 43, at 64-65. In eighteenth century political culture, European powers considered mistreatment of individual citizens abroad sufficient excuse to engage in armed conflict. See THE FEDERALIST NO. 80, at 404 (Alexander Hamilton) (Buccaneer Books 1992). Hamilton wrote: "As the denial or perversion of justice by the sentences of the courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." *Id.*

47. See Casto, *supra* note 23, at 488-98.

48. See Burley, *supra* note 32, at 475; D'Amato, *supra* note 43, at 64-65. Professor Burley also suggests that the drafters could have envisioned ATCA suits between aliens for torts committed on U.S. soil or on the high seas. See Burley, *supra* note 32, at 488. It seems unlikely, however, that the Framers' expected the ATCA to be invoked by an alien in a suit against his own government for a tort committed within that government's own jurisdiction. See *id.*

49. Burley, *supra* note 32, at 475.

50. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

51. Compare *id.* at 775, 789 (Edwards, J., concurring) (asserting that the ATCA grants jurisdiction over a "minute" number of cases, but is not limited to Blackstone's enumerated offenses), with *id.* at 813-16 (Bork, J., concurring) (arguing that ATCA jurisdiction is restricted to the principal offenses against the law of nations at the time Congress enacted the statute), and *id.* at 823, 827 (Robb, S.C.J., concurring) (declining to reach the issue of actionable alien torts because of the political question doctrine, and observing that judicial reliance on commentators to define what acts have evolved into violations of the law of nations will yield nothing more authoritative than a battle of experts).

52. See 21 J. CONTINENTAL CONG. 1136-37 (1781), quoted in Burley, *supra* note 32, at 476.

lations, the Congress further encouraged the states to allow suits for additional “offen[s]es . . . not contained in the foregoing enumeration.”<sup>53</sup>

Congress’s open-ended approach to alien tort actions in 1781 permitted incorporation of international obligations into municipal law.<sup>54</sup> Consequently, direct enforcement of these norms by private individuals became feasible through the nation’s internal domestic law.<sup>55</sup> This approach is consistent with the jurisdictional grant later conferred by the ATCA, which ensured the availability of a forum for alien tort actions while leaving it to the courts to elaborate the law.<sup>56</sup> Indeed, the courts quickly declared that the law of nations, whatever it was or might become, was securely ensconced in federal common law.<sup>57</sup>

#### *a. Finding the Law of Nations: Early Cases*

While the U.S. Supreme Court proclaimed the law of nations as “the universal law of society,”<sup>58</sup> an explicit definition of the law of nations remained elusive.<sup>59</sup> In 1820, Justice Story, writing for the Court in *United*

53. *Id.* Blackstone, likewise, exhorted all governments to communicate relevant international standards to their citizens by incorporating offenses against the law of nations into their respective municipal laws. See Burley, *supra* note 32, at 475-76 (quoting W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 881 (G. Chase 4th ed. 1923)).

54. See Burley, *supra* note 32, at 476-77 (arguing that the 1781 resolution was “expansive” and designed to permit domestic enforcement of the evolving tenets of international law).

55. Cf. GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 11 (Hurst Hannum ed., 2d ed. 1992) [hereinafter GUIDE] (discussing the means of incorporating international obligations into domestic law).

56. See Burley, *supra* note 32, at 476-77.

57. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law.”); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (“[T]he law of nations . . . is part of the common law . . . .”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (asserting that the law of nations “is a part of the law of the land”); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (holding that the law of nations is a part federal common law). Indeed, American courts integrated the law of nations into domestic law before the Congress ratified the Constitution. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784) (asserting that the law of nations was part of Pennsylvania state law). British law also adopts the law of nations as the law of the land. See JANIS, *supra* note 11, at 99 (quoting Blackstone). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 819-21 (1997) (arguing that customary international law is not a source of federal law because neither Congress, nor the President, have ever authorized its incorporation into domestic law).

58. *Smith*, 18 U.S. (5 Wheat.) at 159.

59. See, e.g., *id.* at 157 (noting one nineteenth century attorney’s argument: “To refer to the law of nations for a definition of the crime, is not a definition; [sic] for the very thing to be ascertained by the definition, is the law of nations on the subject.”).

*States v. Smith*,<sup>60</sup> observed that there existed no complete or accurate public code defining the law of nations.<sup>61</sup> Instead, the Court “found” the law of nations by consulting scholarly writings, state practice, and relevant judicial decisions.<sup>62</sup> Justice Livingston, dissenting in *Smith*, argued, however, that Congress had a duty to incorporate definitions of international law into the nation’s statutory law.<sup>63</sup> He rejected any analysis requiring American citizens to refer to unfamiliar foreign laws to ascertain rules of conduct.<sup>64</sup>

While riding circuit one year later,<sup>65</sup> Justice Story relied on natural law traditions and emerging state practice in the piracy case *United States v. La Jeune Eugenie*,<sup>66</sup> to condemn slave trading as a violation of “universal law.”<sup>67</sup> After surveying the moral proscription against slavery, referring to contemporary European conferences promoting abolition, and distinguishing one contrary British judicial opinion, Justice Story concluded

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60. 18 U.S. (5 Wheat.) 153 (1820).

61. *See id.* at 159.

62. *See id.* at 160-61.

63. *See id.* at 182 (Livingston, J., dissenting).

64. *See id.* at 181-82 (Livingston, J., dissenting). Implicit in Justice Livingston’s dissent is the seed of the political question doctrine. *See id.* at 178-81 (asserting that the legislature must define violations of the law of nations). Chief Justice Fuller’s dissent in *The Paquete Habana* further developed concerns underlying the political question doctrine. *See The Paquete Habana*, 175 U.S. 677, 715-20 (1900) (Fuller, C.J., dissenting). Quoting Chief Justice Marshall, Chief Justice Fuller opined that the courts should resolve questions of law, not issues of foreign policy. *See id.* at 715-16. Chief Justice Fuller observed further that contrary expert opinions could be found on international law issues and thus “[i]t is needless to review the speculations and repetitions of the writers on international law . . . [because] [t]heir lucubrations may be persuasive, but are not authoritative.” *Id.* at 720; *see also infra* notes 83-84 and accompanying text (discussing the political question doctrine). The modern political question doctrine is a constitutional rejection of judicial competence to make decisions in the area of international relations. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). For judicial discussions of the political question doctrine in the context of ATCA cases, *see Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) in which the court denied a motion to dismiss based on a political question, and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823-27 (1984) (Robb, S.J., concurring) in which Senior Judge Robb argued for dismissal of an ATCA claim on the basis of the political question doctrine. *See generally* STEPHENS & RATNER, *supra* note 22, at 141-45 (discussing the chances of a political question argument prevailing in an ATCA suit).

65. *Cf.* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 142-43 (2d ed. 1985). The Judiciary Act of 1789 created three judicial circuits, each composed of two Supreme Court justices and a district judge. *See id.* at 142. The Supreme Court justices traveled to their circuits several times a year to try cases arising out of diversity jurisdiction and hear a limited number of appeals. *See id.* at 143.

66. 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

67. *See id.* at 851. Justice Story opined that the law of nations could be “deduced . . . from the general principles of right and justice,” customary state practice, and conventional laws regulating international affairs. *Id.* at 846.

that recent state practices and customs recognized slave trading as an offense against the law of nations.<sup>68</sup>

Three years later in *The Antelope*,<sup>69</sup> however, Chief Justice Marshall conducted his own survey of state practices and, contrary to Justice Story's opinion in *Smith*, found that many nations, including the United States and Africa, continued to permit slavery.<sup>70</sup> While acknowledging the natural law proscription against the practice, two recent centuries of African, American, and European participation in slave trading convinced Marshall that proclaiming a universal consensus against slavery was premature.<sup>71</sup> Although Congress had recently enacted several statutes defining slave trading as piracy,<sup>72</sup> Marshall held that the law of the United States did not transform slave trading into a violation of the law of nations.<sup>73</sup> In Marshall's view, no nation could prescribe a rule for others or make a law of nations.<sup>74</sup> Consequently, because the prohibition against slave trading lacked the universal assent necessary to find a violation of the law of nations, the practice remained lawful to governments who had not forbidden it.<sup>75</sup>

*b. Ancient Usage and Ripening Rules: The Paquete Habana*<sup>76</sup>

As a practical matter, the argument between Marshall and Story over whether slave trading violated the law of nations turned on the issue of ripening.<sup>77</sup> The Court did not clearly enunciate that concept, however,

68. *See id.* at 845-51. Justice Story wrote that "[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations." *Id.* at 846.

69. 23 U.S. (10 Wheat.) 66 (1825).

70. *See id.* at 122-23.

71. *See id.*

72. *See id.* at 71-72.

73. *See id.* at 122-23.

74. *See id.*

75. *See id.* Chief Justice Marshall held that "the perfect equality of nations" prevented one nation from prescribing a rule for others. *Id.* at 122. This opinion is also reflected in modern judgments by the International Court of Justice (ICJ). *See North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 4 (Feb. 20). The ICJ has held that the relevant "[s]tate practice . . . should [be] both extensive and virtually uniform in the sense of the provision invoked." *Id.* at 43.

76. 175 U.S. 677 (1900).

77. *Compare The Antelope*, 23 U.S. (10 Wheat.) at 121-22 (finding, implicitly, that slave trading had not ripened into a violation of universal law because, despite its moral repugnance, some nations still engaged in slavery and slave trading), *with La Jeune Eugenie*, 26 F. Cas. 832, 846-47, 851 (C.C.D. Mass. 1821) (finding, implicitly, that the moral proscription against slave trading had ripened sufficiently so that it was prohibited



until the beginning of the twentieth century.<sup>78</sup> In *The Paquete Habana*, the Court thoroughly documented customary international practices that related to exempting coastal fishing vessels from capture as prizes of war to establish “an ancient usage . . . gradually ripening into a rule of international law.”<sup>79</sup> Engaging in a simple, but exhaustive, balancing test, the Court observed that, while countries of the world accepted the capture of fishing vessels as prizes of war occasionally in the past, they rejected the practice far more often and recently.<sup>80</sup> Thus, the Court held that the proscription against seizing fishing vessels had ripened into an accepted rule of international law “by the general assent of civilized nations.”<sup>81</sup> Hence, ripening seemed to imply uniformity and consistency of international state practice, but not the unanimity Justice Marshall demanded in *The Antelope*.<sup>82</sup>

Chief Justice Fuller, dissenting in *The Paquete Habana*, argued that determining customary international practice was more of a political policy judgment than question of law.<sup>83</sup> He reasoned, therefore, that the inquiry of what practices had sufficiently ripened was better suited for the legislature, which can adjust the law at will, than the judiciary, which can only interpret the law as it is written.<sup>84</sup>

### *B. The Tortuous Trail to Tortious Conduct: Finding a Tort in Violation of the Law of Nations at the End of the Twentieth-Century*

Consistent with *The Paquete Habana*, Congress interpreted the ATCA in 1992 as permitting suits based on either existing norms or those that may eventually ripen into rules of customary international law.<sup>85</sup> Unfor-

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by universal law because many nations acknowledged the inhumanity of the conduct and were committed to promoting abolition).

78. See *The Paquete Habana*, 175 U.S. 677, 686 (1900) (articulating the ripening standard).

79. *Id.* at 686.

80. See *id.* at 686-711. The Court reviewed state practices from 1403 through 1894. See *id.*

81. *Id.* at 694, 700. “[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.” *Id.* at 700. Thus, statutes enacted under domestic law “preempt existing principles of customary international law.” *Committee of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988).

82. See JANIS, *supra* note 11, at 45-46.

83. See *The Paquete Habana*, 175 U.S. at 715-16 (Fuller, C.J., dissenting).

84. See *id.* at 716. But see *Baker v. Carr*, 369 U.S. 186, 211 (1962) (holding that not “every case or controversy which touches foreign relations [is] beyond judicial cognizance”).

85. See H.R. REP. NO. 102-367, at 4 (1992), reprinted in 1992 U.S.C.C.A.N. 84 (House Report on the Torture Victim Protection Act of 1991).

tunately, the paucity of cases brought under the statute in its first 191 years<sup>86</sup> does little to clarify what international torts have ripened sufficiently to warrant incorporation into the ATCA's ever-evolving definition of the law of nations.<sup>87</sup> ATCA claims, therefore, generate significant time-consuming disputes at the jurisdictional threshold because the statutory phrase "tort . . . in violation of the law of nations" has no clearly accepted meaning in modern law.<sup>88</sup> Consequently, each court confronting an ATCA claim must "engage[] in a more searching preliminary review of the merits than is required" for other jurisdictional formulations.<sup>89</sup> Courts and commentators continue to debate whether the judicial process involved in ascertaining the law of nations is more art than science.<sup>90</sup>

1. *Commanding the "General Assent of Civilized Nations": Filartiga v. Pena-Irala*<sup>91</sup>

Modern courts have supplemented *The Paquete Habana's* enduring and oft-cited approach with a contemporary framework for determining when customary state practice has sufficiently ripened to become international law.<sup>92</sup> In 1980, the Second Circuit Court of Appeals articulated

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86. See Randall, *supra* note 42, at 4-5 n.15 (comprising the most comprehensive published research to date on ATCA cases). Professor Randall reported that plaintiffs asserted ATCA jurisdiction in only 21 cases before the seminal *Filartiga* decision in 1980. See *id.* Before *Filartiga*, courts sustained ATCA jurisdiction only twice in 191 years. See *Adra v. Clift*, 195 F. Supp. 857, 864-65 (D. Md. 1961) (finding, in a child custody case, that falsifying a minor child's passport and wrongfully transporting the child from country to country violated the law of nations); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.D.S.C. 1795) (No. 1,607) (sustaining jurisdiction in maritime war prize case); see also Randall, *supra* note 42, at 5. Several attorney's general also discussed the ATCA. See, e.g., 26 Op. Att'y Gen. 250 (1907) (opining that the ATCA provided Mexican citizens with a forum and right of action in the United States based on a claim that an American company wrongfully changed the boundary line between the two countries by diverting the waters of the Rio Grande); 1 Op. Att'y Gen. 57 (1795) (opining that the ATCA provides jurisdiction for tortious acts committed on the high seas).

87. See STEPHENS & RATNER, *supra* note 22, at 49-50 (discussing the courts' struggle to identify torts cognizable under the ATCA).

88. See *id.* at 50.

89. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The *Filartiga* court compared the complexities involved in ascertaining whether a plaintiff has properly asserted a violation of the law of nations under the ATCA with the broader and less complex "arising under" formulation attending federal question jurisdiction. See *id.* at 887-88. The *Filartiga* court observed also that "[t]he paucity of suits successfully maintained under [the ATCA] is readily attributable to the statute's requirement of alleging a 'violation of the law of nations' at the jurisdictional threshold." *Id.* at 887 (emphasis omitted).

90. See JANIS, *supra* note 11, at 44-54 (surveying judicial approaches in determining the content of customary international law).

91. 630 F.2d 876, 881 (2d Cir. 1980).

92. See, e.g., *id.*; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987). For

a modern test for ATCA jurisdiction in the landmark human rights case of *Filartiga v. Pena-Irala*.<sup>93</sup> In *Filartiga*, an expatriate Paraguayan family asserted ATCA jurisdiction to sue a former Paraguayan official for wrongfully kidnapping and torturing their son.<sup>94</sup> The federal district court granted the defendant's motion to dismiss the case for lack of subject matter jurisdiction, finding that the law of nations did not "govern[] a state's treatment of its own citizens."<sup>95</sup>

The Second Circuit reversed, however, observing that in the modern world, a nation's treatment of its own citizens is a matter of international interest.<sup>96</sup> Following the analytical framework set forth in *Smith* and *The Paquete Habana*, the court scrutinized numerous sources before concluding that, regardless of the nationalities of the parties, deliberate state-sponsored torture had ripened into a violation of international law.<sup>97</sup> The court noted, however, that not every wrong, even if prohibited by most of the countries of the world, violates the law of nations.<sup>98</sup>

The *Filartiga* court adopted *The Paquete Habana's* conception of an evolving law of nations and its attendant ripening requirement.<sup>99</sup> Accordingly, the court chose to interpret international law not as it existed when Congress enacted the statute, but as it has evolved and prevailed among modern nations.<sup>100</sup> The *Filartiga* court provided three general

an analysis of the process used by the *Forti* court in concluding that certain torts were violations of the law of nations (prolonged arbitrary detention, summary execution, and causing disappearance) while others were not (cruel, inhuman, and degrading treatment), see generally, Christopher M. Leh, Comment, *Remedying Foreign Repression Through U.S. Courts: Forti v. Suarez-Mason and the Recognition of Torture, Summary Execution, Prolonged Arbitrary Detention and Causing Disappearance as Cognizable Claims Under the Alien Tort Claims Act*, 20 N.Y.U. J. INT'L L. & POL. 405 (1988).

93. 630 F.2d 876 (2d Cir. 1980). For an excellent analysis of *Filartiga* and its impact on ATCA litigation, see generally 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 (1981).

94. See *Filartiga*, 630 F.2d at 878.

95. *Id.* at 880. The district court acknowledged "that official torture violat[ed] an emerging norm of customary international law," but interpreted previous Second Circuit cases as preventing jurisdiction. *Id.*

96. See *id.* at 878, 881. The court based its ruling, in part, on provisions of the United Nations Charter, which is a treaty of the United States. See *id.* at 881 (citing 59 Stat. 1033 (1945)).

97. See *id.* at 880-85.

98. See *id.* at 888. The court cited an earlier Second Circuit opinion noting that even if every nation incorporated into its municipal law the Eighth Commandment's prohibition against stealing, theft would not be a violation of the law of nations unless many nations recognized it as such by entering into international accords prohibiting such conduct. See *id.* (quoting *IIT v. Vencap*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

99. See *id.* at 881.

100. See *id.* (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796)) ("distinguishing be-

guidelines for determining whether a customary wrong has ripened into a violation of modern international law within the meaning of the ATCA.<sup>101</sup> First, the wrong must be a violation that “command[s] the ‘general assent of civilized nations.’”<sup>102</sup> Second, the prohibition against the wrong must be “clear and unambiguous.”<sup>103</sup> Finally, the nations of the world must demonstrate expressly by international accords “that the wrong is of mutual, and not merely several, concern.”<sup>104</sup> The court, therefore, cited numerous international treaties and accords as the basis for its determination that the modern usage and practice of civilized nations clearly and unambiguously renounced state-sponsored torture.<sup>105</sup> Accordingly, the *Filartiga* court held that torture was a violation of the law of nations for which the ATCA provided federal jurisdiction.<sup>106</sup>

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tween ‘ancient’ and ‘modern’ law of nations”).

101. *See id.* at 881, 884, 888.

102. *Id.* at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

103. *Id.* at 884.

104. *Id.* at 888.

105. *See id.* at 883-84.

106. *See id.* at 880, 887. After *Filartiga*, a variety of alien plaintiffs relied on the ATCA to sue current and former public officials of their own governments. *See, e.g.,* Abebe-Jira v. Negewo, 72 F.3d 844, 846-48 (11th Cir. 1996) (affirming a damages judgment under ATCA against a former Ethiopian official for torture and cruel, inhuman, and degrading treatment); Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (holding alleged war crimes, genocide, and other atrocities committed by Bosnian Serb leader cognizable under ATCA), *cert. denied*, 116 S. Ct. 2524 (1996); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1472-76 (9th Cir. 1994) (permitting class action claims under ATCA for torture, disappearance, and summary execution by the Marcos regime in the Philippines); *National Coalition Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 349 (C.D. Cal. 1997) (finding a claim brought by Burmese citizens against Burma’s military junta actionable); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1092-94 (S.D. Fla. 1997) (finding Bolivian citizen’s conspiracy with Bolivian authorities to arbitrarily detain a Kodak employee actionable under the ATCA); *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 888, 892, 896, 898 (C.D. Cal. 1997) (finding a claim brought by Burmese citizens against U.S.-based MNC actionable, but dismissing claims against Burmese government entities on the basis of foreign sovereign immunity); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196-97 (S.D.N.Y. 1996) (permitting claims brought by former Ghanaian trade counselor against Ghanaian National Security Officer alleging torture); *Mushikiwabo v. Barayagwiza*, No. 94-CIV-3627, 1996 WL 164496, at \*2-\*3 (S.D.N.Y. Apr. 9, 1996) (awarding damages under the ATCA against a Rwandan official for acts of genocide); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169, 189, 202 (D. Mass. 1995) (awarding default judgments for compensatory and punitive damages to plaintiffs who brought suit against the Guatemalan Minister of Defense for human rights abuses perpetrated by armed forces); *Paul v. Avril*, 901 F. Supp. 330, 335-36 (S.D. Fla. 1994) (awarding damages against a former Haitian military official for human rights abuses); *Lafontant v. Aristide*, 844 F. Supp. 128, 139-40 (E.D.N.Y. 1994) (dismissing ATCA claims against Haitian leader because of head-of-state immunity); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540-44 (N.D. Cal. 1987) (*Forti I*) (alleging that former Argentine general perpetrated acts of prolonged arbitrary detention, torture, summary execution, and disappearance on Argentine citizen), *on reconsideration*, 694 F. Supp. 707 (N.D. Cal. 1988) (*Forti II*).

## 2. Universal, Definable, and Obligatory Norms

In the wake of *Filartiga*, Jeffrey Blum and Ralph Steinhardt suggested four criteria to determine which torts are cognizable under the ATCA.<sup>107</sup> Under this formulation, torts in violation of the law of nations must be 1) definable, 2) universal, and 3) obligatory norms that are 4) the object of concerted international attention.<sup>108</sup> The first three criteria entered ATCA jurisprudence in Judge Edwards's concurrence in *Tel-Oren v. Libyan Arab Republic*,<sup>109</sup> a complex case brought by survivors of victims murdered in a Palestine Liberation Organization attack on a civilian bus in Israel.<sup>110</sup>

In *Tel-Oren*, Judge Edwards observed that commentators had begun to define the ATCA's scope by identifying "a handful of heinous actions" that violated definable, universal and obligatory norms.<sup>111</sup> He noted, however, several flaws in this formulation, particularly the overwhelming research involved when district courts undertake the burden of distilling concrete principles of liability from a nebulous entity like the law of nations.<sup>112</sup> Despite the weaknesses noted by Judge Edwards, international law scholars have adopted this formulation,<sup>113</sup> and it emerged as the judicial standard at the jurisdictional threshold in many subsequent ATCA cases.<sup>114</sup>

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107. See Blum & Steinhardt, *supra* note 93, at 87-90.

108. See *id.*

109. 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (citing Blum & Steinhardt, *supra* note 93, at 87-90).

110. See *id.* at 776 (Edwards, J., concurring). The three-judge panel, which dismissed *Tel-Oren* for lack of subject matter jurisdiction, however, did not agree on the interpretation of the ATCA's statutory language. See *id.* at 775. Judge Edwards endorsed the *Filartiga* approach but did not believe that international law imposed liability on a non-state actor like the Palestine Liberation Organization. See *id.* at 776 (Edwards, J., concurring). Judge Bork rejected the *Filartiga* court's reading of the statute as contrary to the role of the courts under separation of powers principles. See *id.* at 799 (Bork, J., concurring). Senior Circuit Judge Robb affirmed the dismissal on the grounds that the case raised a non-justiciable political question. See *id.* at 823 (Robb, J., concurring).

111. *Id.* at 781 (Edwards, J., concurring).

112. See *id.* at 781-82 (Edwards, J., concurring). Judge Edwards discussed an alternative approach of using municipal law as the standard of liability, but he noted problems involving the degree of nexus required between domestic and international torts. See *id.* at 787-88.

113. See STEPHENS & RATNER, *supra* note 22, at 322 (Affidavit of International Law Scholars in *Ortiz v. Gramajo*).

114. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542-43 (N.D. Cal. 1987) (*Forti I*) ("Before this Court may adjudicate a tort claim under § 1350, it must be satisfied that the legal standard it is to apply is one with universal acceptance and definition; on no other basis may the Court exercise jurisdiction over a claimed violation of the law of nations."); see also cases cited *supra* note 106 (listing cases in which alien plaintiffs relied on

Thus, before a court may adjudicate an ATCA claim it must be satisfied that the legal standard it is to apply is universally accepted.<sup>115</sup> While the dictionary defines “universally” as something occurring “in every instance” or “in every part or place,”<sup>116</sup> modern courts have applied a somewhat less restrictive meaning.<sup>117</sup> Accordingly, unanimity among nations is not required to meet the burden of universality; rather, plaintiffs need only “show a general recognition among states that a specific [sic] practice is prohibited.”<sup>118</sup> One court described universality as requiring a showing that “no state condone[s] the act in question and there is a recognizable ‘universal’ consensus of prohibition against it.”<sup>119</sup> Hence, determining universality in the ATCA context requires a federal district court judge to decide to what extent the nations of the international community tolerate a challenged act or practice.<sup>120</sup>

The remaining prongs seem to be vestiges of universality, rather than distinct issues.<sup>121</sup> “Definable,” thus demands universal consensus<sup>122</sup> by requiring a showing of international agreement on the specific elements of the tort.<sup>123</sup> Similarly, the “obligatory” prong demands that the world community expressly require the prohibition of a specific practice; therefore, courts will not take cognizance of international norms that are simply encouraged or advisory.<sup>124</sup>

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the ATCA to sue current and former public officials of their own governments).

115. See, e.g., *Forti I*, 672 F. Supp. at 1542.

116. WEBSTER'S NEW WORLD DICTIONARY 1460 (3d College ed. 1988).

117. See, e.g., *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (*Forti II*).

118. *Id.*

119. *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995).

120. See *supra* notes 111-19 and accompanying text (discussing judicial application of the universality prong).

121. Cf. *Xuncax*, 886 F. Supp. at 187 (“[T]he requirement of universality goes not only to recognition of the norm in the abstract sense, but to agreement upon its content as well.”). But see *id.* (“It is not necessary that every aspect of what might comprise a standard such as ‘cruel, inhuman or degrading treatment’ be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law.”).

122. See *Xuncax*, 886 F. Supp. at 184; *Forti II*, 694 F. Supp. at 712.

123. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987) (*Forti I*). Merely incorporating all the factual allegations of a claim and then alleging that the acts constitute a violation of customary international law will not suffice. See *Forti II*, 694 F. Supp. at 711.

124. See Blum & Steinhardt, *supra* note 93, at 89. Courts and commentators often assess the extent of the obligation imposed by looking at the number of international agreements, as well as the number of states that have joined them. See *id.* The “obligatory” prong may present a difficult hurdle for plaintiffs with novel claims seeking recognition of emerging norms that have not yet coalesced into law because “[t]he United States, has a singularly poor record of ratifying [] human rights treaties.” GUIDE, *supra* note 55, at 18 n.3 (listing treaties to which the United States is a party).

Applying this contemporary standard, courts have recognized eight torts as violations of the law of nations: torture,<sup>125</sup> summary execution,<sup>126</sup> genocide,<sup>127</sup> war crimes,<sup>128</sup> disappearance,<sup>129</sup> arbitrary detention,<sup>130</sup> slave trading,<sup>131</sup> and cruel, inhuman, or degrading punishment.<sup>132</sup> Conversely, courts have held that the law of nations does not confer jurisdiction for the following acts: environmental harms,<sup>133</sup> theft,<sup>134</sup> seizure or expropriation of property,<sup>135</sup> supporting armed forces,<sup>136</sup> and several labor rights

125. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980).

126. See *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

127. See *Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995).

128. See *id.* at 242-43.

129. See *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (*Forti II*).

130. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995).

131. See *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).

132. See *Xuncax*, 886 F. Supp. at 187-89.

133. See *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 669-71 (S.D.N.Y. 1991) (dismissing ATCA claim involving the international shipment of hazardous materials for want of a "clear . . . violation of the law of nations"). More recently, the same court seemed willing to consider conferring ATCA jurisdiction for environmental harms arising from "a massive industrial undertaking extending over a substantial period of time and with major consequences." *Aguinda v. Texaco, Inc.*, No. 93.CIV.7527, 1994 WL 142006, at \*1, \*7 (S.D.N.Y. Apr. 11, 1994) (Broderick, J.) (permitting limited discovery on allegations of environmental abuse made by Ecuadorian citizens against U.S. based oil company, Texaco), *vacated sub nom.*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). After the death of District Judge Broderick, however, District Judge Rakoff dismissed the case, observing that "plaintiffs' imaginative view of this Court's power must face the reality that United States district courts are courts of limited jurisdiction. While their power within those limits is substantial, it does not include a general writ to right the world's wrongs." *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996) (dismissing on forum non conveniens and comity grounds, and for failure to join the Ecuadorian government and a state entity as indispensable parties), *vacated sub nom.*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (holding that the district court erred in dismissing the case without requiring the corporate defendant to accept jurisdiction in Ecuador). *Cf. infra* notes 209-11 (citing recent literature discussing the emergence of international environmental standards upon which courts might predicate ATCA jurisdiction).

134. See *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995).

135. See *Unocal*, 963 F. Supp. at 899 (clarifying an order dismissing expropriation of property claim); see also *Bigio v. Coca-Cola, Co.*, No. 97 Civ. 2858, 1998 WL 293990, at \*2 n.4 (S.D.N.Y. June 5, 1998).

136. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985). In *Sanchez-Espinoza*, then-Circuit Judge Scalia affirmed the district court's dismissal of ATCA claims brought by Nicaraguan citizens against United States federal officials. See *id.* at 205-06. The Nicaraguan plaintiffs asserted that the federal defendants conspired to provide financial, technical, and military training support to Nicaraguan Contras attempting to destabilize and overthrow the Nicaraguan Government. See *id.* at 205. Judge Scalia, citing Judge Bork's concurrence in *Tel-Oren*, concluded that the ATCA would not reach private, non-state support of military forces, nor, absent a waiver of sovereign immunity, would it encompass official state action supporting military forces. See *id.* at 206-07.

violations.<sup>137</sup>

3. Finding the “Mystic Over-Law to Which Even the United States Must Bow”: Sources of the Law of Nations<sup>138</sup>

As a practical matter, courts look first to written works, such as international treaties and agreements, in determining whether a particular tort is universal, definable, and obligatory.<sup>139</sup> Some commentators suggest that the number of agreements coupled with the number of states that have signed them provide persuasive authority on which to base ATCA jurisdiction.<sup>140</sup> Courts find additional evidence of the universal status of a particular violation by looking to other written works such as the rulings of international commissions and tribunals, the *Restatement (Third) of Foreign Relations Law of the United States [Restatement]*, scholarly writing and affidavits, and international resolutions and declarations.<sup>141</sup>

Customary international law, however, extends beyond written, legally ratified agreements and encompasses rules to which states *conform in practice* “because they believe that they are under a normative obligation

Scalia concluded further that “[t]he Alien Tort Statute itself is not a waiver of sovereign immunity.” *Id.* at 207.

137. See *Khedivial Line, S.A.E. v. Seafarers’ Int’l Union*, 278 F.2d 49, 51-52 (2d Cir. 1960) (finding that picketing did not violate the law of nations). For an excellent discussion of the ATCA’s potential for vindication of transnational labor rights, see Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1561-79 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds. 1996)).

138. *In re The Western Maid*, 257 U.S. 419, 432 (1922) (Holmes, J.) (“There is no mystic over-law to which even the United States must bow.”). In an earlier case, Justice Holmes observed “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

139. See Blum & Steinhardt, *supra* note 93, at 87-90. *But see infra* Part II.C.2 (discussing the *Unocal* court’s failure to cite any international instruments in support of its finding of ATCA jurisdiction).

140. See Blum & Steinhardt, *supra* note 93, at 87-90.

141. See STEPHENS & RATNER, *supra* note 22, at 54-58. In this regard, some commentators and jurists have concluded that the Universal Declaration of Human Rights, which purportedly “defin[es] the fundamental rights to which all individuals are entitled,” has become in its entirety a binding part of customary international law. See Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 19 I.L.M. 585, 592 (1980), reprinted in David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos*, 12 HASTINGS INT’L & COMP. L. REV. 1, 34, 39 (1988). *But see* HUNTINGTON, *supra* note 17, at 192-98 (arguing that recent declines in Western economic power have diminished the importance and acceptance of the Universal Declaration of Human Rights).



to comply."<sup>142</sup> Courts interpret these rules as *jus cogens* norms, which are internationally accepted principles of law from which the nations of the world, supposedly, permit no derogation.<sup>143</sup> *Jus cogens* violations consist of "a handful of heinous actions" that transgress "definable, universal and obligatory norms."<sup>144</sup> While these norms may be determined by consulting widely ratified treaties,<sup>145</sup> courts today, as in the time of *La Jeune Eugenie* and *The Paquete Habana*, often ascertain the content of customary international law largely by looking to state practice.<sup>146</sup>

142. GUIDE, *supra* note 55, at 10.

143. See Committee of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679); 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (hereinafter RESTATEMENT). The *Restatement* lists seven violations of *jus cogens* norms:

- (a) A state violates international law if, as a matter of state policy, it practices, encourages, or condones
- (b) genocide,
- (c) slavery or slave trade,
- (d) the murder or causing the disappearance of individuals,
- (e) torture or other cruel, inhuman, or degrading treatment or punishment,
- (f) prolonged arbitrary detention,
- (g) systematic racial discrimination, or
- (h) a consistent pattern of gross violations of internationally recognized human rights.

*Id.* Of course, the phrase "internationally recognized human rights" poses the same interpretational problems as the ATCA's language "tort . . . in violation of the law of nations," however, the *Restatement* incorporates explicitly an evolving standard into its text. See *id.* § 702 cmt. a.

144. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

145. Compare generally Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 5-6, 45 (1988) (arguing "that treaties are simply one more form of state practice" that often do not reflect the actual practice of states and, therefore, have limited value in ascertaining the customary international law of human rights), with Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988) (arguing that treaties are particularly important in the context of customary international human rights law).

146. Compare *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 845-51 (C.C.D. Mass. 1822) (No. 15,551) (examining the long-standing moral proscription and more recent European conventions abolishing slavery), and *The Paquete Habana*, 175 U.S. 677, 686-711 (1900) (surveying over 400 years of state practice regarding the capture of fishing vessels as prizes of war), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (reviewing state practices related to war crimes, torture, and genocide), and *Filatiga v. Penaralra*, 630 F.2d 876, 883-85 (2d Cir. 1980) (analyzing the development of state practices regarding the use of torture).

*C. Implications of Looking to State Practice: State Action, Acts of State, and Foreign Sovereign Immunity*

*1. State Action & "Color of Law"*

Judicial reliance on state practice is consistent with the traditional view of the law of nations as primarily a law between states,<sup>147</sup> establishing "substantive principles for determining whether one country has wronged another,"<sup>148</sup> rather than creating liability or rights of action for private actors.<sup>149</sup> Modern ATCA jurisprudence holds, however, that the law of nations does not always "confine its reach to state action."<sup>150</sup> According to this jurisprudence, private individuals may also be liable for certain violations of the law of nations including genocide, war crimes, piracy, and slavery, regardless of whether they act under color of state law.<sup>151</sup> Nevertheless, courts interpret all other violations of the law of nations as having a state action requirement.<sup>152</sup> Therefore, norms associated with violations other than genocide, war crimes, piracy, and slavery are binding only upon states and persons acting under color of state law, not private individuals.<sup>153</sup>

Courts apply the constitutional standards derived from the "color of law" jurisprudence of 42 U.S.C. § 1983,<sup>154</sup> a domestic civil rights statute,

147. See 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 19 (H. Lauterpacht ed., 7th ed. 1948).

148. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964).

149. See OPPENHEIM, *supra* note 147, at 19. The underlying rationale of this approach is that

[s]ince the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

*Id.* Until *Filartiga*, conventional jurisprudence excluded a state's treatment of its own citizens as a violation of the law of nations. See *Filartiga*, 630 F.2d at 880 (observing that the district court felt constrained by previous dicta to narrowly construe the law of nations as excluding any law that governed a state's treatment of its own citizens). Thus, historically, an alien could not historically sue officials of his own country under the ATCA no matter how egregious the conduct alleged. Cf. *Burley*, *supra* note 32, at 488 (observing that the drafters could not have anticipated ATCA suits between aliens and officials of their own government for torts committed in that government's jurisdiction).

150. *Kadic*, 70 F.3d at 239-40.

151. See *id.* at 239-44.

152. See, e.g., *id.*; *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 890-92 (C.D. Cal. 1997); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 373-80 (E.D. La. 1997).

153. See *Freeport-McMoRan*, 969 F. Supp. at 373-74.

154. See *supra* text accompanying note 27 (introducing the application of the state action requirement in the context of ATCA litigation). The application of § 1983 jurispru-

to determine whether a defendant has engaged in state action for the purposes of ATCA jurisdiction and liability.<sup>155</sup> Under 42 U.S.C. § 1983, a private individual acts under color of law “when he acts together with state officials or with significant state aid.”<sup>156</sup> The Supreme Court cases deciding when courts may fairly ascribe private action to the state for purposes of constitutional liability have not been, however, a model of consistency.<sup>157</sup> Moreover, courts have developed the applicable standards and definitions in a variety of domestic *constitutional* contexts unrelated to the ATCA.<sup>158</sup> District courts, nevertheless, examine the conduct of ATCA defendants using the four tests of state action emerging from the U.S. Supreme Court’s domestic civil rights jurisprudence:<sup>159</sup> public func-

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dence to ATCA claims seems to have originated in *Forti I*. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (*Forti I*). In *Forti I*, the court stated that “[c]laims for tortious conduct of government officials under [the ATCA] may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983, where plaintiffs must allege both deprivation of a federally protected right and action ‘under color of’ state law.” *Id.* Subsequent courts accepted, without scrutiny, *Forti*’s assertion that domestic constitutional standards were applicable to relationships among foreign actors, both governmental and private. See, e.g., *Kadic*, 70 F.3d at 245; *Unocal*, 963 F. Supp. at 890; *Freeport-McMoRan*, 969 F. Supp. at 375-76. This Comment argues, however, that standards of American constitutional liability should not apply in the context of business relationships between U.S. corporations and foreign nations arising out of economic globalization. See discussion *infra* Parts II.D and III.

155. See, e.g., *Unocal*, 963 F. Supp. at 890-891; *Kadic*, 70 F.3d at 245.

156. *Kadic*, 70 F.3d at 245 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

157. See *supra* note 29 (regarding inconsistent Supreme Court jurisprudence surrounding § 1983’s “color of law” requirements).

158. See cases cited *infra* notes 160-63, 165-66; see also *Freeport-McMoRan*, 969 F. Supp. at 375-80 (analogizing the facts and holdings of various non-ATCA § 1983 cases to a corporate ATCA case). Section 1983 provides a remedy for governmental deprivations of life, liberty, or property in violation of the Due Process Clause of the 14th Amendment. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 347-49 (1974). The *Restatement* also provides a “color of authority” test. See *RESTATEMENT*, *supra* note 143, § 207 cmt. d. The *Restatement* test requires consideration of the totality of the circumstances, including whether the challenged conduct was for private gain or public purpose, whether official equipment or uniforms were used, and whether the actors reasonably considered their conduct to be official. See *id.* *Freeport-McMoRan*, however, is the only corporate ATCA case even to analyze tortious conduct under the *Restatement* test. See *Freeport-McMoRan*, 969 F. Supp. at 375.

159. See, e.g., *Freeport-McMoRan*, 969 F. Supp. at 380 (analyzing conduct of corporate ATCA defendant under all four § 1983 tests of state action); *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 890-91 (C.D. Cal. 1997) (noting the applicability of the four § 1983 tests of state action to ATCA claims). The Supreme Court has yet to resolve whether the various tests operate differently or whether they are “simply different ways of characterizing the necessarily fact-bound inquiry” confronting the courts. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

tion,<sup>160</sup> symbiotic relationship,<sup>161</sup> nexus,<sup>162</sup> and joint action.<sup>163</sup>

The joint action test is particularly relevant because the only court to find ATCA jurisdiction over a corporate defendant applied that test.<sup>164</sup> The joint action test posits that private actors can be state actors if they willfully participate in joint action with a state to effect a particular deprivation of rights.<sup>165</sup> Willful participation includes an agreement,<sup>166</sup> conspiracy,<sup>167</sup> or a substantial degree of cooperative action between a private actor and a state government.<sup>168</sup>

## 2. Act of State Doctrine

In ATCA litigation targeting collusion between corporate defendants and their foreign host-governments, the state action requirement is likely to trigger judicial consideration of the prudential act of state doctrine.<sup>169</sup>

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160. See, e.g., *Jackson*, 419 U.S. at 349-52. The public function test holds that a private entity is a state actor when it performs an exclusive function of the state. See *id.* at 352.

161. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). State action exists if “[t]he [s]tate has so far insinuated itself into a position of interdependence with a private actor” that “it must be recognized as a joint participant in the challenged activity.” *Id.* at 725. The *Freeport-McMoRan* court referred to the *Burton* standard as the “symbiotic relationship test.” *Freeport*, 969 F. Supp. at 378. The *Lugar* Court, however, cited *Burton* as applying the “‘nexus’ test.” *Lugar*, 457 U.S. at 939.

162. See *Jackson*, 419 U.S. at 350-51. Under the nexus test, the plaintiff must demonstrate that the nexus between the state and the private actor is sufficiently close to allow the court to impute the challenged conduct to the state. See *id.* The state must be significantly involved or have actually participated in the challenged conduct to satisfy the nexus test. See *Gallagher v. “Neil Young Freedom Concert,”* 49 F.3d 1442, 1449 (10th Cir. 1995).

163. See *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). State action exists when a private actor “is a willful participant in joint action with the State or its agents.” *Id.* Courts find joint action “if there is a ‘substantial degree of cooperative action’ between” the state and private actors to deprive another of constitutional rights. *Gallagher*, 49 F.3d at 1454.

164. See *Unocal*, 963 F. Supp. at 890-91 (C.D. Cal. 1997) (applying the joint action test to find subject matter jurisdiction over corporate defendant under the ATCA).

165. See *Dennis*, 449 U.S. at 27.

166. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (holding that proof that a private employee and police officer “somehow reached an understanding” to violate petitioner’s constitutional rights was basis for relief under § 1983). Mere acquiescence, however, in a federal investigative request by private employees is insufficient to prove such an understanding or agreement. See *Fonda v. Gray*, 707 F.2d 435, 437-38 (9th Cir. 1983).

167. See, e.g., *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (assuming that conspiracy constitutes willful participation).

168. See, e.g., *Gallagher*, 49 F.3d at 1452.

169. See Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply “Historical Trivia”?*, 21 J. MARSHALL L. REV. 341, 352-55 (1988) (discussing the use of abstention doctrines such as act of state and political question in ATCA litigation).

In *Banco Nacional de Cuba v. Sabbatino*,<sup>170</sup> the U.S. Supreme Court stated that the act of state doctrine prevents U.S. courts from inquiring into the legitimacy of public acts committed by a recognized foreign sovereign power within its own territory.<sup>171</sup> The constitutional underpinnings of this doctrine reflect the judiciary's concerns regarding separation of powers, particularly that U.S. courts sitting in judgment of a foreign state may be interfering with the conduct of foreign policy by the President and Congress.<sup>172</sup>

The scope and purpose of the act of state doctrine in the context of alleged human rights violations is tempered, however, by dictum from *Sabbatino*.<sup>173</sup> The *Sabbatino* Court noted that if a particular area of international law attracted a greater degree of codification or consensus, then it would be more appropriate for the judiciary to render decisions related to that concern.<sup>174</sup> Hence, when jurisdiction is otherwise available for violations of authoritative and well-documented norms, such as torture and slavery, modern courts have not felt constrained by the act of state doctrine.<sup>175</sup>

### 3. Foreign Sovereign Immunity

Plaintiffs rarely sue foreign governments, however, because, with few exceptions, foreign states have complete immunity.<sup>176</sup> The sole means for

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170. 376 U.S. 398 (1964).

171. *See id.* at 423-27.

172. *See id.* at 423-37. While neither the Constitution nor international law compel the use of the act of state doctrine, it arises out of constitutional separation of powers and the notion that the judiciary is the branch of government least competent to engage in international relations. *See id.* at 423.

173. *See id.* at 428.

174. *See id.* The Ninth Circuit has conditioned application of the doctrine on whether it is apparent that adjudication of a claim "would bring our country into a hostile confrontation" with another, *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360 (9th Cir. 1988), and "whether the foreign state was acting in the public interest," *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). The doctrine applies only to "public acts" and, in theory, no state commits human rights violations as a matter of public policy, therefore, the judiciary should not consider such conduct a "public act." *See S. REP. NO. 102-249*, at 8 (1991) (Senate report on the Torture Victim Protection Act of 1991). In its most recent foray into the act of state doctrine, the U.S. Supreme Court held that a ruling on the validity of a sovereign official's act would occur if "the outcome of the case turns upon [] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990).

175. *See, e.g., John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 892-95 (C.D. Cal. 1997) (holding that the policies underlying the act of state doctrine militate against its application in cases where, *inter alia*, the coordinate branches of government have previously denounced the human rights abuses of a foreign nation).

176. *See STEPHENS & RATNER, supra* note 22, at 126.

obtaining jurisdiction over a foreign state in this country is the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>177</sup> Under the FSIA, foreign states are immune from suit and federal courts lack subject matter jurisdiction over claims against them, unless one of the FSIA's enumerated exceptions applies.<sup>178</sup>

The exceptions to jurisdictional immunity focus on commercial activity occurring or causing a direct effect in the United States.<sup>179</sup> A foreign government engages in commercial activity when it acts not as a market regulator, but rather as a private participant.<sup>180</sup> Courts test for commercial activity by determining whether the foreign state "exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'"<sup>181</sup> While commercial collusion between a corporation and its foreign host-government intuitively seems to fit within an FSIA exception, a foreign state's abuse of police or penal powers in support of commercial endeavors may not destroy immunity.<sup>182</sup>

#### *D. The ATCA Paradox: Who Gets Left Holding the Bag?*

The effect of invoking foreign sovereign immunity while at the same time finding the act of state doctrine inapplicable to state action involving a corporate ATCA case yields an interesting paradox. Such a judgment holds corporate defendants liable for the conduct of foreign host-

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177. 28 U.S.C. §§ 1602-11 (1994 & Supp. II 1996); *see* *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 431-32, 443 (1989) (reversing Second Circuit decision arising out of military attack on neutral commercial shipping during the Falklands War on the grounds that the FSIA was the only means of establishing jurisdiction over a foreign nation).

178. *See* 28 U.S.C. §§ 1604-05. Section 1605(a)(2) provides exceptions for (1) commercial activity carried on in the United States by a foreign state, (2) acts performed in the United States connected to the foreign state's commercial activity elsewhere, or (3) commercial activity of a foreign state occurring overseas but having a "direct effect" in the United States. *See id.* § 1605(a)(2). Additionally, the FSIA provides several other general exceptions to immunity including waiver, cases involving property in or connected with the United States, and certain cases in admiralty. *See id.* § 1605. Even if a foreign state does not enter an appearance or assert an immunity defense, a court must satisfy itself that one of the enumerated exceptions applies before taking any other action. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992).

179. *See* 28 U.S.C. § 1605(a)(2).

180. *See* *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

181. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993).

182. *See* *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 887-89 (C.D. Cal. 1997). For example, Burma's use of military troops to forcibly enslave and relocate local farmers in the path of a commercial gas pipeline was an act "peculiarly sovereign in nature" and, thus, did not come within the FSIA's commercial activity exception. *Id.* at 888 (internal quotations omitted).

governments for which the foreign governments, themselves, are immune.<sup>183</sup> Likewise, before the court may adjudicate the claim, it must be satisfied that the legal standard it is to apply is universally accepted.<sup>184</sup> A court finding ATCA jurisdiction in such a case, therefore, expressly holds that “no state condones” the tortious conduct in question,<sup>185</sup> while at the same time accepting as true, allegations of foreign government complicity in that conduct.<sup>186</sup>

## II. RACE TO THE BOTTOM: THE GLOBAL TENSION BETWEEN PROFITS AND PRINCIPLES

### A. *Fatal Attraction: Multinational Corporations and Their Foreign Host-Governments*

In a growing number of ATCA suits, indigenous people are alleging corporate complicity in human rights abuses committed on and near company oil and mining operations by the military and police forces of foreign governments.<sup>187</sup> These cases typically arise out of mutually beneficial business relationships between military dictatorships and MNCs.<sup>188</sup> The MNC defendants assert that in their search for finite resources, “geology and geography[,] not geopolitics”, compel their choice of foreign government business partners.<sup>189</sup> Many factors, however, draw MNCs to

183. See, e.g., Pizzurro & Delaney, *supra* note 22.

184. See *supra* notes 115-37 and accompanying text (discussing the universality requirement).

185. *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995).

186. See *Unocal*, 963 F. Supp. at 887-91 (dismissing slavery claims against Burmese government entity on the basis of foreign sovereign immunity, but accepting allegations of state sponsored slavery as true to allow the case to go forward against the private corporate defendant).

187. See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 2 (S.D.N.Y. Sep. 25, 1998); *Unocal*, 963 F. Supp. at 884-85; *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 369 (E.D. La. 1997).

188. See *infra* Parts II.B-E (describing relationships between corporations and their foreign host-governments that led to ATCA litigation).

189. See *Constructive Engagement in Myanmar: Hearings on S. 1511 Before the Senate Comm. on Banking*, 104th Cong. (1996) (statement of John Imle, President of Unocal Corp.) (last visited Feb. 19, 1999) <<http://www.mrdltd.com/usviews/Files/testimony.html>> [hereinafter Statement of John Imle]. Senate consideration of the Burma Freedom and Democracy Act of 1995 motivated Mr. Imle’s testimony. See *id.* A military junta has ruled Burma since 1962. See Burma Freedom and Democracy Act of 1995, S. 1511, 104th Cong. § 2 (1995). In an effort to repress the Burmese pro-democracy movement, the junta established the State Law and Order Restoration Council (SLORC) in 1988. See *id.* In 1990, the people of Burma voted in a free election for the National League for Democracy (NLD) led by Aung San Suu Kyi. See *id.* SLORC refused to respect the outcome of the 1990 elections. See *id.* The Burma Freedom and Democracy Act of 1995 sought to impose

nations with dismal human rights records.<sup>190</sup>

It is undisputed that MNCs benefit from the labor, economic, and environmental policies of abusive foreign host-governments.<sup>191</sup> The host-governments, likewise, benefit from both the international prestige of collaborating with powerful MNCs and the much-needed revenue generated by their presence.<sup>192</sup> That revenue, however, often finances repressive armies and police forces that are essential if an abusive government is to stay in power.<sup>193</sup> Thus, “large, visible investment in often desperately poor countries” often attracts the attention of dissident and revolutionary groups pursuing economic and social rights.<sup>194</sup> Similarly, the corruption and poor labor practices that often attend development in emerging economies frequently generate intense domestic opposition.<sup>195</sup>

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certain unilateral and multilateral economic sanctions against Burma to compel SLORC to step aside and permit the elected government of Burma to take power. *See id.* §§ 3-4. The bill, which Congress never passed, required the Secretary of Labor to report to the appropriate congressional committees on Burma’s unfair labor practices. *See id.* § 5. Mr. Imle, the President of Unocal, opposed passage of the bill arguing that it would “diminish [the United States’s] ability to influence constructively the future of Southeast Asia and cede the opportunity to participate in the formative stages of Myanmar’s development.” Statement of John Imle, *supra*.

190. *See* MARBER, *supra* note 1, at 87-104 (discussing the benefits MNCs obtain by operating in emerging nations that do not value human rights).

191. *See* Jeff Manning, *Nike Steps Into Political Minefield*, OREGONIAN, Nov. 11, 1997, at A1 (citing Professor David Kang of Dartmouth College). According to the World Bank, “foreign direct investment [, a measure of] capital, plant, and equipment going abroad[,] swelled from approximately \$20.5 billion in 1987 to an estimated \$100 billion in 1997.” MARBER, *supra* note 1, at 95-96. Likewise, observers estimated that investment in manufacturing in emerging nations totaling \$56 billion in 1995 would grow to a projected \$90 billion in 1997. *See id.* at 96.

192. *See* Arvind Ganesan, *Industry Focus: Partners in Crime*, GUARDIAN, May 20, 1998, Society, at 4.

193. *See* Leyla Alyanak, *Activists Awry Over Gas Pipeline Running Through Old Thai Forest* (visited Sept. 3, 1998) <[http://www.earthtimes.org/aug/environmentactivistsawryaug19\\_98.htm](http://www.earthtimes.org/aug/environmentactivistsawryaug19_98.htm)> (discussing the extent to which Unocal’s funding of the Yadana pipeline project on the Burma/Thailand border is propping up SLORC’s military regime) (on file with the *Catholic University Law Review*).

194. Vidal, *supra* note 4, at 5. Disenfranchised indigenous groups have found that attacking a corporate financed mine or pipeline project, for example, is an effective way to destabilize the government business partner. *See id.*; *see also* Justin Lowe, *Rumble in the Jungle*, MOTHER JONES (Mar. 10, 1998) <[http://www.motherjones.com/news\\_wire/lowe.html](http://www.motherjones.com/news_wire/lowe.html)> (arguing that foreign economic development projects must be opposed because they should benefit the poor, but actually benefit only multinational corporations and the very rich).

195. *See* MARBER, *supra* note 1, at 207-08 (discussing the accusations, public outcry, and unintended consequences surrounding allegations of “sweatshop” labor practices); Fred Hiatt, *Why Democracies Matter*, WASH. POST, July 28, 1996, at C7 (eschewing the Association of South East Asian Nations’ (ASEAN) argument that its business and labor practices do not constitute corruption, but rather are cultural characteristics); Vidal, *supra*



To protect their investments in high-risk nations, corporations sometimes make contractual security and labor arrangements with host-governments known to be among the worst violators of human rights in the world.<sup>196</sup> The recent spate of ATCA cases explores the contours of liability when MNCs knowingly benefit from a governmental business partner's violation of the human rights of its own citizens.<sup>197</sup>

*B. The Midas Touch: Beanal v. Freeport-McMoRan, Inc.*<sup>198</sup>

In *Beanal v. Freeport-McMoRan, Inc.*, an Indonesian tribal leader filed an ATCA suit in United States district court against a Louisiana-based gold and copper mining corporation, Freeport-McMoRan (Freeport).<sup>199</sup> The complaint alleged that Freeport committed environmental and human rights abuses at its mine in Irian Jaya, Indonesia.<sup>200</sup> Moreover, the plaintiff asserted that Freeport's environmental practices amounted to genocide because the practices were bringing about the physical destruction of the Amungme tribe.<sup>201</sup>

Freeport has long-term mining rights granted by the Indonesian government,<sup>202</sup> a major shareholder in Freeport's Indonesian subsidiary and

note 4, at 5.

196. See discussion *infra* Parts II.B-E (describing the relationships between several corporations and their host-governments that have led to recent ATCA claims).

197. See *supra* note 20 (listing recent corporate ATCA cases).

198. 969 F. Supp. 362 (E.D. La. 1997) *dismissed with prejudice*, No. CIV.A.96-1474, 1998 WL 92246 (E.D. La. Mar. 3, 1998). For extensive background information on this case, see generally, *US Mining Corporation Sued in Federal Court by Indonesian Tribal Leader*, 1996 COLO. J. INT'L ENVTL. L. & POL'Y 89 (1997) [hereinafter *US Mining*] (published before dismissal of the suit).

199. See *Freeport-McMoRan*, 969 F. Supp. at 365-66.

200. See *id.* Thomas Beanal, chairman of the Amungme Tribal Council, filed a class action suit against Freeport on behalf of himself and 3,000 indigenous people. See *id.*; *US Mining*, *supra* note 198, at 89. Freeport owns 82% of its subsidiary, PT Freeport Indonesia, which in turn owns 90% of the mine. See *US Mining*, *supra* note 198, at 91. The Indonesian Government owns 10% of the Freeport mining operation, which is valued at 60 billion dollars. See *id.* The class was never certified and Beanal remained the lone plaintiff throughout the suit. See *Beanal v. Freeport-McMoRan, Inc.*, No. CIV.A.96-1474 1998 WL 92246, at \*1 (E.D. La. Mar. 3, 1998) (dismissing claims with prejudice due to failure to amend complaint after three opportunities).

201. See *Freeport-McMoRan*, 969 F. Supp. at 372-73. Beanal alleged that Freeport discharged huge amounts of hazardous mine tailings into a nearby river, thereby destroying the natural resources necessary for the tribe's survival. See *id.* at 382-83; see also *US Mining*, *supra* note 198, at 92-93 (describing claims that Freeport's actions threatened the physical survival of the Indonesian people). The complaint alleged that Freeport's environmental practices resulted in displacement, relocation and "purposeful, deliberate, contrived and planned" demise of a culture of indigenous people. *Freeport-McMoRan*, 969 F. Supp. at 369.

202. See *Freeport-McMoRan*, 969 F. Supp. at 379.

a prominent source of corporate income.<sup>203</sup> The court acknowledged that the complaint depicted “Freeport’s vast and draconian control” over the region.<sup>204</sup> The corporation allegedly maintained this control, in part, through the assistance of an Indonesian military presence at the mine.<sup>205</sup> These official Indonesian troops were apparently distinct, however, from the additional security personnel privately employed by the corporation.<sup>206</sup> These privately employed security forces allegedly abducted, detained, and tortured Amungme tribesmen on corporate property.<sup>207</sup>

### 1. *The Lack of Universal Consensus Regarding Environmental Torts*

The willingness of the *Freeport-McMoRan* court to consider environmental damage as a potential violation of human rights may be one reason why it gave the plaintiff three opportunities to amend his complaint<sup>208</sup> and considerable guidance in making the amendments.<sup>209</sup> Existing international environmental principles, however, merely express a general sense that nations take care to ensure that internal state practice does not

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203. *See id.* at 378-79.

204. *Id.* at 380.

205. *See id.* at 379.

206. *See id.* at 378.

207. *See id.* at 369, 380. The challenged conduct allegedly occurred on buses, within workshops, at security stations, on private roadways, and in containers owned by Freeport. *See id.*

208. *Cf.* *Beanal v. Freeport-McMoRan, Inc.*, No. CIV.A.96-1474, 1998 WL 92246, at \*1 (E.D. La. Mar. 3, 1998) (dismissing plaintiff’s third amended complaint with prejudice); *Beanal v. Freeport McMoRan, Inc.*, No. CIV.A.96-1474, 1997 WL 465283, at \*1 (E.D. La. Aug. 7, 1997) (dismissing second amended complaint without prejudice); *Freeport-McMoRan*, 969 F. Supp. at 383. The litigation was contentious and hotly contested. *See Beanal v. Freeport-McMoRan, Inc.*, No. CIV.A.96-1474, 1996 WL 371835, at \*2-3 (E.D. La. Jul. 3, 1996) (granting Freeport’s Motion for Rule 11 Sanctions against Beanal’s attorney, Martin Regan).

209. *See Freeport-McMoRan*, 969 F. Supp. at 383 (“As a preliminary matter, courts have recognized that § 1350 may be applicable to international environmental torts.”); *see also Freeport-McMoRan*, 1998 WL 92246, at \*3 (E.D. La. Mar. 3, 1998) (asserting that “[t]he court undertook a thorough analysis” of the first complaint, and in later Orders “provided plaintiff a road map as to the type of allegations which might survive a motion to dismiss” and gave still “more guidance” with which the plaintiff did not comply). For an excellent analysis of the international legal principles underlying the environmental claims in *Freeport-McMoRan* see, Anastasia Khokhryakova, Note, *Beanal v. Freeport-McMoRan, Inc.: Liability of a Private Actor For an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 463, 479-88 (1998). For a detailed proposal to expand remedies available to indigenous people for environmental torts arising out of corporate activity, see generally Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs*, 38 VA. J. INT’L L. 331 (1998).

harm the environment beyond their borders.<sup>210</sup> Consequently, neither the court nor the plaintiff was able to identify, absent state action, any germane universal norm in customary international law that could establish private corporate ATCA liability for environmental practices harmful to an indigenous tribe.<sup>211</sup>

Unable to find sufficient consensus to claim an environmental tort in violation of the law of nations and, perhaps, seeking to avoid the state action requirement, Beanal apparently attempted to characterize the environmental damage as genocide.<sup>212</sup> Genocide, however, encompasses

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210. See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION* 186-93 (1995). Professor Sands finds that Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration provide the "legal bas[es] for bringing claims under customary [international] law asserting liability for environmental damage." *Id.* at 186, 194. Cf. Marcia Coyle, *Suits Test Environmental Jurisdiction*, NAT'L L.J., Feb. 8, 1999, at B1. Ms. Coyle reports on recent developments in federal corporate ATCA cases attempting to establish a clear set of binding international environmental standards. See *id.* In Ms. Coyle's article, John C. Reynolds, corporate defense counsel to Freeport-McMoRan argues that "'sovereign nations . . . have never agreed to [international environmental principles] and have never delineated any standards.'" *Id.* While David Hunter, vice president of the Center for International Environmental Law contends that courts can fashion standards out of treaties, World Bank policy statements, and non-binding declarations, he acknowledges that "[t]he basic problem is, we don't have a set of international environmental standards as clearly binding and articulated as in the human rights area." *Id.*

211. See *Freeport-McMoRan*, 969 F. Supp. at 382-84. Beanal asserted three international environmental law principles to support his cause of action: 1) the Polluter Pays Principle, 2) the Precautionary Principle, and 3) the Proximity Principle. See *id.* at 383-84. The *Freeport-McMoRan* court, however, rejected these principles because these standards had not garnered universal consensus in the international community, and because they applied only to state actors. See *id.* at 384. For a discussion of international agreements related to a human "right to a safe environment" in the context of MNC operations among indigenous peoples, see Geer, *supra* note 209, at 377-84. While Professor Geer concludes that the "right to a safe environment" has yet to achieve the status of customary international law, he observes a growing trend toward recognizing environmental rights in the context of international human rights norms. See *id.* at 384. But see Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 343-44 (1997) (arguing "that human rights protection against severe environmental harm has developed sufficiently to allow for relief under the [ATCA]").

212. See *Freeport-McMoRan*, 969 F. Supp. at 371, 382-84. While the court recognized that state action is not required for an allegation of genocide, it dismissed the claim relying on definitions found in the Convention of the Prevention and Punishment of the Crime of Genocide (Genocide Convention). See *id.* at 371-72 (citing the Genocide Convention, 78 U.N.T.S. 277). The Genocide Convention defines genocide as the intentional destruction of a group, generally through acts of extreme violence. See *id.* at 372. Thus, the court emphasized that only deliberate acts committed by Freeport with the intent to destroy the Amungme people, rather than their culture, would be sufficient to state a claim for genocide under international law. See *id.* at 373. After giving the plaintiff two opportunities to amend his complaint to allege state action, the district court dismissed the claim with

deliberate violence aimed at eradicating a race of people,<sup>213</sup> not reckless efforts to make a profit by engaging in poor environmental practices.<sup>214</sup> The *Freeport-McMoRan* court observed that, as long as Freeport did not *intend* to destroy the people of the Amungme Tribe, the law of nations did not proscribe its detrimental environmental conduct, regardless of the consequences.<sup>215</sup> Further, the existing international consensus on environmental damage<sup>216</sup> gives states “the sovereign right to exploit their own resources”<sup>217</sup> in following their own environmental and developmental policies.<sup>218</sup> Thus, as long as host-government business partners, like Indonesia, refrain from regulating these practices to encourage foreign investment, it seems unlikely that the requisite state practice or universal consensus against environmental torts will emerge.<sup>219</sup>

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prejudice. See *Freeport-McMoRan*, 1998 WL 92246, at \*3. The court found the amended complaints too general because the plaintiff failed to state what happened to him personally as the injured party, instead making only a “superficial effort” to personalize the complaint by “pepper[ing] his own name” throughout. *Id.* at \*1.

213. See *Freeport-McMoRan*, 969 F. Supp. at 372 (quoting Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277).

214. See Khokhryakova, *supra* note 209, at 477-79.

215. See *Freeport-McMoRan*, 969 F. Supp. at 373 & n.7 (noting that “[g]enocide is a specific intent offense” and that proof of genocide requires that the defendant committed certain acts with the intent to destroy an ethnic group); see also Geer, *supra* note 209, at 395-96 (arguing that MNCs operating in Amazonia have not displayed the requisite intent to support a charge of genocide under customary international law); Khokhryakova, *supra* note 209, at 477-79 (predicting that Beanal is unlikely to succeed on appeal with an argument equating environmental crimes with genocide). In *Freeport-McMoRan*, the corporation allegedly dumped forty million tons of untreated and toxic mine tailings into the Ajkwa River during 1996. See *US Mining*, *supra* note 198, at 92. This practice led to flooding, alteration of the river’s course, damage to the drinking water supply, and increased health problems for the local population. See *id.* The Government of Indonesia has little incentive to regulate the practice, however, because its revenue from the mine in the same year was approximately \$480 million. See *id.* at 93.

216. See Khokhryakova, *supra* note 209, at 485-88 (discussing Principle 21 of the Stockholm Convention and Principle 2 of the Rio Declaration); see also Osofsky, *supra* note 211, at 368-81 (providing a thorough discussion of potential sources of international environmental law that may yield subject matter jurisdiction under the ATCA).

217. *Report of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF. 48/14, reprinted in 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration].

218. See *Report of the U.N. Conference on Environment and Development, Rio Declaration*, U.N. Doc. A/Conf.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 876 [hereinafter Rio Declaration].

219. Cf. Khokhryakova, *supra* note 209, at 478 (predicting that Beanal will be unsuccessful on appeal because of the difficulty in proving Freeport’s intent to destroy the Amungme people through the use of poor environmental practices).

## 2. *The State Action Defense*

Acknowledging that “[c]orporations can represent the state,”<sup>220</sup> the *Freeport-McMoRan* court nevertheless dismissed the remainder of the human rights claims because the facts alleged were insufficient to establish state action under any “color of law” test from the jurisprudence of 42 U.S.C. § 1983.<sup>221</sup> Despite the presence of Indonesian troops at the mine, the alien plaintiff failed to satisfy either the nexus or joint action tests.<sup>222</sup> Beanal’s failure to allege “whether the military personnel helped enforce Freeport’s policies or merely observed Freeport’s private security guards” violate tribe members’ human rights was fatal to his nexus argument.<sup>223</sup> Similarly, the court similarly found that Beanal failed to establish sufficient facts to satisfy the symbiotic relationship test.<sup>224</sup> In the court’s view, a long-term mining concession, conferred by a government contract and supported by government investment, did not establish the degree of physical and financial interdependence between Freeport and the government of Indonesia necessary to constitute state action.<sup>225</sup> Finally, notwithstanding Freeport’s “draconian” grasp over the region, the plaintiff’s failure to allege sufficient facts that the corporation had “taken over the functions of regulating local life” also doomed the complaint under the public functions test.<sup>226</sup>

The *Freeport-McMoRan* court’s exhaustive discussion of the state action requirement for the non-genocide related human rights claims<sup>227</sup> clearly exposes the dilemma caused by applying American standards of constitutional liability in the context of globalized business relationships. Despite an intimate commercial relationship between Freeport and the Indonesian Government,<sup>228</sup> the alien plaintiff was unable to persuade the court that Freeport knowingly benefited from the foreign regime’s financial and military support.<sup>229</sup> That result, however, is unsupported by the

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220. *Freeport-McMoRan*, 969 F. Supp. at 376.

221. *See id.* at 377-80.

222. *See id.* at 378-79.

223. *Id.* at 378.

224. *See id.* at 379.

225. *See id.* at 378-79.

226. *Id.* at 379-80.

227. *See id.* at 373-80.

228. *See supra* notes 202-07 and accompanying text (detailing the comprehensive business relationship between Indonesia and Freeport-McMoRan); *infra* notes 231-37 and accompanying text (arguing that Freeport-McMoRan and the Indonesian Government were indispensable in each other’s quest for profit).

229. *See Freeport-McMoRan*, 969 F. Supp. at 378-80. The court based its dismissal primarily on the ambiguity in Beanal’s allegations regarding the role played by the Indo-

relationship between Freeport and its foreign host.<sup>230</sup>

As a result of that intimate commercial relationship, the Government of Indonesia allowed Freeport to conduct environmentally damaging mining operations on expropriated land in return for nearly one-half billion dollars in annual government profit.<sup>231</sup> The Government of Indonesia chose not to regulate Freeport's abusive practices, of which it was aware,<sup>232</sup> and provided a military presence at the mine to secure its lucrative investment.<sup>233</sup> Freeport was, therefore, an indispensable part of the Indonesian Government's well-paying joint venture project, and the Government was an equally indispensable part of Freeport's profit margin.<sup>234</sup> Unfortunately, the *Freeport-McMoRan* court's formalistic approach to converting private conduct into state action focused on the role of the military troops at the mine, rather than on the commercial relationship between Freeport and its host-government.<sup>235</sup> In so doing, the court failed to comprehend that the "substantial degree of cooperative action"<sup>236</sup> involved in sustaining the long-term and economically interde-

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nesian military at the Irian Jaya mine. *See id.* Only once in the opinion, however, did the court analyze the contractual and economic relationship between Freeport and the Indonesian Government as the basis for finding state action. *See id.* at 378-79 (applying the "symbiotic relationship" test). While the allegations of Freeport's misconduct failed to persuade the court, the Overseas Private Investment Corporation (OPIC) was convinced. *See US Mining, supra* note 198, at 93-94 (describing OPIC's actions in response to Freeport's overseas activities during 1995-96). In 1995, OPIC, which insures U.S. MNCs against political upheaval in emerging nations, canceled Freeport's \$100 million political risk insurance policy after deciding that the mining operation "had gone beyond the scope of its policy." *Id.* at 93. OPIC reinstated the policy in April 1996 following a positive audit of the operation prepared by Dames and Moore. *See id.* Freeport subsequently canceled its coverage, either as a routine business decision or because it desired to evade required on-site inspections attending the coverage. *See id.* at 94.

230. *See infra* notes 231-37 and accompanying text (enumerating the various public components of Freeport's relationship with the Indonesian host-government, including mining rights, military support, and lax environmental regulation).

231. *See US Mining, supra* note 198, at 92-93.

232. *See id.* The Indonesian Ministry of Mines and Energy approved an environmental impact assessment for the Irian Jaya site and it withstood in-country court challenges. *See id.* at 89, 92-93. Non-governmental organizations claim, however, that the military government of Indonesia is simply not regulating environmental damage in order to protect its substantial economic interest in the mine. *See id.* at 93.

233. *See Freeport-McMoRan*, 969 F. Supp. at 374-75 (alleging the presence of military troops at the mine to assist Freeport in maintaining security).

234. *See US Mining, supra* note 198, at 94 (discussing the "cozy relationship" between Freeport and the Government of Indonesia).

235. *See Freeport-McMoRan*, 969 F. Supp. at 378-80 (holding that Beanal's complaint failed to satisfy three out of four state action tests because he failed to allege the role played by military personnel in committing the challenged conduct).

236. *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442, 1454 (10th Cir. 1995) (finding that a "substantial degree of cooperative action" between state and private actors

pendent association between Indonesia and Freeport was sufficient to satisfy both the symbiotic relationship and joint action tests.<sup>237</sup>

Moreover, the court's dismissal of Beanal's complaint, for failure to allege what role the Indonesian military played in committing human rights abuses at the mine, yields a result that is incongruous with the ATCA's intent.<sup>238</sup> If the ATCA is to provide a remedy for aliens subjected to tortious conduct by United States citizens at home or abroad, then there is no reason to predicate jurisdiction on the involvement of foreign agents.<sup>239</sup> Indeed, the absence of host-government influence alleviates any *Sabbatino*-like concerns regarding the participation of U.S. courts in foreign affairs.<sup>240</sup> Accordingly, courts should not dismiss alien tort claims against U.S.-based MNCs simply because of the uncertain role played by foreign-state actors in the challenged conduct. Characterizing detention, assault, and killing as private, rather than state, action is simply not a principled basis for allowing a domestically chartered corporation to evade liability for abusive overseas conduct.

### C. *The Ties That Bind: John Doe I v. Unocal Corp.*<sup>241</sup>

While the *Freeport-McMoRan* court dismissed ATCA claims against a corporate defendant because of the absence of state action, another court allowed a case to proceed against a private MNC that did not actually commit any torts itself, but that benefited from a foreign host-government who did.<sup>242</sup> Thus, in *John Doe I v. Unocal Corp.*, a federal district court in California applied 42 U.S.C. § 1983's joint action test and

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in effecting a deprivation of rights constitutes state action).

237. *Cf. Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that a state is a joint participant in challenged activity when it "insinuate[s] itself into a position of interdependence with" a private actor); *Gallagher*, 49 F.3d at 1454 (holding that state action is present when there is a "substantial degree of cooperative action" between the state and private actors in effecting the deprivation of constitutional rights or when the state and private actors "share a common, unconstitutional goal").

238. *See supra* notes 32-49 and accompanying text (discussing the possible purposes of the ATCA).

239. *But see Freeport-McMoRan*, 969 F. Supp. at 380 (concluding that the plaintiff's failure to satisfy the ATCA's state action requirement by alleging specifically the role played by foreign military forces in committing human rights abuses justified dismissal for failure to state a claim).

240. *See supra* notes 169-75 (discussing the underlying policy concerns of the act of state doctrine).

241. 963 F. Supp. 880 (C.D. Cal. 1997).

242. *Compare Freeport-McMoRan*, 969 F. Supp. at 380 (dismissing ATCA claim for failure to allege state action), *with John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 896 (C.D. Cal. 1997) (refusing to dismiss claim against corporate defendant who allegedly committed no challenged conduct directly but who knew of or benefited from the human rights abuses of the foreign host-government).

held, for the first time, that the ATCA provided subject matter jurisdiction in a human rights case involving a MNC defendant.<sup>243</sup>

In 1993, Unocal joined with the military government of Myanmar, known as the State Law and Order Restoration Council (SLORC), in developing the \$1.2 billion Yadana natural gas pipeline project.<sup>244</sup> SLORC had established an extensive system of slave labor for construction and infrastructure projects.<sup>245</sup> Many MNCs, responding to worldwide public pressure, withdrew from Myanmar<sup>246</sup> and, in 1995, Congress and the Clinton Administration banned new investment<sup>247</sup> in the poor, but “resource-rich,” nation.<sup>248</sup> The ban was not retroactive, however, and Unocal, providing the single largest source of outside investment in Myanmar, continued its involvement with the Yadana pipeline project.<sup>249</sup>

As part of an implied partnership agreement, Unocal provided venture capital and expertise, while SLORC agreed to clear forests, and provide labor, security, and material for the pipeline.<sup>250</sup> The *Unocal* plaintiffs sued SLORC and Unocal alleging that, in the course of the joint venture, SLORC forcibly relocated, enslaved, and tortured thousands of Burmese farmers living along the pipeline route.<sup>251</sup> SLORC allegedly forced male farmers to work on the pipeline clearing trees, leveling forests, and per-

243. See *id.* at 891; Pizzurro & Delaney, *supra* note 22.

244. See Bencivenga, *supra* note 20, at 5; *Unocal*, 963 F. Supp. at 884-85. The members of the joint venture project included Unocal, Total S.A. (a French oil company), the military government of Myanmar (also known as the State Law and Order Restoration Council (SLORC)), and the state-owned Myanmar Oil and Gas Enterprise (MOGE). See *id.*; Pizzurro & Delaney, *supra* note 22.

245. See AMERICAN EMBASSY RANGOON, UNITED STATES DEPARTMENT OF STATE, COUNTRY COMMERCIAL GUIDE: BURMA FISCAL YEAR 1998 (1997), available at <<http://www.flatrade.org/CCG/burma.HTM>>; William Barnes, *Escapees Tell of Pipeline's Slave Labour*, S. CHINA MORNING POST, Aug. 21, 1997, at 11, available in 1997 WL 13260844 [hereinafter COUNTRY COMMERCIAL GUIDE: BURMA]; Gregory J. Wallace, *Linked to Slavery*, LEGAL TIMES, Dec. 1, 1997, at 24 (analyzing and commenting on *Unocal*). The American Embassy Rangoon euphemistically reported that SLORC “made increasing use of uncompensated corvee labor on physical infrastructure construction projects.” COUNTRY COMMERCIAL GUIDE: BURMA, *supra*.

246. See MARBER, *supra* note 1, at 215 (noting withdrawal by Pepsi, Macy's, Columbia Sportswear, Carlsberg, and Heineken); see also Frey, *supra* note 15, at 180 (noting the termination of business contracts with Burmese suppliers by Levi Strauss).

247. See Foreign Operations, Export Financing, and Related Program Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 to 3009-167 (1996); Exec. Order No. 13,047, 3 C.F.R. 202, 202-04 (1997).

248. See COUNTRY COMMERCIAL GUIDE: BURMA, *supra* note 245.

249. See Wallace, *supra* note 245.

250. See *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 885 (C.D. Cal. 1997).

251. See *id.*



forming construction and porter labor.<sup>252</sup> Government officials, meanwhile, allegedly raped female family members that were left behind, and seized the farmers' property.<sup>253</sup> There was no allegation that Unocal, itself, committed any tortious conduct.<sup>254</sup> Instead, plaintiffs claimed that SLORC committed all the acts alleged with Unocal's knowledge and complicity.<sup>255</sup>

### 1. *The Court Leaves Unocal to Fend for Itself*

The district court held that, in this case, the FSIA entitled SLORC to sovereign immunity.<sup>256</sup> As discussed earlier,<sup>257</sup> the *Unocal* court did not construe SLORC's deployment of military and police forces along the pipeline route as falling within the FSIA's commercial activity exception because abuse of police power is "peculiarly sovereign in nature."<sup>258</sup> Subsequently, the court premised subject matter jurisdiction over the ATCA claims remaining against Unocal on the plaintiff's allegations of "forced labor and other human rights violations."<sup>259</sup> The court did not expressly analyze, however, the allegations using the framework applied in *Filar-tiga* and refined in later cases.<sup>260</sup> Rather, it simply asserted, without citation to authority, that forced labor violates *jus cogens* norms.<sup>261</sup>

Having established, or at least declared, subject matter jurisdiction, the claim now confronted the court with the dilemma of finding state action in the conduct of a private multinational corporate actor.<sup>262</sup> The *Unocal* court seemed to adopt a functional view of state action, rather than the

252. *See id.*

253. *See id.*

254. *See id.* at 896.

255. *See id.*

256. *See id.* at 888. The court also ruled that SLORC was not a necessary and indispensable party for purposes of Rule 19 of the *Federal Rules of Civil Procedure* because, even in the absence of the host-government defendants, the plaintiffs could still obtain complete relief from Unocal. *See id.* at 889.

257. *See supra* Part I.C.3 (discussing commercial exceptions to the FSIA).

258. *Unocal*, 963 F. Supp. at 888 (internal quotations omitted).

259. *Id.* at 891.

260. *Compare id.* at 890-92 (construing allegations of forced labor as participation in slave trading, a violation of *jus cogens* norms, but citing no authority to support that proposition), with *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-85 (2d Cir. 1980) (analyzing the development of state practices regarding the use of torture).

261. *See id.* at 890-91. The *Unocal* court observed that torture was a violation *jus cogens* norms, however it drew no specific analogy between torture and forced labor. *See id.*

262. *See id.* at 890. The court relied on dictum from earlier ATCA decisions to distinguish between those claims requiring state action and those that did not. *See id.* 891-92 (citing, for example, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring)).

formalistic approach taken by the court in *Freeport-McMoRan*.<sup>263</sup> Accordingly, the *Unocal* court found that a corporate defendant could be liable under two distinct theories.<sup>264</sup> First, plaintiffs' claims of rape, torture, and summary execution alleged that SLORC acted as an agent of Unocal to further their mutual interest in the pipeline project.<sup>265</sup> The court held that, if proven, this relationship would satisfy the joint action test of 42 U.S.C. § 1983 and, therefore, found the allegations sufficient to establish subject matter jurisdiction under the ATCA.<sup>266</sup>

Alternatively, the court found the allegations of forced labor sufficient to support subject matter jurisdiction against Unocal, even in the absence of state action.<sup>267</sup> The *Unocal* court performed some legal sleight of hand, however, in order to reach this holding.<sup>268</sup> The court restated the forced labor claim as a slave trading allegation<sup>269</sup> because the only way to establish private actor liability in the absence of state action is to allege one of "the handful of crimes to which the law of nations attributes individual responsibility."<sup>270</sup> While the plaintiffs did not allege that SLORC physically sold Burmese citizens to Unocal, the court found that the corporation effectively treated SLORC as an "overseer."<sup>271</sup> By virtue of the facts that Unocal paid SLORC to provide labor and security for the pipeline, accepted the benefit, and approved the use of forced labor, the court construed the forced labor allegations as acts of slave trading.<sup>272</sup> Consequently, the court subjected Unocal to alien tort liability without requiring proof of state action.<sup>273</sup>

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263. Compare *id.* at 890-92 (finding the state action requirement satisfied if government entities either acted as agents of the MNC, engaged in joint commercial ventures with the MNC, or conspired with the MNC to commit violations of international law in furtherance of commercial interests), with *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 378-80 (E.D. La. 1997) (holding that allegations of a "close link" between the MNC and host-government were insufficient to satisfy the state action requirement, despite the MNC's "vast and draconian control" over the region, because the complaint failed to allege the precise role played by the host-government's military troops in the alleged conduct).

264. See *Unocal*, 963 F. Supp. at 890-92.

265. See *id.* at 891.

266. See *id.*

267. See *id.* at 891-92.

268. See *id.* (construing allegations of forced labor, conduct not generally considered to be a *jus cogens* violation, into allegations of slavery, an accepted *jus cogens* violation).

269. See *id.*

270. *Id.* (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)).

271. See *id.* at 892.

272. See *id.* at 891-92.

273. See *id.* at 892.

## 2. Calling a Slave "a Slave"

Unlike *Freeport-McMoRan*, the *Unocal* court seemed less preoccupied with ascertaining dispositive sources of international law.<sup>274</sup> In fact, the reasoning of the *Unocal* court was analogous to Justice Story's approach in *La Jeune Eugenie*.<sup>275</sup> Confronted with financially lucrative, yet morally reprehensible, conduct associated with a withering, but still tolerated, global business practice, the *Unocal* and *La Jeune Eugenie* courts both attempted to craft a universal proscription against the challenged conduct.<sup>276</sup> Justice Story ignored the ubiquity of slave trading,<sup>277</sup> characterized the conduct as immoral,<sup>278</sup> equated slave trading with piracy,<sup>279</sup> and declared it a violation of the law of nations.<sup>280</sup> The *Unocal* court similarly sought to transform SLORC's practice of using conscripted and uncompensated rural laborers on infrastructure projects into slave trading to make it conform with a violation of *jus cogens* norms.<sup>281</sup> This legal transformation allowed the court to assert a violation of the law of nations, despite the fact that the conduct remained lawful in Myanmar.<sup>282</sup>

274. Compare *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 369-84 (E.D. La. 1997) (reviewing various sources of international law that might be used to state a claim), with *Unocal*, 963 F. Supp. at 890-92 (citing only one international document, the Vienna Convention, and then only to define generally *jus cogens* norms).

275. See *supra* notes 66-68 and accompanying text (analyzing *La Jeune Eugenie*).

276. Compare *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 845-47 (C.C.D. Mass. 1822) (No. 15,551) (linking slave trading with slavery and piracy to find a violation of the law of nations), with *Unocal*, 963 F. Supp. at 891-92 (linking forced labor with slavery to find a violation of the law of nations).

277. Cf. *The Antelope*, 23 U.S. 66, 78, 92-99, 120-23 (1825) (overruling implicitly *La Jeune Eugenie*). The appellants in *The Antelope* cited *La Jeune Eugenie* as authority for the proposition that slave trading was inconsistent with the law of nations. See *id.* at 77-78. In return, the respondents criticized Justice Story's inquiry in *La Jeune Eugenie*, as to whether slave trading violated the law of nations, as "vain and nugatory." *Id.* at 96. Chief Justice Marshall, presented with the slave trading question for the first time in *The Antelope*, acknowledged the split among the circuits and districts, and held that slave trading "[could not] be pronounced unlawful" because Europeans and Americans engaged in slave trading for two centuries, such conduct was therefore "sanctioned by universal assent." *Id.* at 120-22.

278. See *La Jeune Eugenie*, 26 F. Cas. at 846.

279. See *id.* at 847.

280. See *id.* at 851.

281. See *Unocal*, 963 F. Supp. at 890-92. For an excellent discussion of the *Unocal* court's transformation of a forced labor claim into a slavery allegation, see Wells, *supra* note 15 (manuscript at 15-20).

282. See *id.*; *supra* note 245 and accompanying text (discussing the government's use of forced labor in Burma); cf. *The Antelope*, 23 U.S. at 122. A similar transformation disturbed Chief Justice Marshall in *The Antelope*, prompting him to observe that slave trading "must remain lawful to those who cannot be induced to relinquish it." *Id.* at 122.

To accomplish the transformation from forced labor to slavery, the court characterized the relationship between Unocal and SLORC as a master benefiting from the services of an “overseer.”<sup>283</sup> The International Convention to Suppress the Slave Trade and Slavery<sup>284</sup> (Slave Trade Convention), however, defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of *ownership* are exercised.”<sup>285</sup> While the court did not cite the Slave Trade Convention, it conceded that the claim failed to allege that SLORC ever sold its citizens to Unocal.<sup>286</sup> Hence, the court based jurisdiction over Unocal on the corporation’s knowledge of and benefit from the government’s conscription policy, not on corporate ownership of slaves.<sup>287</sup>

The character of the contractual arrangement described in *Unocal*<sup>288</sup> is more consistent with conduct proscribed in two widely ratified treaties prohibiting forced labor, neither of which the *Unocal* court cited.<sup>289</sup> The Convention Concerning Forced or Compulsory Labour<sup>290</sup> (Compulsory Labour Convention) defines forced labor as “all work or service which is exacted from any person under the menace of any penalty and” which is not voluntary.<sup>291</sup> At a minimum, there exists a legal distinction between

283. See *Unocal*, 963 F. Supp. at 892.

284. International Convention to Suppress Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927). In addition to both the United States and Burma, 133 other states are parties to this Convention. See U.S. DEP’T OF STATE, TREATIES IN FORCE 446-47 (1998).

285. *Id.* at 2191 (emphasis added). The International Convention to Suppress Slave Trade and Slavery further defines slave trading as “the acquisition or disposal of a person with intent to reduce him to slavery.” *Id.*

286. See *Unocal*, 963 F. Supp. at 892.

287. See *id.* at 892, 896.

288. See *supra* note 250 and accompanying text (describing the contractual arrangement between SLORC and Unocal).

289. See Convention Concerning the Abolition of Forced Labour, *opened for signature* Jul. 4, 1957, 320 U.N.T.S. 291 (entered into force by the United States Sept. 25, 1992) (ILO No. 105); Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) (ILO No. 29) [hereinafter Compulsory Labour Convention]. The United States is among the 139 parties to ratify the Convention Concerning the Abolition of Forced Labour, but Burma is not. See U.S. DEP’T OF STATE, TREATIES IN FORCE 396 (1998); *International Labour Organization* (visited Apr. 11, 1999) <<http://www.ilo.org>> (providing current ratification status for all ILO documents). Conversely, Burma is among the 150 nations to ratify the Compulsory Labour Convention, but the United States is not. See *International Labour Organization, supra*. The *Restatement* does not, however, cite forced labor as a violation of *jus cogens* norms. See *RESTATEMENT, supra* note 143, § 702 & cmt. a (noting, however, that “human rights not listed in this section . . . [might] achieve [] the status of customary [international] law, . . . in the future”).

290. See Compulsory Labour Convention, *supra* note 289.

291. *Id.* at 58.

slavery and forced labor in that forced labor may involve involuntary and abusive conduct, but it does not involve ownership rights of other human beings.<sup>292</sup> It is the manifestation of ownership, and the underlying economic transactions, which propel slavery into the realm of *jus cogens* violations.<sup>293</sup> While transforming forced labor allegations into a claim of slave trading may be applauded as morally correct, the *Unocal* court's decision to do so without reference to any relevant international instruments exemplifies the ambiguity and subjectivity inherent in judicial determinations of "universal" norms.<sup>294</sup>

*D. Corporate Consciousness of International Human Rights Abuses in Light of Freeport-McMoRan and Unocal*

After *Unocal*, the criterion for applying 42 U.S.C. § 1983's "color of law" jurisprudence remains unclear in the context of the attenuated relationship between corporations and their government partners in foreign joint ventures.<sup>295</sup> Under the rationale expressed in both *Unocal* and *Freeport-McMoRan*, the mere existence of a business relationship between a corporate defendant and a foreign government is insufficient to state a claim.<sup>296</sup> In *Freeport-McMoRan*, the corporation evaded liability because its private security force, rather than official government forces, allegedly committed torts on indigenous people such that there was no state action.<sup>297</sup> In *Unocal*, however, the court subjected the corporate defendant to liability because the indigenous plaintiffs attributed all the allegations of tortious conduct to official government forces, not the corporation.<sup>298</sup>

292. Compare *id.* (defining forced labor as involuntary work or service, but not discussing ownership rights), with International Convention to Suppress Slave Trade and Slavery, *supra* note 284, at 2191 (defining slavery explicitly as the ownership of another human being).

293. Cf. RESTATEMENT, *supra* note 143, § 702 cmt. n (citing slavery, but not forced labor, as a *jus cogens* violation); Wells, *supra* note 15 (manuscript at 19) ("Ultimately, however, even if a slave essentially acts as a forced laborer, slavery cannot be conflated with forced labor because the element of ownership is absent in forced labor.").

294. See generally *supra* notes 107-46 and accompanying text (discussing the judicial process involved in finding "universal" norms).

295. See Bencivenga, *supra* note 20, at 5 (pointing out the numerous questions arising from the *Unocal* decision); Wallace, *supra* note 245, at 24 (same).

296. See *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 896 (C.D. Cal. 1997); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 378-79 (E.D. La. 1997) (holding that government mining concession and investment in business operation were insufficient to satisfy the ATCA's state action requirement).

297. See *Freeport-McMoRan*, 969 F. Supp. at 369, 374, 379-80.

298. See *Unocal*, 963 F. Supp. at 896.

Read together, *Unocal* and *Freeport-McMoRan* suggest that the ATCA permits U.S.-based MNCs to engage in tortious conduct abroad so long as it does not involve the direct participation of foreign troops.<sup>299</sup> This judicial interpretation of the ATCA allows MNCs to evade accountability for the conduct of their private security forces,<sup>300</sup> while exposing them to liability for the exclusive conduct of military forces commanded by their immunized government partners.<sup>301</sup> In other words, American courts will permit U.S.-based MNCs to finance human rights abuses as long as nominally private agents, not uniformed foreign military forces, perpetrate them.<sup>302</sup> Such an outcome is both unprincipled and inconsistent with the purpose of the ATCA.<sup>303</sup>

Comparing *Freeport-McMoRan* and *Unocal* further suggests that 42 U.S.C. § 1983's constitutional standards may be inappropriate for adjudicating cases arising out of economic globalization.<sup>304</sup> Both cases involved foreign direct investment in which military dictatorships attracted MNCs with cost-reducing incentives derived from exploiting the labor and environment of indigenous populations.<sup>305</sup> Under *Freeport-McMoRan*'s for-

299. Compare *id.* (holding that corporation could be liable if it knew of and benefited from human rights abuses committed solely by host-government troops), with *Freeport-McMoRan*, 969 F. Supp. at 380 (dismissing claim because plaintiff failed to allege what role the host-government's military troops played in assisting private paramilitary security personnel in committing human rights abuses).

300. See *supra* notes 220-39 and accompanying text (criticizing the *Freeport-McMoRan* court's formalistic state action analysis).

301. See *supra* notes 262-73 and accompanying text (discussing the *Unocal* court's functional approach to state action analysis).

302. Cf. *Freeport-McMoRan*, 969 F. Supp. at 378, 380 (dismissing ATCA claim against MNC because, *inter alia*, plaintiff failed to allege whether host-government military troops helped enforce corporate policy or "merely observed" corporate paramilitary forces engage in violative conduct).

303. See *supra* notes 41-49 and accompanying text (discussing competing theories of the purpose of the ATCA).

304. Cf. *Unocal*, 963 F. Supp. at 890 (commenting on the inconsistency of § 1983 jurisprudence); *Freeport-McMoRan*, 969 F. Supp. at 380 (analyzing state action under four tests and finding that, despite long-term, mutually beneficial contractual and economic relations between the host-government and defendant-corporation, plaintiff's failure to allege the specific role played by foreign military forces undermined the ATCA claim).

305. See Milton R. Moskowitz, *Company Performance Roundup*, 98 BUS. & SOC'Y REV. 55, 61-62 (1997) (discussing the benefits to Unocal resulting from its relationship with SLORC); John Pilger, *The Burmese Gulag*, COVERT ACTION QUARTERLY (visited Aug. 20, 1998) <<http://caq.com/CAQ58burmese.html>> (same); *US Mining*, *supra* note 198, at 91-96 (discussing the relationship between Freeport and the Indonesian Government). But see MARBER, *supra* note 1, at 97 (asserting that criticism of a government's choice to allow, or an MNC's decision to employ, cheap labor is both short cited and naïve). Marber theorizes that by exploiting indigenous labor to attract investment, emerging nations will be able to industrialize sufficiently to abandon such practices. See *id.*

malistic approach, the relationship between the parties was not interdependent enough to predicate liability by 42 U.S.C. § 1983 standards.<sup>306</sup> Thus, the court did not find state action based on allegations that the host-government conferred contractual rights for resource extraction, significantly invested in the ensuing project, and maintained an on-site military presence.<sup>307</sup> In contrast, the *Unocal* court allowed for liability because the corporate defendant contracted for the *services*, not merely the property rights, which resulted in the challenged conduct.<sup>308</sup> This formulation suggests that a sufficiently vague contractual arrangement will mitigate liability, regardless of the real-world physical and financial relationship between the MNC and the host-government.

Thus, after *Unocal*, an MNC may be liable if it knows of, or economically benefits from, human rights abuses perpetrated by a foreign host-government on its own citizens in the course of a joint venture project.<sup>309</sup> The contours of liability, however, remain general and uncertain.<sup>310</sup> Open questions for future courts include how direct the benefit must be for liability to attach, and what degree of knowledge the corporation must possess to be culpable.<sup>311</sup> Under the current statutory scheme, these issues, along with defining what conduct amounts to a violation of the law of nations, must be resolved judicially, on a case-by-case basis.<sup>312</sup> Therefore, while *Unocal* may ultimately yield a measure of justice for impoverished Burmese farmers, the decision offers minimal guidance for global corporate conduct.<sup>313</sup>

### *E. Next on the Docket: Taking A Crack at Shell and Chevron*

#### *1. Oil, Guns, and Money: Wiwa v. Royal Dutch Petroleum Co.*<sup>314</sup>

In 1996, the family of Nigerian activist Ken Saro-Wiwa sued Shell

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306. See *Freeport-McMoRan*, 969 F. Supp. at 378-79 (holding that the complaint failed to satisfy the symbiotic relationship test).

307. See *id.* (holding that the allegations failed to make out a claim under either the symbiotic relationship or joint action tests).

308. See *Unocal*, 963 F. Supp. at 892 (finding a contractual arrangement for labor and security services coupled with a knowledge of and payment for abusive practices sufficient to establish liability).

309. See *id.*

310. See Pizzurro & Delaney, *supra* note 22.

311. See *id.*

312. Cf. Wallace, *supra* note 245, at 25 (arguing that Congress, not the courts, should articulate the parameters of ATCA liability).

313. See *id.*

314. No. 96 Civ. 8386 (S.D.N.Y. Sept. 25, 1998).

Oil,<sup>315</sup> alleging that the corporation was complicit in the Nigerian military regime's execution of Saro-Wiwa and several other members of the Ogoni tribe.<sup>316</sup> Saro-Wiwa led protests against Shell's practices in Nigeria, which included devastating pollution and systematic corruption.<sup>317</sup> In retaliation against Saro-Wiwa's demands that his Ogoni people receive a greater share of the oil revenues and that Shell clean up its environmental damage, the corporation allegedly financed numerous police attacks on Ogoni villages.<sup>318</sup> The Nigerian government subsequently arrested Saro-Wiwa.<sup>319</sup> Thereafter, Shell refused to use its influence with the government to obtain clemency for Saro-Wiwa unless he agreed to call off the campaign to discredit the company.<sup>320</sup> Shortly thereafter, Nigeria executed Saro-Wiwa by hanging him.<sup>321</sup>

While the district court dismissed the claim on forum non conveniens grounds,<sup>322</sup> the complaint alleged that Shell, like Unocal in Myanmar, knew of and benefited from human rights abuses committed by its foreign host-government.<sup>323</sup> Shell has admitted to buying weapons and vehicles for the Nigerian police force, although it "defend[ed] its actions as the common practice of a 'wide range of companies in Nigeria, who employ the police to guard their facilities.'"<sup>324</sup> In addition, plaintiffs accused

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315. See *id.*, slip op. at 2-3 (S.D.N.Y. Sept. 25, 1998).

316. See *id.*; Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 958-64 (1998) (discussing the events leading up to the filing of *Wiwa*).

317. See *Wiwa*, slip. op. at 2; Sacharoff, *supra* note 316, at 958-60.

318. See Sacharoff, *supra* note 316, at 960-61.

319. See *id.* at 961-62.

320. See Andy Rowell, *Sleeping With the Enemy: Worldwide Protests Can't Stop Shell Snuggling Up to Nigeria's Military*, VILLAGE VOICE, Jan. 23, 1996, at 23 (reporting the account given by Dr. Owens Wiwa, Ken Saro-Wiwa's brother, regarding secret meetings with Brian Anderson, the head of Shell Nigeria).

321. See *id.*

322. See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 12-16 (S.D.N.Y. Sept. 25, 1998). Plaintiff has filed a motion for reconsideration in light of *Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998) (finding error in dismissal of ATCA case against Texaco alleging environmental damage in Ecuador because the lower court had not required the corporate defendant to submit to jurisdiction in Ecuador). Telephone Interview with Professor Julie Shapiro, counsel for the Center of Constitutional Rights (Jan. 29, 1999).

323. Compare *Wiwa*, slip op. at 2 (alleging that corporate defendant conspired with the Nigerian government in committing numerous human rights violations), with *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 885 (C.D. Cal. 1997) (alleging that the corporate defendants "were aware of and benefited from" human rights abuse committed by agents of the Burmese government).

324. Matthew Yeomans, *Oil, Guns, And Lies*, VILLAGE VOICE, Feb. 20, 1996, at 26. Shell has since appointed a new managing director and adopted a new corporate philoso-



Shell of playing a role in bribing prosecution witnesses at Saro-Wiwa's trial.<sup>325</sup> Thus, the *Wiwa* case seems to implicate knowledge of human rights abuses that is more direct than in *Unocal*,<sup>326</sup> and more financially interdependent than in *Freeport-McMoRan*.<sup>327</sup> Moreover, Shell's assertion that the practice of arming government soldiers to protect company facilities is a widespread corporate practice in Nigeria<sup>328</sup> supports new allegations recently made against Chevron that may result in an ATCA claim.<sup>329</sup>

## 2. *Same Story, Different Stripe: The Case against Chevron*

In May 1998, unarmed Nigerian protesters occupied an offshore oil rig owned by Chevron.<sup>330</sup> The protesters allege that they were negotiating with "Chevron's representative over reparations for environmental damage" when the corporation called in the Nigerian military and police forces.<sup>331</sup> The armed forces killed two protesters and injured others.<sup>332</sup>

The families of those killed and injured are contemplating suing Chevron in federal court under the ATCA, alleging that the corporation arranged the attack and paid Nigerian forces a customary "special duty pay" for their activities.<sup>333</sup> Chevron denies the allegations stating that "[a]s a matter of Chevron corporate policy, we would not pay any law en-

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phy of profits and principles. See *supra* note 2 (discussing Shell's recent efforts in the area of corporate social responsibility).

325. See Sacharoff, *supra* note 316, at 963; see also Rowell, *supra* note 320, at 23 (reporting on allegations that Shell representatives supported attempts to bribe witnesses and were present when government agents made such bribes). The head of Shell Nigeria has been quoted as admitting that the company has fallen into "a 'black hole of corruption,' which is 'acting like a gravity that is pulling us down all the time.'" *Id.*

326. Compare *supra* notes 315-25 and accompanying text (describing allegations of direct corporate participation in bribery and conspiracy), with *Unocal*, 963 F. Supp. at 896 (alleging mere knowledge of, and payment for, abusive services rather than actual corporate participation in, and presence during, tortious conduct).

327. Compare Rowell, *supra* note 320, at 23 (describing allegations of direct corporate funding for bribery and logistical support for the Nigerian military), with *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 378-79 (E.D. La. 1997) (alleging a government mining concession and investment, but not direct corporate funding of the military).

328. See Yeomans, *supra* note 324.

329. See McAuley, *supra* note 20 (reporting on potential ATCA suit against Chevron); *Drilling and Killing: Chevron and Nigeria's Oil Dictatorship* (Pacifica Network radio broadcast, Sept. 30, 1998), transcript available at <<http://www.pacifica.org/programs/nigeria/printing.html>> (interviewing numerous witnesses to, and participants in, Shell's Nigerian operations).

330. See McAuley, *supra* note 20.

331. *Id.*

332. See *id.*

333. See *id.*

forcement agency representative.”<sup>334</sup> At this writing, the potential plaintiffs have yet to file suit.

The Chevron incident, like the events described in *Freeport-McMoRan*, *Unocal*, and *Wiwa*, is one of a growing number of conflicts between indigenous groups and energy companies.<sup>335</sup> The *Unocal* decision has opened U.S. federal courts to resolving these disputes, or at least to assigning liability.<sup>336</sup> Nevertheless, the scope of the antiquated ATCA, as discerned from a single statutory sentence and its relatively minimal and inconsistent jurisprudence, remains remarkably ill-defined and unsuited for modern transnational human rights litigation.

### III. VIRTUE IS ITS OWN REWARD: AMENDING THE ALIEN TORT CLAIMS ACT TO PROVIDE A REMEDY FOR CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS

#### A. *When Fictions Collide: Universal Norms and Multinational Corporations*

Universal norms are a legal fiction.<sup>337</sup> It is unrealistic to expect “over 160 different countries with different cultures, political systems, and ideologies, and at different stages of economic development” to reach a consensus on what rights should be protected by rules of international law.<sup>338</sup> Moreover, the political and economic factors that influence one nation’s willingness to require another nation to comply with human rights norms generally undermine effective state enforcement.<sup>339</sup> The use

334. *Id.* (quoting Michael Libby, spokesman for Chevron). Pacifica Radio Network broadcast a news program on September 30, 1998, however, quoting the contractor on the rig as saying that Chevron paid and supplied the naval officers who took part in the raid. *See id.*

335. *See Yerton, supra* note 21.

336. *See Pizzurro & Delaney, supra* note 22 (concluding that *Unocal* creates a new legal peril for MNCs doing business with foreign regimes).

337. *Cf. GUIDE, supra* note 55, at 14-16 (highlighting the differences in perspective emerging between Western developed nations that emphasize civil and political rights, and developing countries that are focused on economic and social rights); HUNTINGTON, *supra* note 17, at 183, 192-98, 310 (arguing that Western efforts at promoting a universal Western culture is the central problem affecting “intercivilizational” relationships and that universality is false, immoral, and dangerous); JANIS, *supra* note 11, at 7 (observing that the complexity and diversity of the international legal process “verge[s] on anarchy” and “often seem[s] to defy the very idea of any international legal ‘system’ at all”).

338. *GUIDE, supra* note 55, at 14-15. While certain widely-ratified treaties may impose sanctions on government officials who violate a narrow range of human rights, “the United States has a singularly poor record of ratifying [major] human rights treaties.” *Id.* at 18 nn.1, 3.

339. *See HUNTINGTON, supra* note 17, at 192-98, 226-29 (discussing political and eco-

of so-called “universal norms” thus holds Western values captive for several reasons.<sup>340</sup> First, state practices crucial to finding universal norms are both diverse and divisive.<sup>341</sup> Whatever economic connections exist between foreign and American societies, emerging nations in the East and developed nations in the West do not adhere to each other’s legal and moral values.<sup>342</sup> It is precisely these cultural differences underlying divergent state practices that draw corporations and foreign host-governments together causing human rights and environmental abuses for the sake of profit.<sup>343</sup> Second, judges find universal norms by subjectively weighing evidence of state practice from myriad non-binding sources whose precedence and value as precedent is, at least, debatable.<sup>344</sup> Just because one judge finds that particular conduct violates so-called universal norms, there is no guarantee that another judge will

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conomic factors affecting the United States’ ability to influence the human rights policies of Asian nations). For example, the growing economic strength of Asian countries has reduced the importance of foreign aid as a source of hard currency, thereby decreasing the influence of Western governments that once supplied such aid. *See id.* at 194-95. Likewise, the regional members of Association of Southeast Asian Nations (ASEAN) were unwilling to pressure Burma to stop human rights violations and, instead, welcomed SLORC’s military junta into their fold. *See id.*; *see also* Hiatt, *supra* note 195, at C7. Myanmar’s foreign minister, Ohn Gyaw, lauding his nation’s arrival at ASEAN, similarly dismissed Western efforts to discourage child labor and corruption. *See id.* Gyaw claimed that Myanmar “respects ‘the norms and ideals of human rights . . . . But like in any other country in Southeast Asia, we have to take into consideration our culture, our history, our ethos . . . . What is good in other countries cannot be good in our country.’” *Id.*

340. *See* HUNTINGTON, *supra* note 17, at 308-12 (describing political and foreign policy implications of false universalism).

341. *See* JANIS, *supra* note 11, at 52-54 (admitting that customary “international law is subject to a number of sometimes crippling faults”).

342. *See* HUNTINGTON, *supra* note 17, at 71-72 (arguing “that ‘the values that are most important in the West are least important worldwide,’” particularly Western emphasis on individualism); *see also* Paul Blustein, *Gore Remarks Anger Malaysian Leaders*, WASH. POST, Nov. 17, 1998, at A29 (reporting that Vice President Gore’s remarks supporting pro-democracy forces in Malaysia “provoked a furious response” from Asian leaders because of the tension between so-called “Asian values” and Western democratic ideals).

343. *See* MARBER, *supra* note 1, at 95-104. Mr. Marber argues that emerging nations can and should use their unregulated economies to gain a “comparative advantage” over Western nations. *See id.* at 97. He contends further that the public should not “give in to the demands of labor and human rights activists campaigning for international labor standards” because to do so would jeopardize the chance that developing countries would join more “advanced markets.” *Id.* 208-09; *see also* HUNTINGTON, *supra* note 17, at 226-28 (observing that economic and industrial conflicts between Asia and the United States arose out of cultural differences). Professor Huntington argues that Western attempts to promote human rights in the East have met with only limited success because growing economic strength in Asia is resulting in rising cultural assertiveness that is challenging Western policies and values. *See id.* 192-98.

344. *See* JANIS, *supra* note 11, at 53 (noting that ascertaining norms of customary international law is a subjective process, “and subjective scales tilt differently in different hands”).

subjectively agree.<sup>345</sup> Finally, the mere fact that so many emerging nations seem to engage in abusive practices suggests the banality of any universal standard.<sup>346</sup>

Corporations, likewise, are a legal fiction.<sup>347</sup> In 1819, Justice Marshall observed that “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”<sup>348</sup> Today’s MNCs are not paper tigers, however, and powerful corporations in the global economy are both transcending and transforming the nations that spawned them.<sup>349</sup>

The collision of these two legal fictions in ATCA litigation gives rise to the notion that the United States government has little or no interest in how its own corporations treat foreign citizens abroad.<sup>350</sup> Reliance on subjective universal norms, rather than concrete domestic regulations, to create subject matter jurisdiction in ATCA claims arises out of the presumption against extraterritorial application of United States law.<sup>351</sup> Respect for foreign sovereignty<sup>352</sup> and an apparent desire to promote U.S. corporate competitiveness in the global market underlies this presump-

345. *See id.*; *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (panel of three judges dismissing case but disagreeing significantly on rationale); *supra* note 110 (discussing the various perspectives of the *Tel-Oren* panel).

346. *See supra* notes 69-75 and accompanying text (observing that this was essentially Justice Marshall’s position regarding slave trading in *The Antelope*).

347. *See infra* note 348 and accompanying text.

348. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, J.). More recently, the Seventh Circuit noted that “[t]he corporation is just a convenient name for a complex web of contracts among managers, workers, and suppliers of equity and debt capital.” *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985).

349. *Compare generally* KORTEN, *supra* note 1, at 11, *with* MARBER, *supra* note 1, at 213. Mr. Korten makes a lucid and compelling argument that the social and political tension arising out of corporate pursuit of accelerated economic growth is destroying both the social and ecological “fabric that sustains [the] human community.” KORTEN, *supra* note 1, at 11. Mr. Marber agrees that corporations are part of the world’s economic transformation, but argues that economic opportunities flowing from accelerated global economic interdependence will provide benefits for all nations. *See* MARBER, *supra* note 1, at 213.

350. *Cf. Gibney & Emerick, supra* note 9, at 134 (arguing against U.S. laws permitting “American corporation[s] operating overseas to systematically discriminate against native workers . . . in a variety of ways”).

351. *Cf. id.* at 141-45 (analyzing the underlying premises of extraterritorial application of U.S. law, and concluding that courts should place more reliance on the nationality principle of extraterritorial jurisdiction as a means of utilizing domestic law to regulate U.S. corporations operating overseas).

352. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-24 (1964) (“While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.”).

tion against extra-territoriality.<sup>353</sup> Abusive foreign regimes, however, have seized on this double standard in American law to lure corporate investment and tighten their grip on power at the expense of their own people.<sup>354</sup> By conspiring with host-governments to profit from unethical practices overseas that would be illegal if carried out at home, MNCs evade accountability for their complicity in human rights abuses.<sup>355</sup>

## B. The Need for Legislation

### 1. Congress Can and Should Amend the ATCA

Congress should not permit private U.S. MNCs, as mere creatures of our domestic law, to escape liability for their egregious extraterritorial human rights violations simply because prevailing norms abroad differ from our own.<sup>356</sup> “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States,”<sup>357</sup> and has done so in the areas of antitrust<sup>358</sup> and securities.<sup>359</sup> In response to the moral outrage over revelations of widespread international corruption involving the overseas activities of leading U.S. MNCs, Congress passed the Foreign Corrupt Practices Act of 1977<sup>360</sup> prohibiting foreign bribery.<sup>361</sup> Faced with similar moral outrage over corporate human rights abuses overseas, the time has come to enact legislation designed to cure these corporate

353. See Gibney & Emerick, *supra* note 9, at 144-45.

354. See *id.* at 136-37.

355. See *id.* at 133, 144-45; see also discussion *supra* Part II (analyzing the disposition of several recent ATCA cases alleging multinational corporate complicity in human rights abuses).

356. See Gibney & Emerick, *supra* note 9, at 142-145.

357. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

358. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that the Sherman Act applies to wholly foreign conduct if the defendant intended the conduct to produce, and it did produce, “some substantial effect” within the United States); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2, 9 (1st Cir. 1997) (holding that price fixing that occurred entirely in Japan was subject to criminal prosecution under United States antitrust laws because the acts were intended to, and did, have a “substantial effect” in the United States). For a critical analysis of the “effects” test applied in *Hartford Fire* and *Nippon Paper*, see Gibney & Emerick, *supra* note 9, at 140-145.

359. See *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424-25 (9th Cir. 1983) (holding that acts in furtherance of fraudulent transactions are sufficient to support jurisdiction against foreigners under the Securities and Exchange Act as long as “at least some activity designed to further the fraud scheme” occurred in the United States).

360. Pub. L. No. 95-213, §§ 102-04, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78dd, 78dd-1, 78dd-2 (1994)).

361. See *id.*; S. REP. NO. 95-114, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101. Treasury Secretary Blumenthal testified regarding the moral sanctions against bribery. See *id.*

practices.

The United States need not wait for foreign nations to accept responsibility for regulating the human rights activities of those doing business within their borders. Instead, the United States must take the initiative and seek to deter human rights abuses committed overseas by its own corporate creations. Several states and municipalities have already taken the first step by adopting selective purchasing ordinances and banning contracts with firms doing business in Myanmar.<sup>362</sup> Furthermore, non-governmental organizations are pursuing consumer and shareholder education,<sup>363</sup> in addition to more radical measures such as corporate charter revocation.<sup>364</sup> Grassroots activism promotes public debate on the issue of corporate social responsibility, however, it offers no remedy to those harmed by abusive MNC practices.

Legislatively modernizing the ATCA will enhance both the rights of corporations and the remedies available to alien victims of human rights abuses abroad. The current practice of crafting standards of conduct case-by-case, in a piecemeal fashion, without statutory guidelines, creates unnecessary financial risks for MNCs and may erode their competitive edge abroad.<sup>365</sup> Moreover, inconsistent judicial interpretations of the

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362. See Organization for International Investment, *State and Municipal Sanctions Report* (visited Feb. 23, 1999) <<http://www.ofii.org/issues/sanction.html>> (noting municipalities that have directed purchasing ordinances at Burma, Cuba, Indonesia, Nigeria, Switzerland, and Tibet). At least one court, however, has found that such an ordinance impermissibly encroaches on the federal power to regulate foreign affairs. See *National Foreign Trade Council v. Baker*, No. 97 12042 (D.C. Mass. Nov. 4, 1998), available at <<http://www.usaengage.org/background/lawsuit/NFTCruling.html>> (holding that Massachusetts's Burma Law unconstitutionally violates the federal foreign affairs power and, thus, not reaching a Commerce Clause or preemption analysis) (on file with the *Catholic University Law Review*); see also Fred Hiatt, Editorial, *Massachusetts Takes on Burma*, WASH. POST, Jan. 31, 1999, at B7 (characterizing the dispute over selective purchasing laws as "local sovereignty vs. an international rule of law," and describing the complex internal dispute within the Clinton Administration in balancing trade policy with human rights).

363. See *Corporations and Human Rights*, *supra* note 2 (reviewing initiatives taken in 1996 by non-governmental organizations to improve corporate social responsibility).

364. See Wells, *supra* note 15 (manuscript at 2-4 n.7); Mary Hood & Nick Penniman, *Environmental, Human Rights and Women's Groups Petition California Attorney General to Revoke UNOCAL's Charter* (visited Feb. 23, 1999) <<http://www.igc.org/igc/en/hg/unocal.html>> (discussing a brief filed by 30 citizens' groups and individuals seeking to revoke Unocal's state charter because of numerous human rights and environmental violations at home and abroad).

365. See Bencivenga, *supra* note 20 (reporting that Unocal's general counsel believes that the ATCA suit against his company could have a "chilling effect" on foreign investment because it would nullify even the best due diligence efforts); Yerton, *supra* note 21 (discussing potential corporate liability and quoting the Freeport-McMoRan chairman as saying "[If Unocal is held liable, then n]o American company (could) sign a contract of

ATCA's threshold requirements have led to both unprincipled and unanticipated results, making it difficult for MNCs to ascertain precisely what conduct the nation expects them to conform to abroad.<sup>366</sup> Likewise, in the absence of precise statutory language, human rights advocates expend their scarce resources attempting to imbue a single sentence in an ancient and obscure statute with more meaning than its drafters ever meant to convey.<sup>367</sup> The fact that the phrase "tort . . . in violation of the law of nations" eludes clear meaning in modern law<sup>368</sup> is a poor excuse, however, for failing to hold MNCs accountable for their role in human rights abuses overseas.

## 2. *Filartiga Resulted in ATCA Legislation and Unocal Should Too*

Congress should reinforce and expand the ATCA as it has done in the past.<sup>369</sup> In 1992, Congress responded to the *Filartiga* case by enacting the Torture Victim Protection Act (TVPA).<sup>370</sup> The TVPA defined specific causes of action for torture and extra-judicial killing in recognition of the United States' international obligation "to provide means of civil redress to victims of torture."<sup>371</sup> In preparing the TVPA, the House Report

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work in China" because "[t]hose activists would be on you as soon as the ink dries.").

366. See Bencivenga, *supra* note 20 (describing corporate concerns over the open questions regarding degree of knowledge, extent of benefit, and types of relationships that might lead to corporate liability for human rights abuses after *Unocal*); Pizzurro & Delaney, *supra* note 22 (same). For a comprehensive analysis of the potential liability and litigation implications of the *Unocal* decision for American companies doing business overseas, see generally Lucien J. Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for Human Rights Violations*, 24 N.C. J. INT'L L. & COM. REG. 1 (1998). Professor Dhooge concludes that "[t]his new era [heralded by the *Unocal* decision] . . . is fraught with peril for American businesses." *Id.* at 66.

367. Cf. STEPHENS & RATNER, *supra* note 22, at 49-50 (noting that the open-ended language of the ATCA has led to extensive debate and that courts will not necessarily rely unquestionably on the growing body of precedent).

368. See *id.* at 50 (observing that "[t]he language employed by the ATCA . . . has no clearly recognized definition in modern law").

369. See, e.g., Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note) (1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823, 827 (D.C. Cir. 1984) (Robb, S.J., concurring). In *Tel-Oren*, Senior Circuit Judge Robb argued that "[c]ourts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations." *Id.* at 827. Instead of consigning "broad and novel questions" surrounding the definition of the law of nations to academic and judicial speculations, Senior Circuit Judge Robb urged that Congress and the President should first determine if the issue is proper for judicial inquiry, and if so, "then provide the courts with the guidelines by which such inquiries should proceed." *Id.*

370. See 28 U.S.C. § 1350 note (1994). For a thorough discussion of the origin, strengths, and weaknesses of the TVPA, see generally STEPHENS & RATNER, *supra* note 22, at 25-29.

371. H.R. REP. NO. 102-367, pt. 1, at 3 (1991).

commented that “universal principles provide scant comfort . . . to the many thousands of victims of torture and summary executions around the world.”<sup>372</sup> The House of Representatives observed that “[d]espite universal condemnation of these abuses, many of the world’s governments still engage in” human rights violations and that international standards forbidding such conduct are “[t]oo often . . . honored in the breach.”<sup>373</sup> The facts of *Unocal*, *Freeport-McMoRan*, and *Wiwa* suggest that corporate collusion with foreign governments, to reduce costs and increase profits at the expense of human rights, demand a similar congressional response.<sup>374</sup>

Corporate complicity in human rights abuses will only abate under the pressure of enforcement and liability.<sup>375</sup> Moreover, the case law makes

372. *Id.*

373. *Id.*; cf. Annan, *supra* note 16, at A15 (observing that “[w]ithout the private sector’s active commitment and support, there is a danger that universal values will remain little more than fine words—documents whose anniversaries we can celebrate and make speeches about but with limited impact on the lives of ordinary people.”).

374. Cf. Wallace, *supra* note 245. Mr. Wallace agrees with the spirit of the *Unocal* ruling, that companies doing business with “hellish” governments should not avoid responsibility when they knowingly benefit from the host-government’s “abhorrent acts.” *Id.* He argues, however, that such a doctrine should be embodied in coherent statutory standards rather than evolving case-by-case through judicial fiat. *See id.*

Formulating a comprehensive transnational code of conduct for U.S.-based corporations or selecting which of the myriad federal commercial laws will have extraterritorial application for purposes of ATCA litigation is beyond the scope of this Comment. This Comment proposes, however, that any legislative framework should define clearly the scope and limits of corporate ATCA liability. To this end, section 702(a)-(f) of the *Restatement* provides a plausible range of defined conduct suitable for this purpose. *See* RESTATEMENT, *supra* note 143, at § 702(a)-(f) (including genocide, slavery, murder and causing disappearance, torture, prolonged arbitrary detention, and systematic racial discrimination as violations of the law of nations). Congress should augment any legislation modeled after § 702, however, to include, at a minimum, gross environmental damage inflicted on indigenous peoples. *See supra* note 211 (citing literature supporting the proposition that severe environmental damage should be actionable under ATCA, particularly when it effects indigenous peoples). Corporations should be liable for damages to any individual subjected to the actionable conduct. Legislation should also provide guidance for class action and third party suits. Further, Congress should eliminate the judicially-imposed state action requirement by providing that a corporate entity need not act under actual or apparent authority, or color of law, of any nation to be liable for damages. Congress could adopt provisions addressing exhaustion of remedies, statute of limitations, and equitable tolling from the TVPA. *See* 28 U.S.C. § 1350 note (1994). Finally, any corporate human rights abuse statute should include a clear statement providing for retroactive application. Cf. STEPHENS & RATNER, *supra* note 22, at 155-59 (arguing that retroactive application of the TVPA is consistent with the exceptions to the presumption against retroactive application set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)).

375. Cf. *supra* notes 14-25 and accompanying text (noting that human rights advocates turned to civil lawsuits against corporate ATCA defendants because other means of compelling responsible corporate human rights policies were ineffective).



clear that redress for victims depends on the articulation of clear and specific rights and duties pertinent to corporate social responsibility.<sup>376</sup> Legal language in this context carries a ponderous burden because an amended ATCA may influence matters of life and death, as well as billions of dollars of investment and profit.<sup>377</sup> For this reason, precise and detailed legislative pronouncements of the nation's ethical expectations of MNCs, rather than inconsistent and contradictory judicial debate, will better serve both the boardroom and the global village.<sup>378</sup>

The argument by opponents of an amended ATCA, that it will open a floodgate of litigation and constrain global investment, is without merit because most corporations will probably avoid doing business in places where the worst human rights abuses occur.<sup>379</sup> This is because unstable governments are likely to deter most investors, particularly when the rest of the world offers profitable and relatively safer ventures.<sup>380</sup> Contractual security arrangements, express or implied, that might lead to ATCA liability are, therefore, uncommon because they are only needed in unstable high risk venues like Burma and Nigeria. Thus, Congress need only tailor the ATCA to address a narrow range of social irresponsibility arising out of unethical and unnecessary corporate practices.

Voluntary corporate codes of conduct provide a sound basis for developing an amended ATCA that is responsive to corporate social responsibility.<sup>381</sup> Working together with responsible corporations and human rights advocates, Congress should ensure that an amended ATCA would be either a catalyst for improvement of multinational corporate governance or a potent means of redress for victims of heedless corporate actors.

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376. See discussion *supra* Part II (analyzing recent corporate ATCA cases and the judicial search for clear universal norms in a diverse, globalized economy).

377. See generally MARBER, *supra* note 1, at 96 (estimating that investments in manufacturing in developing nations would grow to almost \$90 billion in 1997).

378. See Wallace, *supra* note 245 (arguing that legislation, not adjudication, is needed to clarify corporate social responsibility). *But cf.* Symposium, *Can Corporate Social Responsibility Be Legislated?*, 96 BUS. & SOC'Y REV. 4-10 (1996) (surveying the views of various business leaders generally opposed to proposed legislation designed to compel corporations to act more responsibly towards employees and communities).

379. See E-mail from Stuart Solsky, Partner in the Project Finance and Infrastructure Group in the New York Office of Kelley, Drye & Warren, LLP, to the author (Sep. 3, 1998) (on file with the *Catholic University Law Review*).

380. See *id.*

381. See Wells, *supra* note 15 (manuscript at 4, 38-44) (discussing in detail voluntary corporate codes and arguing that the *Unocal* decision is consistent with the most conservative multinational practices and initiatives).

## IV. CONCLUSION

The corporate ATCA cases are just the tip of the iceberg of evidence demonstrating the significant impact of business and trade in perpetuating human rights violations in those countries where such abuses are most prevalent.<sup>382</sup> Whatever economic connections might exist between foreign and American societies, emerging nations in the East and developed nations in the West do not adhere to the same legal and moral values. The concept of evolving universal norms is, therefore, a legal fiction manipulated by MNCs to evade accountability for unethical overseas investment activities and finessed by human rights advocates seeking remedies for indigenous victims of corporate abuses. The consequent struggle to define “a tort . . . in violation of the law of nations”<sup>383</sup> benefits no one.

In the multicultural, boundaryless, and privatized world of emerging markets, the co-existence of economic prosperity and human rights increasingly depends on ethical business management.<sup>384</sup> While the borderless capitalism that gave rise to MNCs created a powerful economic engine,<sup>385</sup> the consequence of unregulated global commerce yields indif-

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382. See, e.g., Judith Matloff, *Oil—or Rights—in Central Asia?*, CHRISTIAN SCI. MONITOR, Jan. 15, 1999, at 6 (reporting that the United States Government was overlooking human rights violations by the Government of Kazakstan in order to preserve lucrative investments by American oil executives engaged in pipeline and oil field development in the Caspian Sea); Russell Mokhiber & Robert Weissman, *Beat the Devil: The 10 Worst Corporations of 1997*, MULTINATIONAL MONITOR, Dec. 1997, at 9-18 (detailing the “worst” in global corporate social irresponsibility during 1997); Michael Shari, *What Did Mobil Know?*, BUS. WK., Dec. 28, 1998, at 68-74 (reporting on allegations that Mobil Oil Indonesia, a wholly owned subsidiary of American based Mobil, assisted the Indonesian army in suppressing a guerrilla movement by providing logistic support for state sponsored torture and the digging of mass graves); Kalpana Sharma, *Enron Violating Human Rights*, THE HINDU, Jan. 25, 1999, at 14, available at <<http://webpage.com/hindu/daily/1990125/02/02250008.htm>> (reporting that an Indian power corporation, owned in part by a United States energy conglomerate, used corporate security forces to harass demonstrators, and benefited from human rights violations committed by local police suppressing dissent); Vidal, *supra* note 4 (commenting on the destabilizing effects of the oil industry in poor nations, and predicting that the increasing political turbulence in the Caspian region makes that area ripe for corporate involvement in human rights and environmental conflicts).

383. 28 U.S.C. § 1350 (1994).

384. See Annan, *supra* note 16, at A15 (discussing the link between open markets, economic prosperity, and global corporate support for “core values in the areas of human rights, labor standards, and environmental practices”).

385. See generally KORTEN, *supra* note 1 (criticizing economic globalization as undermining democracy and destroying the environment); MARBER, *supra* note 1 (approving of relatively unbridled economic corporate globalization as a means for promoting the economic prosperity of both emerging and developing nations); Manning, *supra* note 191 (discussing the effects of globalism on corporate economics).

ferent, and often deliberately cruel, results for the indigenous people of developing countries. Too often, these results occur with the knowledge and approval of U.S. chartered corporations. Thus, where American corporate social responsibility is concerned, the sovereign, not the market, must rule. Just as Congress legislated standards to prevent foreign corrupt practices, it should similarly amend the ATCA to legislate corporate human rights standards. By establishing clear guidelines and liability for overseas investment, Congress can best promote corporate efforts at sustainable development in emerging nations, while meeting the United States' obligations as a leader in the world community.