CORPORATE SOCIAL RESPONSIBILITY: A MULTIFACETED TOOL TO AVOID ALIEN TORT CLAIMS ACT LITIGATION WHILE SIMULTANEOUSLY BUILDING A BETTER BUSINESS REPUTATION

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INTRODUCTION

The Alien Tort Statute ("ATS") remains a very high concern for transnational corporations,[1] as illustrated by a recent United States

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1. BLACK'S LAW DICTIONARY 393 (9th ed. 2009) (A "*multinational corporation*," synonymous with "*transnational corporation*," is defined as: "A company with operations in two or more countries, generally allowing it to transfer funds and products according to price and demand conditions, subject to risks such as changes in exchange rates or political instability."). *See also* CHEOL S. EUN & BRUCE G. RESNICK, INTERNATIONAL FINANCIAL MANAGEMENT 16 (McGraw-Hill Cos, Inc. 4th ed. 2007) ("A multinational corporation (MNC) is a business firm incorporated in one country that has production and sales operations in several other countries. The term suggests a firm obtaining raw materials from one national market and financial capital from another, producing goods with labor and capital equipment in a third country, and selling the finished product in yet other national markets.").

Court of Appeals decision vacating the district court's dismissal of plaintiffs' ATS claims.[2] The ATS allows aliens to bring tort claims against transnational corporations in U.S. district courts when companies have violated the laws of nations or are complicit in such violations.[3] Therefore, transnational companies are being hailed into U.S. courts for violations taking place overseas.[4]

For example, *Khulumani v. Barclay National Bank Ltd.* involved a lawsuit brought against numerous multinational corporations including British Petroleum, PLC, Chevrontexaco Corporation, Citigroup, Inc., Exxonmobil Corporation, Ford Motor Company, General Motors Corporations, and J.P. Morgan Chase, among others.[5] There, plaintiffs alleged that the multinational, corporate defendants "violated international law and were involved in colluding with the apartheid state's security apparatuses."[6] Plaintiffs stated that defendants "supplied resources, such as technology, money, and oil, to the South African government or to entities controlled by the government."[7] Many of these resources were subsequently "used by the apartheid regime to further its policies of oppression and

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2. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007). The original dismissal was granted by District Court Judge Sprizzo in *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004). Among other reasons for this decision, Judge Sprizzo stated:

> In a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.

Id. at 554.

3. 28 U.S.C.A. § 1350 (West 2009) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The statute is titled "Alien's action for tort," but is more commonly referred to as the Alien Tort Statute (ATS) of 1789 or the Alien Tort Claims Act (ATCA). *See* ATS discussion *infra* Part II.

4. *See, e.g., Khulumani*, 504 F.3d at 258-59. *See also infra* Part II.

5. *Khulumani*, 504 F.3d 254.

6. Norman Reynolds, *Khulumani's Reparations Case,* GLOBAL POLICY FORUM, Jan. 6, 2005, ¶ 6, http://www.globalpolicy.org/intljustice/atca/2005/0106 khulumani.htm.

7. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 544 (S.D.N.Y. 2004).

persecution of the African majority."[8] Therefore, "[w]ith the support of these corporations, the apartheid government committed extra-judicial killing, torture, sexual assault, prolonged arbitrary detention, and multiple crimes against humanity."[9]

The district court recently upheld its decision to deny defendants' motion to dismiss.[10] The court held "knowledge – rather than intent – is the [*mens*] *rea* requirement for an aiding and abetting claim under the law of nations."[11] Additionally, the court held that "some plaintiffs had advanced sufficient allegations to state claims against defendants under a theory of vicarious liability."[12]

Many hope the plaintiffs in *Khulumani* prevail, both for the benefit of the victims and to produce greater certainty for investors and businesses. As Joseph Stiglitz indicated, "'addressing corporate misconduct brings confidence to consumers and markets, creating a more positive business climate—genuine foreign investors are attracted to conditions of stability where social justice and good political, economic and corporate governance prevail.'"[13] Therefore, the financial effect of ATS litigation on multinational corporations could be fatal.[14]

Notably, if publicly-traded multinational corporations wish to maintain high profit margins and continue to reap the benefits of globalization, they must implement sound Corporate Social Responsibility ("CSR") measures related to human rights. A detailed set of CSR measures will increase investment and internal company morale, thereby attracting a more competitive staff, while simultaneously enabling corporations to avoid the costs of both ATS litigation and reputational harm. This will shed a positive light on the corporation's social policies from the outset.

This article discusses the importance of corporate social responsibility in the globalized world. The general focus will be on

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8. *Id.* at 545.

9. Reynolds, *supra* note 6 ¶ 6.

10. Ntsebeza v. Daimler AG (*In re* S. African Apartheid Litig.), 617 F. Supp. 2d 228, 297 (S.D.N.Y. 2009).

11. *Id.*

12. *Id.*

13. Reynolds, *supra* note 6 ¶ 10.

14. *See* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), discussed *infra* Part II.

publicly-traded transnational corporations, specifically those either based in the United States or having sufficient contacts with the United States, making them amenable to U.S. jurisdiction.[15] Part I defines CSR and outlines the international norms as well as certain CSR measures targeting human rights that have been implemented in the past. Part I will additionally discuss CSR's various benefits to transnational corporations. Part II examines the ATS, a litigation tool used against transnational corporations who fail to implement CSR measures, specifically those protecting human rights. Finally, Part III will suggest specific CSR measures to be taken by transnational corporations to avoid ATS litigation and will analyze how these measures fit into a cost-effective business model. Therefore, corporations can use CSR to their advantage as a multifaceted tool to market the corporation in a positive light while simultaneously avoiding litigation under the ATS.

I. CORPORATE SOCIAL RESPONSIBILITY IN A GLOBALIZED WORLD

Over the last decade multinational litigation against corporations under the ATS has escalated.[16] Companies are being held accountable for their complicity with human rights violations after choosing to outsource in countries with unstable or militarized governmental structures where human rights violations are abundant.[17] Even though cases regarding human rights violations often result in settlement or dismissal, the tarnish to a corporation's reputation remains.[18]

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15. Specifically, personal jurisdiction and subject matter jurisdiction. BLACK'S LAW DICTIONARY 930-31 (9th ed. 2009) *"[P]ersonal jurisdiction,"* also known as, *"in personam jurisdiction; jurisdiction in personam; jurisdiction of the person; jurisdiction over the person,"* is defined as: "A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests." *"[S]ubject-matter jurisdiction"* is defined as "Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *Id.* This concept will be discussed in further detail with specific relation to the Alien Tort Claims Statute. *See infra* Part II.

16. *See infra* Part II.

17. *See Unocal Corp.*, 395 F.3d 932.

18. *See* Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 184 (2007) (stating that CSR norms are often facilitated by a corporation's

A. Corporate Social Responsibility (CSR) Defined

The International Finance Corporation ("IFC"), a member of the World Bank Group, has defined CSR as "the commitment of businesses to contribute to sustainable economic development by working with employees, their families, the local community and society at large to improve their lives in ways that are good for business and for development."[19] Similarly, the U.S. Government Accountability Office ("GAO") has defined CSR as "business efforts to address the impact of business operations on such concerns as human rights, labor, and the environment."[20] The GAO further states that most definitions of CSR suggest that businesses should not only address the interests of its shareholders, but should also "address the interests of its other stakeholders, including customers, employees, suppliers, and the local community."[21] The theory behind CSR is "that the responsibility of a corporation extends beyond the traditional Anglo-American objective of providing financial returns to its shareholders. Instead . . . the legitimate concerns of a corporation should include such broader objectives as sustainable growth, equitable employment practices, and long-term social and environmental well-being."[22]

CSR has been described as an "umbrella term that refers to a variety of initiatives ranging from voluntary codes of conduct to programs whereby companies can undergo external audits to verify the adequacy of their practices in a variety of areas of social

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reputation). *See also* discussion *infra* Part II.C. (regarding the fate of the Unocal Corporation).

19. *Corporate Social Responsibility,* IFC, http://www.ifc.org/ifcext/economics.nsf/Content/CSR-IntroPage (last visited Jan. 29, 2010). Although there are numerous definitions of CSR, this definition clearly outlines the expansive reach of CSR measures.

20. *Globalization: Observations on Federal Activities Related to Global Corporate Social Responsibility and Human Rights*, GAO Testimony Before the Cong. Human Rights Caucus, GAO-05-1049T, at 1 (Sept. 28, 2005) (statement of Loren Yager, Director Int'l Affairs and Trade), *available at* www.gao.gov/new.items/d051049t.pdf [hereinafter *Globalization*].

21. *Id.* at 4.

22. John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement,* 31 J. CORP. L. 1, 1-2 (2005).

concern."[23] Although there are a multitude of specific areas where multinational corporations can improve (or implement) CSR measures, this article will focus on improvements related to human rights. Human rights CSR measures should include the assurance of "basic standards of treatment to all people, regardless of nationality, gender, race, economic status, or religion. Human rights policies generally guard against such concerns as child labor in manufacturing, government action depriving citizens of basic civil liberties, and forced or prison labor."[24]

CSR has recently emerged as a concern in the twenty-first century for two principle reasons. First, as the international economy becomes more globalized and integrated, the decisions of multinational corporations will not only directly affect their own shareholders, but also have rippling effects on the local economies and on international trade.[25] Second, in response to recent corporate scandals and human

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23. McInerney, *supra* note 18, at 172.

24. *Globalization, supra* note 20, at 4 (statement of Loren Yager, Director Int'l Affairs and Trade).

25. *See* EUN & RESNICK, *supra* note 1, at 4 (indicating the corporation's presence in an impoverished area often produces devastating effects on the local community). *See* Tarek F. Maassarani, Margo Tatgenhorst Drakos & Joanna Pajkowska, *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment,* 40 CORNELL INT'L L.J. 135, 138-40 (2007).

> Human rights violations commonly associated with the hydrocarbon industry can be divided into four distinct yet overlapping categories. First, before project construction can commence, developers and their government partners often force indigenous populations to relocate (e.g., Burma, Ecuador, and Chad-Cameroon). Resettlement is rarely accompanied by meaningful and adequate compensation, leaving populations in villages that lack basic infrastructure (e.g., Burma and Chad-Cameroon). Second, when commercial production begins, a substantial new source of revenue serves to legitimize and empower autocratic and unstable regimes with shameless histories of human rights abuses (e.g., Burma and Chad-Cameroon). Such regimes frequently misappropriate massive project revenues rather than meet the legitimate needs of their populations. Third, once resource extraction and transport has commenced, adverse health issues commonly arise from environmental pollution. Toxic leaks, gas flares, and dumping have created public health catastrophes in villages, contaminating vital food and drinking sources and causing cancerous tumors. This amalgam of impacts stems from sudden, drastic changes in the local economy—commonly referred to as boomtown effects or "Dutch Disease"—as the project gets

rights violations (which are now delivered more efficiently to the public through increased technology and globalization of the media),[26] companies must take proactive measures to ensure shareholder ands

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> underway. The costs of domestic goods and services rise sharply, HIV/AIDS follows on the tails of flourishing drug markets and prostitution, and labor is drawn away from traditional public and private sectors such as education and subsistence agriculture. Once the project matures, economic activity and labor demand plateau or decline, leaving dependent workers in an under-diversified economy. The relationship between communities in the developing world and the hydrocarbon industry can be complex and devastating. To protect the citizens of these countries, to promote long-term sustainable development, and to legitimize corporate-led globalization, we must apply human rights concepts to these business projects.

Id. Additionally, international trade is affected by a company's decision to do business overseas, reduction in the cost of production or transportation, and the like. *See* EUN & RESNICK, *supra* note 1, at 395. Such changes will also affect the cost of the product itself and the raise that company's competition within the particular market. *See id.*

26. Thomas Crampton, *A Trend with Legs as Well as a Heart; Doing Good is Becoming a Priority for Companies,* N.Y TIMES., Jan. 28, 2006, *available at* http://www.nytimes.com/2006/01/27/business/worldbusiness/27iht-wbdavos.html.

stakeholder confidence[27] and to avoid implementation of legislative measures aimed at CSR.[28]

B. International Standards of CSR & External Codes of Conduct

Although there are no binding international regulations, there are internationally recognized standards that provide guidance.[29] Transnational corporations can look to these external international standards when implementing their own standards, or they can subject themselves to audits for following external standards "set by non-

27. *See* ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 547 (Thompson/West 10th ed. 2007) (1976) (*quoting* Lisa M. Fairfax, *The Impact of Stakeholder Rhetoric on Corporate Norms,* 31 IOWA J. CORP. L. 675, 691-92 (2006)) ("In a radical shift away from profit speak, a few companies address their annual report to groups other than shareholders. For example, the annual report of General Electric Company begins with a 'letter to stakeholders' as opposed to the traditional 'letter to shareholders.' According to General Electric, their reference to stakeholders is meant to capture the company's commitment to groups beyond shareholders. The rhetoric in these reports underscores the corporate focus on stakeholders, as well as the prominence these concerns now receive."). *See generally* BLACK'S LAW DICTIONARY 1534 (9th ed. 2009) ("*stakeholder*" is defined as "[a] person who has an interest or concern in a business or enterprise, though not necessarily as an owner."); *see also* Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, ¶ 22, E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Norms] ("The term 'stakeholder' includes stockholders, other owners, workers and their representatives, as well as any individual or group that is affected by the activities of transnational corporations or other business enterprises.").

28. *See* Crampton, *supra* note 26, at 15.

29. Such standards for corporations include the International Labor Organization conventions, the Universal Declaration of Human Rights and the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. For specific human rights concerns regarding transnational corporations, corporations should seek guidance from the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. *See* U.N. Norms, *supra* note 27 (stating that transnational corporations should "adopt, disseminate and implement internal rules of operation in compliance with the Norms.") *Id.* ¶ 15.

governmental organizations[,] sometimes accompanied by verification mechanisms."[30]

1. United Nations Human Rights Norms Regarding Transnational Corporations and Other Business Enterprises

The United Nations Economic and Social Council established *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("the U.N. Norms").[31] The Preamble extends the responsibility of States to promote and secure human rights to all businesses:

> [E]ven though States have the primary responsibility to promote, secure the fulfilment [sic] of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.[32]

Including multiple treaties and statutes previously implemented and agreed to by the international community, the U.N. Norms seek to combine those efforts and specify that such obligations are also to be imposed upon "transnational corporations and other business enterprises . . . [w]ithin their respective spheres of activity and influence."[33] The U.N. Norms lay out specific obligations regarding individual human rights. For example, the obligations regarding the "right to security of persons" state that "[t]ransnational corporations . . . shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage[-]taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other

30. Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China,* 15 CARDOZO J. INT'L & COMP. L. 321, 327 (2007).

31. U.N. Norms, *supra* note 27. Note that the U.N. Norms discuss transnational corporations and other business enterprises, however, the focus of this Article is on transnational corporations only. Therefore a reference to other business enterprises may not always be included in further discussion.

32. *Id.*

33. *Id.* ¶ 1.

international crimes against the human person."[34] This obligation specifically addresses corporate complicity in crimes committed by corrupt governments or militarized governments.[35]

The U.N. Norms also include "[g]eneral provisions of implementation" stating that transnational corporations "shall adopt, disseminate and implement internal rules of operation in compliance with the Norms."[36] Additionally, corporations should periodically report on such implementation and "apply and incorporate these [U.N.] Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation."[37] Further, the U.N. Norms state that such corporations will be subject to monitoring by the United Nations.[38]

Although the U.N. Norms provide an excellent framework for transnational corporations to implement internal codes of conduct, there are no concrete enforcement measures, nor are there fully developed monitoring and verification mechanisms.[39] However, corporations can profit from utilizing CSR mechanisms by allowing external auditors to certify the measures taken by the corporation.

2. *SA8000: External Codes of Conduct*

One example of an organization that implements voluntary codes of external conduct is Social Accountability International ("SAI"), which focuses on worker's rights.[40] This organization collaborated with individuals representing various stages of production, human

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34. *Id.* ¶ 3.

35. *See* Khulamani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); *see also* Doe I v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002), discussed *supra* Part II.C.

36. U.N. Norms, *supra* note 27, ¶ 15.

37. *Id.*

38. *Id.* ¶ 16.

39. Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493, 519 (2004) ("A strong enforcement mechanism is the sine qua non for effective implementation of the [U.N.] Norms.").

40. Social Accountability International, http://www.sa-intl.org/ (last visited Jan. 9, 2010).

rights organizations, and trade unions to develop the "Social Accountability 8000 (SA8000) Standard."[41] The SA8000 "addresses national law compliance and incorporates International Labor Organization conventions, the Universal Declaration of Human Rights, and the U.N. [sic] Convention of the Rights of the Child,"[42] among others.

Notably, the certification process of this voluntary system allows companies to be audited by independent companies that are accredited by Social Accountability Accreditation Services (SAAS).[43] Once a corporation has been certified as having met the SA8000 standards, such certification becomes public information and may be used for marketing purposes.[44] There are nine elements to be considered by auditors using SA8000: Child Labor, Forced Labor, Health and Safety, Freedom of Association and Right to Collective Bargaining, Discrimination, Discipline, Working Hours, Compensation, and Management Systems.[45]

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41. Social Accountability International, http://www.sa-intl.org/ (follow "2008 SA8000 Standard" hyperlink) (last visited Jan. 9, 2010).

42. Lin, *supra* note 30, at 328.

43. Social Accountability International, http://www.sa-intl.org/ (follow "SA8000 Certification" hyperlink) (last visited Jan. 9, 2010).

44. Social Accountability International, http://www.sa-intl.org/ (last visited Jan. 9, 2010).

> To certify conformance with SA8000, every facility seeking certification must be audited. Thus auditors will visit factories and assess corporate practice on a wide range of issues and evaluate the state of a company's management systems, necessary to ensure ongoing acceptable practices. Once an organization has implemented any necessary improvements, it can earn a certificate attesting to its compliance with SA8000. This certification provides a public report of good practice to consumers, buyers, and other companies and is intended to be a significant milestone in improving workplace conditions. Maintaining and improving the systems put in place to achieve SA8000 certification is an ongoing process and substantive worker participation can be the best means to ensuring systemic change. The benefits of adopting SA8000 are significant and may include improved staff morale, more reliable business partnerships, enhanced competitiveness, less staff turnover and better worker-manager communication.

Id..

45. A more detailed description of each factor is as follows:

C. Implementation of CSR among Transnational Corporations in the U.S.

To avoid legal and social ramifications companies are implementing internal procedures to increase their transparency and accountability.[46] A few examples of CSR measures implemented by companies are corporate codes of conduct, shareholder resolutions,[47] and social and environmental sustainability reports.[48]

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1. Child Labor: No workers under the age of 15; minimum lowered to 14 for countries operating under the ILO Convention 138 developing-country exception; remediation of any child found to be working; 2. Forced Labor: No forced labor, including prison or debt bondage labor; no lodging of deposits or identity papers by employers or outside recruiters; 3. Health and Safety: Provide a safe and healthy work environment; take steps to prevent injuries; regular health and safety worker training; system to detect threats to health and safety; access to bathrooms and potable water; 4. Freedom of Association and Right to Collective Bargaining: Respect the right to form and join trade unions and bargain collectively; where law prohibits these freedoms, facilitate parallel means of association and bargaining; 5. Discrimination: No discrimination based on race, caste, origin, religion, disability, gender, sexual orientation, union or political affiliation, or age; no sexual harassment; 6. Discipline: No corporal punishment, mental or physical coercion or verbal abuse; 7. Working Hours: Comply with the applicable law but, in any event, no more than 48 hours per week with at least one day off for every seven day period; voluntary overtime paid at a premium rate and not to exceed 12 hours per week on a regular basis; overtime may be mandatory if part of a collective bargaining agreement; 8. Compensation: Wages paid for a standard work week must meet the legal and industry standards and be sufficient to meet the basic need of workers and their families; no disciplinary deductions; 9. Management Systems: Facilities seeking to gain and maintain certification must go beyond simple compliance to integrate the standard into their management systems and practices.

Social Accountability International, http://www.sa-intl.org/ (last visited Jan. 9, 2010).

46. Marisa Anne Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict between U.S. Corporate Codes of Conduct and European Privacy and Work Laws,* 28 BERKELEY J. EMP. & LAB. L. 375, 383 (2007).

47. *Developments in the Law—Jobs and Borders: III. Legal Tools for Altering Labor Conditions Abroad,* 118 HARV. L. REV. 2202, 2220-23 (2005) [hereinafter *Developments in the Law*].

48. Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 468-69 (2004). *See also* Caroline Rees, *ADR's Role in Responsible Corporate Practices: Principles for*

1. Internal Codes of Conduct

Corporations may implement voluntary internal codes of conduct as a form of "self-regulation," carving out certain standards regarding a number of issues including human rights.[49] When doing business in particular areas, companies may look to codes created by other corporations[50] or private groups aimed at particular problems and issues in that specific area or industry.[51]

Hearing Grievances, and an Effective Response, 26 ALTERNATIVES TO HIGH COST LITIG. 59, 59 (2008) (discussing prevention of disputes at the outset: "Establishing clear standards, compliance systems and a means of engaging with different stakeholder groups should constitute basic good practice for companies.").

49. Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INT'L LAW 75, 82 (Menno T. Kamminga & Saman Zia-Zarifi eds., Kluwer Law International 2000) (noting these corporate codes of conduct originated in the United States with the Johnson & Johnson code of conduct, and focused on the pursuit of social responsibility to "four stakeholders: customers, employees, stockholders, and the community."). *See also* Pagnattaro & Peirce, *supra* note 46, at 383. Later, companies "looked to codes of conduct as a way to institutionalize business ethics and to stave off government regulation." *Id.* Corporate codes are instituted for a number of reasons (*see* discussion *supra* Part I), including, "stav[ing] off government regulation, . . . preempt[ing] public denunciation, . . . guid[ing] corporate culture and to communicate the corporation's identity to employees and stakeholders alike, . . . [and] reassur[ing] analysts and potential investors that a company understood and abided by ethical standards." *Id.* at 383-84.

50. Gregory T. Euteneier, *Towards a Corporate "Law of Nations": Multinational Enterprises' Contributions to Customary International Law*, 82 TUL. L. REV. 757, 767-68 (2007). For example, a member of General Motors' board of directors created the "Sullivan Principles": "Public outcry over MNE operation in South Africa during the apartheid era led to the development in 1977 of perhaps the most well-known corporate code of conduct: the Sullivan Principles for U.S. Corporations Operating in South Africa (Sullivan Principles)." *Id.* This voluntary code was implemented by numerous corporations that:

> [P]ledged to integrate racially their working and eating areas and to strive generally to eliminate discrimination in the workplace in South Africa. The Sullivan Principles have since evolved into a global code of conduct endorsed by numerous MNEs including Chevron, Coca-Cola, and General Motors. The current Sullivan Principles consist of eight largely aspirational goals for achievement of basic standards in the areas of human rights, equal opportunity, environmental health, and other areas.

Id.

51. Pagnattaro & Peirce, *supra* note 46, at 383-84 ("For example, U.S. companies adopted the Sullivan Principles for doing business in South Africa during

These standards can guide a company's own conduct and provide minimum standards "for the types of countries the company will be willing to invest in, and standards for the behavior of acceptable business partners."[52] However, the codes of conduct appear to be broad statements of general obligation rather than specific, concrete rules.[53] Additionally, the codes are "self-imposed and voluntary, and thus lack a hard enforcement mechanism."[54]

2. *Shareholder Resolutions*

Shareholder resolutions give investors a voice in company matters, allowing them to bring issues to managers and board members. Specifically, "[s]hareholder resolutions allow investors to petition a company for information or press for a change in company policy or practice."[55] However, shareholder resolutions, which are required to be included in the company's proxy statement under Rule 14a-8 of the Securities Exchange Act of 1934, may be excluded through a loophole in the Rule.[56] Such proposals related to CSR issues may be "exclude[ed] from the company's proxy statement of proposals that fall within the ambit of the company's 'ordinary business' matters."[57]

3. *Social Sustainability Reports*

Notably, the recent increases in social sustainability reports appear to be the most promising avenue of CSR providing for a

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the apartheid era in order to stave off the specter of consumer boycotts. U.S. corporations also adopted the McBride Principles for addressing labor standards issues in Northern Ireland, the Slepak Principles for addressing issues in the former Soviet Union, and the Maquiladora Standards of Conduct for addressing labor standards in Mexico and Central America.").

52. Joseph, *supra* note 49, at 82.

53. *Developments in the Law*, *supra* note 47, at 2221.

54. *Id.*

55. Timothy Smith, *Institutional Investors Find Common Ground With Social Investors*, 1622 PLI/CORP 283, 288 (2007).

56. *Developments in the Law, supra* note 47, at 2222 (citing 17 C.F.R. § 240.14a-8(i)(7) (2004)).

57. *Developments in the Law, supra* note 47, at 2222 (discussing Securities Exchange Act of 1934, Rule 14-a8(i)(7)).

greater transparency to a company's overseas functions and operations.[58] In the United States, publicly-traded companies are required by federal securities laws to file reports disclosing the companies' overall financial situation.[59] This information must be made available to shareholders upon request.[60] Such forms include the Form 10-K, an annual report, and Form 10-Q quarterly reports.[61]

However, more transnational corporations are providing reports which reveal non-required information, such as a company's CSR measures. Detailed disclosure statements are required in some European countries.[62] These statements are geared at stakeholder interests and provide disclosures of "social and environmental risks and impact."[63] KPMG, an international accounting firm, has done extensive research showing the increase in the publication of such information by transnational companies.[64] For example, "64 percent (161 companies) of the [Global Fortune 250 (G250) companies] published [corporate responsibility (CR)] information, either as a separate report or as part of the annual financial report."[65]

Corporations may follow already established initiatives in creating a framework of reporting. One example of such an initiative is the Global Reporting Initiative (GRI), which has created voluntary guidelines for "sustainability reporting."[66] The GRI "is a network-

58. *See* Williams, *supra* note 48, at 468-69.

59. *Form 10-K*, SEC, http://www.sec.gov/answers/form10k.htm.

60. *Id.*

61. *Id.*

62. Conley & Williams, *supra* note 22, at 2 (stating the countries "with the most expansive disclosure regulations are the very countries where a stakeholder concept of the firm has been most dominant: France, Germany, the Netherlands, Belgium, Norway, Denmark, and Sweden.").

63. *Id.*

64. University of Amsterdam & KPMG Global Sustainability Services, *KPMG International Survey of Corporate Social Responsibility Reporting 2005*, at 9-13, *available at* http://www.kpmg.nl/Docs/Corporate_Site/Publicaties/International_Survey_Corporate_Responsibility_2005.pdf.

65. *Id.* at 9.

66. GLOBAL REPORTING INITIATIVE, http://www.republicofmining.com /2008/06/12/global-reporting-initiative/ ("To date, more than 1,500 companies, including many of the world's leading brands, have declared their voluntary adoption of the Guidelines worldwide. Consequently the G3 Guidelines have

based organization that has pioneered the development of the world's most widely used sustainability reporting framework."[67] The GRI framework for such reporting was created "through dialogue between stakeholders from business, the investor community, labor, civil society, accounting, academia, and others."[68]

The GRI provides two-fold guidance: (1) "Principles for defining report content and ensuring the quality of reported information;" and (2) "Standard Disclosures made up of Performance Indicators and other disclosure items, as well as guidance on specific technical topics in reporting."[69] The sustainability reports "can be used to benchmark organizational performance with respect to laws, norms, codes, performance standards and voluntary initiatives; demonstrate organizational commitment to sustainable development; and compare organizational performance over time."[70]

Additionally, reporting varies from industry to industry and companies can chose specific items that directly affect stakeholders, ranging from economic, environmental, and social indicators.[71] The GRI specifies human rights as one such indicator.[72] Companies "report on the extent to which human rights are considered in investment and supplier/contractor selection practices."[73] The GRI identifies human rights norms by following internationally set standards recognized under U.N. conventions and declarations.[74] Using the human rights social indicator to report positive conformance

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become the *de facto* global standard for reporting. The GRI is a collaborating centre of the United Nations Environment Programme.").

67. GLOBAL REPORTING INITIATIVE, http://www.globalreporting.org/AboutGRI/WhatIsGRI/ (follow "About GRI" then "What is GRI?" hyperlinks.)

68. GLOBAL REPORTING INITIATIVE, RG SUSTAINABILITY REPORTING GUIDELINES 3 (2006), *available at* http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1BFF25F735235CA44/0/G3_GuidelinesENU.pdf.

69. *Id.*

70. GLOBAL REPORTING INITIATIVE, http://www.globalreporting.org/AboutGRI/WhatIsGRI/

71. GLOBAL REPORTING INITIATIVE, RG SUSTAINABILITY REPORTING GUIDELINES 8 (2006), *available at* http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1BFF25F735235CA44/0/G3_GuidelinesENU.pdf.

72. *Id.* at 32.

73. *Id.* at 32.

74. *Id.*

with international law norms is especially beneficial to companies seeking to avoid litigation under the ATS.[75]

D. Benefits to CSR

CSR provides many benefits to corporations. Corporations may utilize both defensive and offensive measures. Defensive or preventative measures that are internally implemented and regulated can stop a negative impact that usually results from litigation and reputational harm. Indeed, in addition to social marketing tools, these measures provide an offensive measure for companies to gain stakeholder satisfaction immediately.[76] These stakeholders embody the company's internal morale and the overall reputation of the company.[77] Finally, CSR may be used as a method to avoid litigation under the ATS.[78]

1. Risk Management and Social Marketing: Defensive and Offensive CSR Measures

CSR has two main facets. The first is a "risk management side" which includes monitoring existing suppliers and utilizing "due diligence for new investments."[79] The second involves participation in "social [programs], especially in poor parts of the world."[80] This aspect of CSR "is an increasingly fashionable way for a company to burnish its brand and, with luck, protect itself from attack."[81] Participation in social programs can also afford companies "a competitive advantage and a source of growth in its own right."[82]

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75. *See infra* Part II.

76. *See infra* Part I.D.

77. *See infra* Part I.D.

78. *See infra* Part I.D.

79. *A Stitch in Time: How Companies Manage Risks to Their Reputation*, ECONOMIST, Jan. 19, 2008.

80. *Id.*

81. *Id.* Another benefit from the business prospective is that some of these social programs end up helping the company beyond marketing: "Anglo American, for example, says the $10m a year it spends on HIV testing and treatment in Africa is starting to pay for itself through reduced absenteeism and longer lives for skilled workers." *Id.*

82. *Id.* at 14.

2. *Internal Company Morale & Overall Reputation*

An extension of these defensive and offensive mechanisms concerns the reality that as public trust in transnational companies has eroded,[83] internal pressures and demands for CSR have mounted as employees want to work for a company "'where they share the values and the ethos.'"[84] Therefore, another benefit to the implementation of CSR measures is to remain competitive and "motivate, attract and retain staff."[85] In addition to staff, investors are showing an increased interest in CSR and in particular human rights.[86]

Companies[87] that have embraced CSR and have implemented CSR into their business practices are seen as leaders with good management skills.[88] CSR has been viewed as "part of what

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83. *Just Good Business,* ECONOMIST, Jan. 19, 2008, at 4 ("Scandals at Enron, WorldCom and elsewhere undermined trust in big business and led to heavy-handed government regulation. An ever-expanding army of non-governmental organizations (NGOs) stands ready to do battle with multinational companies at the slightest sign of misbehaviour.").

84. *Id.* at 4 (quoting Mike Kelly, head of CSR at the European arm of KPMG).

85. *Id.* at 4.

86. William J. Holstein, *Office Space: Armchair M.B.A.: A Conscience of Corporations,* N.Y. TIMES, July 2, 2006, at 39. That article discusses the Interfaith Center on Corporate Responsibility, a non-profit group that promotes corporate social responsibility with roughly 300 investors and affiliate members combined. In an interview with Sister Patricia Wolf, the executive director of the Interfaith Center, Sister Wolf states that the shareholder approval of human rights resolutions has significantly grown from 2003 to 2006. Specifically looking at pension funds and mutual funds, Sister Wolf explains the reasoning for this growing concern for human rights is that "[n]o company wants to be tagged as a violator of human rights. From a financial point of view, that can lead to exposure and liability. Long-term institutional investors understand that." *Id. See also* Carolyn Cui, *For Money Managers, A Smarter Approach to Social Responsibility,* WALL ST. J., Nov. 5, 2007, at R1. Investors are now looking to money managers, seeking to make investments with companies that have a social responsibility agenda, here referred to as "well-thought-out strategies for dealing with environmental, social and governance, or ESG, issues." *Id.*

87. Typically in countries without legislative CSR requirements; such companies can look to countries with CSR regulations for guidance, such as the United Kingdom and other European countries. *See* Conley & Williams, *supra* note 22, at 2.

88. *Do it Right: Corporate Responsibility is Largely a Matter of Enlightened Self-Interest,* ECONOMIST, Jan. 19, 2008, at 22.

businesses need to do to keep up with (or, if possible, stay slightly ahead of) society's fast-changing expectations. It is an aspect of taking care of a company's reputation, managing risks[,] and gaining a competitive edge."[89] Therefore, a company's reputation must be protected from negative publicity which could "lead to consumer boycotts, as well as difficulties in attracting or retaining quality staff."[90] Moreover, "consumer outrage can inspire regulatory action by governments or shareholder revolts."[91]

3. Using CSR to Avoid Costly Litigation

A notable advantage to a well-developed CSR plan is to avoid future litigation.[92] If companies implement labor and human rights policies for their international counterparts on the front end, they will likely avoid costly litigation in the future. One of the main weapons individuals and non-governmental organizations have used against corporations is the ATS.[93] Although the success of such suits to date is questionable, there is a "high probability that some pending case could further expand the [ATS]," raising concerns for transnational business "because overseas investment is an essential business strategy in a global economy."[94] Perhaps the real success of recent litigation is not in the outcome of individual cases, but in the resulting progress that the suits have brought to CSR measures among transnational corporations:

> One way of looking at CSR is that it is part of what businesses need to do to keep up with (or, if possible, stay slightly ahead of) society's fast-changing expectations. It is an aspect of taking care of a company's reputation, managing its risks and gaining a competitive edge. This is what good managers ought to do anyway. Doing it well may simply involve a clearer focus and greater effort than in the past, because information now spreads much more quickly and companies feel the heat.

Id.; *see also infra* Part I.D.

89. *Id.* at 24.

90. Joseph, *supra* note 49, at 81.

91. *Id.*

92. Specifically, under the ATS discussed *infra* Part II.

93. *See infra* Part I.D.

94. Captain Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, 16 ST. THOMAS L. REV. 627, 633 (2004).

> [T]he ever-present threat of [ATS] encourages companies to improve their human rights policies and practices to avoid litigation. 'The risks to business reputation from credible allegations of human rights abuses create incentives for companies and directors to consider these issues seriously, irrespective of whether an ultimate finding of liability is likely.'[95]

Even a more attenuated connection to human rights violations may land corporations in U.S. courts. Courts have recently allowed plaintiffs to use the ATS in claiming that corporations were complicit in human rights violations by others under the theory of aiding and abetting.[96]

Therefore, when a company fails to take voluntary CSR measures related to human rights, its future may be subject to devastating consequences.[97] As foreign individuals may use tools such as the ATS against multinational corporations in U.S. courts,[98] companies need to be concerned particularly with their potential connection to human rights or other international law violations committed at their overseas operations.[99]

II. FAILURE TO ADDRESS HUMAN RIGHTS CSR MEASURES: LEGAL IMPLICATIONS

Transnational corporations that ignore specific CSR measures may become involved in costly litigation.[100] Corporations accused of human rights violations overseas may be sued by foreigners in U.S. federal courts under the ATS,[101] a statute that has expanded

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95. Bill Baue, *To Avoid Risk of Alien Tort Claims Act Cases, Companies Must Improve Human Rights,* GLOBAL POLICY FORUM, Aug. 17, 2007, http://www.globalpolicy.org/intljustice/atca/2007/0817improverights.htm (citing Cynthia A. Williams & Jon M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?,* 75 U. CIN. L. REV. 75, 93 (2005)).

96. *See infra* Part II.

97. *See* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002),, discussed *infra* Part II.

98. *See supra* Introduction.

99. *See infra* Part II.

100. *See* discussion *supra* Part I; *see also infra* Part II.

101. *See infra* Part II. A.-B.

immensely in the past century, extending liability to multinational corporations.[102]

A. The Alien Tort Statute: An Overview

Modern case law utilizing the ATS "establishes the U.S. court system as one of the few fora in the world that is available to provide judicial enforcement of core international human rights norms."[103] This powerful statute is only a single sentence in length providing 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."[104]

After lying dormant for nearly 200 years, the ATS was expanded, "allowing foreign aliens access to U.S. courts when seeking redress

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102. *See infra* Part II.B.

103. Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 972 (2004).

104. 28 U.S.C.A. § 1350 (West 2009). The purpose of the statute has been analyzed by both scholars and courts and multiple theories exist as to its original purpose. LINDA A. WILLETT, MICHELE S. SUGGS & M. ALEXIS PENNOTTI, THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS, *in* 7 BRIEFLY...PERSPECTIVES ON LEGISLATION, REGULATION, AND LITIGATION 2-3 (Nat'l Legal Ctr. for the Pub. Interest 2003). For example, recent case law suggests that the original goal was "to allow the federal courts to hear cases that could affect the young nation's foreign relations, rather than sending them to state courts." Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1006 (S.D. Ind. 2007). The First Congress enacted the ATS "to ensure that the federal government could address such sensitive cases ['with potential implications for foreign affairs'] in its own courts." *Id.* at 1006 (citing William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 515-22 (1986)). One of the first uses of the statute was to provide restitution for acts of piracy. WILLETT, SUGGS & PENNOTTI, *supra* note 104, at 4 (citing Bolchos v. Darrel, 3 Fed. Cas. 810 (D.S.C. 1795) (No. 1,607)). The district court set precedent in 1795, "providing a judicial forum for foreigners in order to enforce international law as it related to the conduct of individuals." *Id.* Nearly 170 years after the decision regarding piracy, the statute was used to decide an international custody dispute. *Id.* (citing Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961)). The court determined it had jurisdiction to hear the case as a violation of the law of nations had occurred. *Id.* (discussing how the child's mother and step father came to the United States and refused to obey the decision of the Religious Court of Beirut, awarding custody to the child's biological father, a Lebanese national).

for human rights violations committed outside the United States by other foreign aliens."[105] This moment has been referred to as "the birth of transnational litigation in the United States. Transnational litigation involves the use of domestic litigation to affirm international norms."[106]

1. Elements

In order to obtain jurisdiction under the ATS a plaintiff must meet the following three conditions: "(1) an alien sues; (2) the suit is for a tort; and (3) the plaintiff alleges a violation of international law."[107] The two major judicial obstacles for an alien's claim to fit into this framework are subject matter jurisdiction (SMJ) and an internationally recognized cause of action. Under the ATS this cause of action must either be a violation of the "law of nations" or of a treaty.[108] This article focuses on violations of the "law of nations" by U.S. corporations, as this is the applicable cause of action used against transnational corporations.

a. Subject Matter Jurisdiction (SMJ)

Original jurisdiction is vested to the United States District Courts for violations of international law under the ATS.[109] However, "[e]ven

105. WILLETT, SUGGS & PENNOTTI, *supra* note 104, at 4 (citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)). *See also* William J. Aceves, *Affirming the Law of Nations in U.S. Courts*, 49 Fed. Law. 33, 33 (2002).

106. WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA IRALA 4 (Koninklijke Brill NV 2007) [hereinafter THE ANATOMY OF TORTURE].

107. *Id.* at 34.

108. 28 U.S.C. § 1350. *See generally* Upper Lakes Shipping Ltd. v. Int'l Longshoremen's Ass'n, 33 F.R.D. 348, 350 (S.D.N.Y. 1963) ("Plaintiff contends that he has a cause of action arising under the treaty between the United States and Canada concerning the boundary waters between the United States and Canada . . . . The treaty having expressed the remedy to be pursued for violations thereof by a specified tribunal, the Court holds that no action lies in this Court for violation of the treaty (28 U.S.C. § 1350)."); *see also* 3 C.J.S. *Aliens* § 178 (West 2003 & Supp. 2007) (regarding a violation of a U.S. treaty: "Where the treaty provides a specific remedy to be pursued in the event of a violation, the exercise of jurisdiction under the [ATS] is precluded.").

109. 3 C.J.S. *Aliens* § 178.

though federal district courts have jurisdiction of a particular action under the [ATS], they may decline to exercise jurisdiction under the doctrine of forum non conveniens, or because the plaintiff seeks to litigate an essentially political question."[110] Although the ATS contains no statute of limitations,[111] many courts have applied the ten-year statute of limitations set forth under the Torture Victim Protection Act (TVPA).[112] Notably, personal jurisdiction is an additional obstacle for those seeking to sue under the ATS.[113]

b. Cause of Action—Violation of the "Law of Nations"

Once the court determines it is proper to assert jurisdiction, it must then determine "the nature of the 'action' over which . . . section [1350] affords jurisdiction."[114] The "law of nations," also termed

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110. *Id.*

111. *Id.*

112. Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004); Papa v. U.S., 281 F.3d 1004 (9th Cir. 2002); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115 (D.D.C. 2003).

113. Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 750 n.5 (2007). *See generally* Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities For Violations Of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 406 (2002) (citing Int'l Shoe v. Washington, 326 U.S. 310, 315 (1945)) ("In its simplest form, the principle of personal jurisdiction states that a court may hear a complaint against a corporation or individual who has minimum contacts with the forum state so as to satisfy traditional notions of fair play and substantial justice. Federal Rule of Civil Procedure 4(k)(2) permits federal courts to exercise personal jurisdiction over any person or corporation that has sufficient contacts with the United States, but that lacks contacts with any individual state."). When analyzing personal jurisdiction over foreign corporations, courts will look at whether it is "fair" to subject a particular corporation to jurisdiction in the U.S. court system. *See* Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 99 (2d Cir. 2000) (where the court found it fair to hold the defendants amenable to jurisdiction in New York, reasoning that "[t]hey have a physical presence in the forum state, have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions, have a four-decade long relationship with one of the nation's leading law firms, and are the parent companies of one of America's largest corporations, which has a very significant presence in New York. New York City, furthermore, where the trial would be held, is a major world capital which offers central location, easy access, and extensive facilities of all kinds.").

114. Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (D.C.N.Y. 1984).

"international law" is defined as "[t]he legal system governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals."[115] This definition is quite expansive, leaving room for judicial interpretation, but "[a]s a general rule, a violation of the law of nations arises only where there has been a violation by one or more individuals of those standards, rules, or customs that govern the relationships between states or between individuals and foreign states."[116] Judges may determine whether or not a violation of the law of nations has occurred by looking to "'the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or *by judicial decisions recognizing and enforcing that law.*'"[117]

2. *Evolution of the ATS through Judicial Precedent*

The courts have narrowed the definition of the "law of nations" over the years. Moreover, the courts have identified that liability is expansive, holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[118]

a. The Filartiga Case

In *Filartiga*, the Court concluded that a determination of "the substantive principles to be applied" should be made "by looking to international law, which . . . 'became a part of the common law *of the*

115. BLACK'S LAW DICTIONARY 892 (9th ed. 2009).

116. 3 C.J.S. *Aliens* § 178 (West 2003 & Supp. 2007). *See generally* 48 C.J.S. *International Law* § 1 (West 2004). One example of such a violation is torture: "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights and the law of nations, regardless of the nationality of the parties, and whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the ATS provides federal jurisdiction with respect to tort claims." *Id.*

117. Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (citing Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)).

118. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) ("We do not agree that the law of nations, as understood in the modern era, confines its reach to state action.").

United States upon the adoption of the Constitution.'"[119] The Second Circuit determined that the ATS did not provide new rights to aliens, but provided an avenue for aliens to adjudicate certain "rights already recognized by international law."[120] Further, "in determining jurisdiction under the ATS the 'law of nations' must be understood as an evolving standard that will encompass more than it did at the time of the statute's enactment."[121]

In *Filartiga*, two Paraguayan citizens brought suit against another Paraguayan citizen for the torture and murder of their brother and son.[122] The Court of Appeals reversed the lower court's dismissal for lack of jurisdiction, holding that jurisdiction was proper as "'deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.'"[123] The court then added torture to the list of actionable violations of the law of nations under the ATS as "for purposes of civil liability, the torturer has become like the pirate and slave trader before him: *hostis humani generis*, an enemy of all mankind."[124] The decision concluded with this statement: "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[125]

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119. *Filartiga*, 577 F. Supp. at 863 (citing the appellate court's decision in *Filartiga*, 630 F.2d at 886 (2d. Cir. 1980)).

120. *Filartiga*, 630 F.2d at 887 (confirming the federal courts jurisdiction over such matters under the ATS).

121. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004) (citing *Filartiga*, 630 F.2d at 881).

122. Filartiga, 577 F. Supp. at 861.

123. *Id.* (citing the appellate court's decision in Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980)).

124. *Filartiga*, 630 F.2d at 890 (emphasis added) ("In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture.").

125. *Id.* The case was then remanded to the district court where judgment was entered for the plaintiffs. *Filartiga*, 577 F. Supp. at 867 (D.C.N.Y. 1984) ("Judgment may be entered for plaintiff Dolly M.E. Filartiga in the amount of

b. Sosa v. Alvarez-Machain

The reasoning of *Filartiga* was reaffirmed with the United States Supreme Court's decision in *Sosa v. Alvarez-Machain.*[126] There, the Court stated "where there is a norm of international character accepted by the civilized world, and defined by specificity comparable to recognized paradigms, an alien can sue for violations of that norm in federal court under the [ATS]."[127] However, the Court in *Sosa* also made a point to distinguish the jurisdictional aspect of the statute from a new cause of action—the statute did not in and of itself create a new cause of action, but rather a cause of action had to be specifically defined under the "law of nations."[128] Consequently, the causes of action afforded to aliens under the ATS would be limited to specifically defined violations of international law, recognized by the international community as universal norms.[129]

In seeking a modern day definition of such an actionable international law violation, the Court looked to the history of the statute and determined that such violations should be narrowly construed.[130] The Court reasoned that:

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that common law would

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$5,175,000 and for plaintiff Joel Filartiga in the amount of $5,210,364, a total judgment of $10,385,364.").

126. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

127. Harold Hongju Koh, *Foreword* to THE ANATOMY OF TORTURE, *supra* note 106, at xvii.

128. 3 C.J.S. *Aliens* § 178 (West 2003 & Supp. 2007) ("[The statute] only addresses power of courts to entertain certain claims and does not create statutory cause of action for aliens."); *Sosa*, 542 U.S. at 714 ("We think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.").

129. *Sosa*, 542 U.S. at 714.

130. *Id.* at 723-25.

> provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[131]

The Court then provided further guidance to the lower courts that such claims should be "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[132] Moreover, the Court referred to Blackstone's "three specific offenses against the law of nations . . . : violation of safe conducts, infringement of the rights of ambassadors, and piracy."[133]

The Court stated the judiciary should take caution when creating new causes of action as violations of the law of nations.[134] "It was this narrow set of violations of the law of nations . . . that was probably on minds of the men who drafted the ATS with its reference to tort."[135] Although not limiting the definition of the law of nations to the three

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131. *Id.* at 724.

132. *Id.* at 725. The Court recognized Blackstone's three part division of violations of the "law of nations." The first part was rights between states: "general norms governing the behavior of national states with each other." *Id.* at 714 (citing to 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)); "[t]his aspect of the law of nations thus occupied the executive and legislative domains, not the judicial." *Sosa*, 542 U.S. at 725. The second part was individual rights: a "pedestrian element . . . that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Id.* at 715. The third part was "finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Id.* at 715.

133. *Sosa*, 542 U.S. at 715 (discussing how these violations were included under the third sphere of the law of nations explained by Blackstone, the private/state overlap). The Court reasoned that "[a]n assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war." *Id.*

134. *Id.* at 725, 727 (where the Court further reasoned that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" and that particular caution should be heeded by the Court where there is potential backlash in foreign affairs: "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.").

135. *Id.* at 715.

eighteenth-century crimes referred to by Blackstone, the Court required the cause of action to have comparable "definite context and acceptance among civilized nations."[136] The violation must be of a specific nature and it must be recognized internationally as a universal norm.[137] Alvarez invoked the ATS against Sosa in his arbitrary arrest claim. However, the Court held arbitrary arrests were not recognized violations of the law of nations and therefore Alvarez lost his case.[138]

The interpretation of the ATS has expanded "in three major ways with far-reaching consequences."[139] The courts have held (1) "the [ATS] confers tort jurisdiction over *all* violations of international law as contemporaneously interpreted"; (2) "MNCs [multinational corporations] can be targeted as defendants when they act in concert with a foreign state"; and (3) "foreign plaintiffs [are not compelled] to bring their cases in their national courts whenever possible."[140] However, it is important to keep in mind that "the [ATS] is not a waiver of sovereign immunity, and does not authorize suits against the United States."[141] It is within the court's discretion "whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law."[142]

B. Corporate Liability

Transnational litigation under the ATS was further expanded to include violations by corporations doing business overseas:[143]

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136. *Id.* at 732.

137. *Id.* at 732-33 (providing a list by the Court of many cases and providing further explanation supporting this narrow interpretation of the "law of nations").

138. *Id.* at 736.

139. GARY CLYDE HUFBAUER & NICOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 4 (Institute for International Economics 2003).

140. *Id.*

141. 3 C.J.S. *Aliens* § 178 (West 2003 & Supp. 2007).

142. Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 265, 269 (2d Cir. 2007).

143. THE ANATOMY OF TORTURE, *supra* note 106, at 6-7 ("ATS litigation soon extended beyond individual defendants and direct perpetrators. Courts began to recognize indirect liability for human rights abuses through principles of command responsibility and accomplice liability. In addition, multinational corporations were sued for human rights abuses and environmental harms that occurred in their

"[C]orporations may be held liable under international law for violations of *jus cogens* norms."[144] According to the U.S. Supreme Court the term "individual" is synonymous with "person," and because "'person' often has a broader meaning in the law than in ordinary usage . . . a corporation is generally viewed . . . as a person in other areas of law."[145] Class action lawsuits are an additional avenue taken against corporate defendants through the ATS, "reveal[ing] that human rights often involved widespread and systematic abuses against civilian populations."[146] Individuals who otherwise may not have the

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overseas operations. These lawsuits alleged that the corporations were complicit in international law violations committed by foreign governments through their joint ventures or other cooperative arrangements.").

144. Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 335 (S.D.N.Y.2005); *see also* Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003). *See generally* BLACK'S LAW DICTIONARY 937 (9th ed. 2009) (defining *jus cogens* as "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted" and is seen as a universally recognized "norm" that may be codified in law but does not need to be); *see also* Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (stating that *[j]us cogens* violations are "violations of norms of international law that are binding on nations *even if they do not agree to them.*") (emphasis added).

145. *Sinaltrainal,* 256 F. Supp. 2d at 1358-59 (quoting Clinton v. New York, 524 U.S. 417, 428, 428 n.13 (1998) (discussing the court's specific reference to corporate liability under the Torture Victim Protection Act (TVPA)). It also mentioned potential liability under the ATS: "Given that the legislative history does not reveal an intent to exempt private corporations from liability, that private corporations can be sued under the ATS, and that the term 'individual' is consistently viewed in the law as including corporations, this Court concluded that the TVPA claim against Bebidas should not be dismissed for lack of subject matter jurisdiction." *Id.*

146. THE ANATOMY OF TORTURE, *supra* note 106, at 7 ("In response to these developments, the U.S. government and, in particular, the George W. Bush administration, became increasingly involved in ATS litigation, often filing Statements of Interest on behalf of defendants. In these filings, the Bush administration argued that ATS litigation harmed U.S. foreign policy and was often in conflict with the economic and political interests of the United States."). *See also* Harold Hongju Koh, *Restoring America's Human Rights Reputation,* 40 CORNELL INT'L L.J. 635, 638 (2007). "The Bush Administration has regularly opposed efforts to redress human rights abuses through civil liberty under the [ATS], although both the Carter and Clinton Administrations had filed briefs in support of victims' claims." *Id.* at 636. Moreover, the Bush Administration's "obsessive focus on the War on Terror" had tarnished "America's longstanding commitment to human

means to engage in costly and emotionally draining litigation against transnational corporations are able to do so through class actions.[147]

Multinational corporations may commit human rights violations by "directly violating human rights, assisting in violations, failing to prevent violations, remaining silent about violations, or [] operating in a state that violates human rights."[148] The most controversial and potentially damaging to a company's reputation is its complicity with human rights violations.[149] These violations are often committed by the foreign government or military rather than the corporate representatives themselves.[150] Generally, corporations are "more likely to be complicit (with their state partner) in the commission of war crimes, genocide, and crimes against humanity, rather than directly to commit those crimes themselves."[151] The theories most widely used to hold multinational corporations civilly liable for their

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rights" and "the International Criminal Court (ICC), and the U.N. Human Rights Council—have diminished gravely America's standing as the world's human rights leader." *Id.*

147. William J. Aceves, *Actio Popularis? The Class Action in International Law,* 2003 U. CHI. LEGAL F. 353, 354 (2003) ("Many of these victims are impoverished and isolated, with little access to a just legal system in their own countries. Class action designation in the United States allows these victims to seek redress in a single proceeding, reducing transaction costs and promoting efficiency in litigation. In light of the often extensive and complex nature of each individual claim, class action lawsuits may provide the only realistic option for redress. Class action designation also provides a degree of anonymity to victims who might otherwise face repercussions from the defendants for filing individual lawsuits.").

148. Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 8 (2003).

149. Such possible complicity is exemplified in Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), discussed *infra* Part II.C.; *see also In re* S. African Apartheid Litig., 246 F. Supp. 2d 538 (S.D.N.Y. 2004), discussed *supra* Introduction.

150. *Id.*

151. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 970 (2004); *see also* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda,* 101 AM. J. INT'L L. 819, 831 (2007) (discussing the role of international law in corporate social responsibility and states that international tribunals have developed a standard for individual liability when corporations are complicity involved in a violation rather than directly involved.).

complicity with human rights violations are "aiding and abetting" and "vicarious liability" theories.[152]

C. *Expansion of the ATS Against Corporations: A Case Study—Doe I v. Unocal Corp. (Unocal)*

The Ninth Circuit Court of Appeals set the precedent that corporations may be held liable for aiding and abetting human rights violations under the ATS, and further defined aiding and abetting in accordance with international standards as "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[153] The court also followed international case precedent to further narrow this definition explaining that the requisite "assistance need not have caused the act of the principal,"[154] but rather, the acts of the accomplice must "have the required '[substantial] effect on the commission of the crime' where 'the

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152. Captain Rosen, *supra* note 94, at 635. Rosen criticizes ATS litigation, claiming that it threatens U.S. security operations which rely heavily on contracted combat support services overseas. *Id.* Rosen argues that ATS is a "weapon of judicial activism [which] can be used to ambush DOD planners and contractors when the order is given to engage a foreign enemy." *Id.* at 628.

153. Doe I. v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002).

154. *Id.* at 950 (quoting Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, ¶ 391 (Feb. 22, 2001), *available at* http://www.un.org/icty/foca/trialc2/judgement/index.htm). *Cf.* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 275-76 (2d Cir. 2007) (holding that aiding and abetting is a violation of international law but appearing to favor the Rome Statute's definition as that most widely excepted by the international community as "the Statute has been signed by 139 countries and ratified by 105, including most of the mature democracies of the world."). The court highlights the Rome Statute's *mens rea* standard as requiring "assistance rendered to the commission of a crime by a group of persons acting within a common purpose, a defendant is guilty of aiding and abetting the commission of a crime only if he does so '[f]or the purpose of facilitating the commission of such a crime.'" *Id.* (quoting Rome Statute of the International Criminal Court art. 25(3)(c)-(d), July 17, 1998, 2187 U.N.T.S. 90). The District Court also upheld its decision denying defendants' motion to dismiss, holding that "knowledge – rather than intent – is the [*mens*] *rea* requirement for an aiding and abetting claim under the law of nations." Ntsebeza v. Daimler AG (*In re* S. African Apartheid Litig.), 617 F. Supp. 2d 228, 297 (S.D.N.Y. 2009). "Therefore, this Court did not err in holding that an individual is liable for aiding and abetting under the law of nations if he or she *knows* that his or her acts will provide substantial assistance to a crime in violation of customary international law." *Id.* at 301.

criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.'"[155]

This case was brought by "[v]illagers from the Tenasserim region in Myanmar," formerly known as Burma.[156] Plaintiffs testified that the Myanmar Military subjected them to forced labor and, "in furtherance of the forced labor program[,] . . . to acts of murder, rape, and torture."[157]

> For instance, Jane Doe I testified that after her husband, John Doe I, attempted to escape the forced labor program, he was shot at by soldiers, and in retaliation for his attempted escape, that she and her baby were thrown into a fire, resulting in injuries to her and the death of the child.[158]

The military has been the source of government in Myanmar since 1958.[159] Unocal became involved in "the Project" to "produce, transport, and sell natural gas from deposits in the Yadana Field off the coast of Myanmar" in 1992.[160] The connection of the Myanmar Military to the Project was clear.[161] The evidence was piling up

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155. *Unocal Corp.*, 395 F.3d at 947 (quoting Prosecutor v. Tadic, ICTY-94-1, ¶ 688 (May 7, 1997), *available at* http://www.un.org/icty/tadic/trials2/judgement/index.htm).

156. *Unocal Corp.*, 395 F.3d at 936.

157. *Id.* at 939.

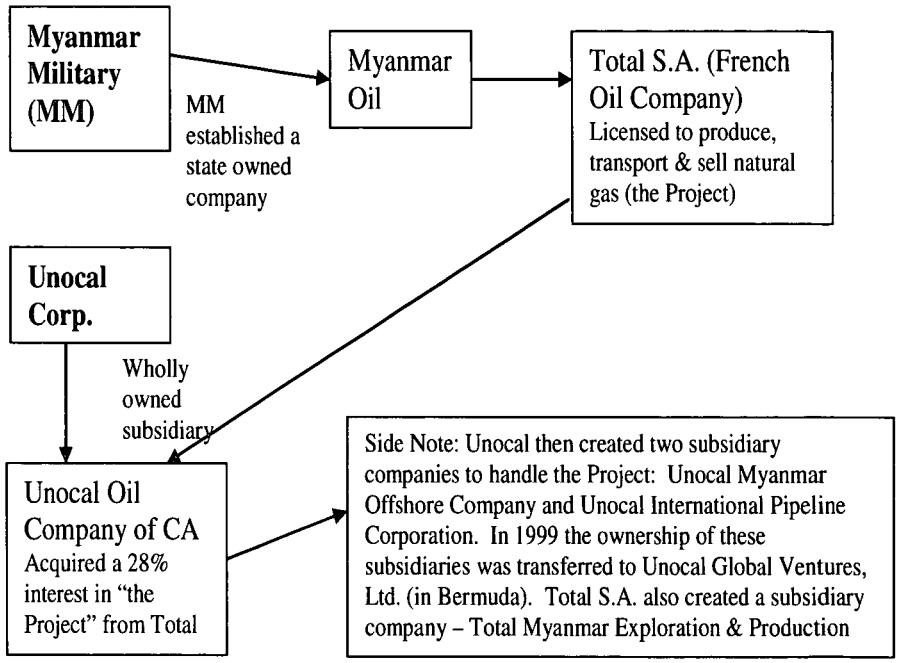
158. *Id.* at 939-40 ("Other witnesses described the summary execution of villagers who refused to participate in the forced labor program, or who grew too weak to work effectively. Several Plaintiffs testified that rapes occurred as part of the forced labor program. For instance, both Jane Does II and III testified that while conscripted to work on pipeline-related construction projects, they were raped at knife-point by Myanmar soldiers who were members of a battalion that was supervising the work.").

159. *Id.* at 937.

160. *Id.* (stating that Unocal Corp. purchased "a 28% interest in the Project from Total," a French oil company that was licensed directly by the state owned company, Myanmar Oil and Gas Enterprise (Myanmar Oil), "to produce, transport and sell natural gas." Myanmar Oil was directly established by the Myanmar Military).

161. *See id.* The following chart displays the connection between the Myanmar Military and Unocal:

against Unocal that it had knowledge that the Myanmar Military was directly overseeing the companies' operations and security, and that Unocal knew of the Military's human rights violations. For example, "even before Unocal invested in the Project, Unocal was made aware-by its own consultants and by its partners in the Project [the International Labor Organization record][162] and that the Myanmar Military might also employ forced labor and commit other human rights violations in connection with the Project."[163]



162. *Id.* at 940; *see, e.g., Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Commission of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)* Parts III.8, V.14(3) (1998) ("[D]escribing several inquiries into forced labour in Myanmar conducted between 1960 and 1992 by the International Labor Organization, and finding 'abundant evidence . . . showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military.").

163. Doe I v. Unocal Corp., 395 F.3d 932, 940 (9th Cir. 2002) ("[E]ven before Unocal invested in the Project, Unocal was made aware-by its own consultants and by its partners in the Project-of this record and that the Myanmar Military might also employ forced labor and commit other human rights violations in connection with

The Ninth Circuit Court of Appeal reversed the district court's grant of summary judgment in favor of Unocal on Plaintiffs' ATS claims for forced labor, murder, and rape.[164] When analyzing the ATS, the Court stated it previously found the ATS "provides a cause of action, as long as 'plaintiffs . . . allege a violation of 'specific, universal, and obligatory' international norms as part of [their] [ATS] claim.'"[165] The case was remanded to the district court,[166] however the *Sosa v. Alvarez-Machain* case was decided in the midst of Unocal's appeal and on December 8, 2004, the parties settled the case.[167] "While the terms of the settlement were confidential, some reports suggest that the settlement reached $30 million.[168]

Unsurprisingly, Unocal made the ultimate decision to settle because the lawsuit had no doubt already tarnished the company's name. It is also unsurprising that two weeks after the settlement, the company was bought out by "the oil giant" ChevronTexaco.[169] The settlement and merger are "no coincidence, and it underscores just how seriously these legal cases are now being taken in corporate boardrooms. Once considered mere nuisances, lawsuits implicating corporations in international human rights abuses have become major obstacles to corporate profitability and prospects."[170]

Although the *Unocal* case resulted in a settlement, it maintained the precedent that a corporation may be held liable for "intentionally

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the Project."). *Contra* Captain Rosen, *supra* note 94, at 635 (contending "[t]here was no evidence that the U.S. parent company had direct knowledge either that the security detail had been hired, or of its activities.").

164. *Unocal Corp.*, 395 F.3d at 962. The court affirmed the summary judgment grant in favor of Unocal regarding the ATS claims for torture, dismissed all of the *Doe*-Plaintiffs' claims against the Myanmar Military and Myanmar Oil, and affirmed the summary judgment grant for Unocal on the Doe-Plaintiffs' RICO claim against Unocal. *Id.* at 962-63.

165. *Id.* at 944 (citing Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (quoting *In re* Estate of Ferdinand E. Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994). This standard has since been narrowed with the Court's decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).

166. *Unocal Corp.*, 395 F.3d at 963.

167. THE ANATOMY OF TORTURE, *supra* note 106, at 106-107.

168. *Id.*

169. Daphne Eviatar, *A Big Win for Human Rights*, NATION, May 9, 2005, http://www.thenation.com/doc/20050509/eviatar.

170. *Id.*

participating in human rights violations carried out by State authorities—"[e]ven though Unocal did not carry out these violations itself."[171] Unocal also set the precedent that forced labor is indeed a "*jus cogens* violation of international law, and has been held to provide a cause of action in a number of ATS cases."[172] However, the ATS may not be as helpful for litigants alleging international labor rights violations, other than the most egregious human rights violations, which are internationally recognized *jus cogens* violations.[173] Such actionable *jus cogens* violations include: "genocide; slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading punishment; prolonged arbitrary detention; systematic racial discrimination; or a consistent pattern of gross violations of internationally recognized human rights."[174]

III. CSR AS A TOOL: A MULTINATIONAL CORPORATION'S SOLUTION TO THE LEGAL IMPLICATIONS OF THE ATS

ATS litigation focuses on violations of international law. U.S. courts have interpreted a cause of action under the "law of nations" very narrowly.[175] ATS litigation has an emphasis on human rights violations[176] as such violations are recognized by the international

171. 17 NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 81 (Intersentia 2002).

172. *Developments in the Law*, *supra* note 47, at 2219 (emphasis added).

173. *Id.* at 2217.

174. Elvia R. Arriola, *Accountability for Murder in the Maquiladoras: Linking Corporate Indifference to Gender Violence at the U.S.-Mexico Border*, 5 SEATTLE J. FOR SOC. JUST. 603, 629 (2007) (discussing the effects of the North American Free Trade Agreement (NAFTA) on labor standards and violence in Mexico. When analyzing the possibility to invoke the ATS on transnational companies, Arriola states that it is difficult to determine whether the actions of such companies technically "rise to the level of violating the 'law of nations'" and notes that "it is necessary to provide evidence that the employer and the Mexican government are together cooperating to enforce employer policies and practices that are recognized as prohibited by all nations.").

175. *See supra* Part II.

176. BLACK'S LAW DICTIONARY 809 (9th ed. 2009) (defining "*human rights*" is defined as "[t]he freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.").

community. When looking at specific violations, corporations can look to past ATS litigation as a guideline of what not to do. Multinational corporations should implement sound Corporate Social Responsibility ("CSR") measures directly related to the protection of human rights, especially when doing business overseas where conditions created by corrupt local governments may need to be considered.

A. ATS Litigation: Human Rights Violations Trigger Reputational Harm Globally

Although the ATS has legal ramifications for either a U.S. company or a company amenable to U.S. jurisdiction when individuals abroad are wronged as a result of some action taken by such corporations, litigation has largely been unsuccessful in the sense that no solid judgments against these corporations have been entered.[177] However, as previously discussed, the real victory for those seeking justice against such corporations may not come in the form of a judgment, but rather as tarnish to the corporation's reputation or through a monetary settlement.[178] In the past, individuals have used the ATS merely to obtain a sense of justice, realizing that the monetary award may never come.[179]

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177. *See supra* Part II.

178. *See* discussion *supra* Part II.C.

179. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Although a judgment was obtained in *Filartiga*, the likelihood of collection was doubtful and was unsuccessful. *See* THE ANATOMY OF TORTURE, *supra* note 106 at 76. However, the Filaritgas, "still consider their case a success. For the Filartiga family, the lawsuit was never about money; it was about seeking justice for [their son] and keeping his memory alive." *Id.* The *Filartiga* case differs from the discussion of this article in that it was an individual suing an individual, instead of a lawsuit against a corporation; however, the point is the same: the purpose of a lawsuit is not always for monetary gain. *See e.g., id.* At 76, 175-83 (discussion the multiple purposes for bringing suit against those who violate human rights, including accountability, deterrence of future crimes, public education and awareness, and psychological benefits to the victims such as confronting their assailant, telling the story, and feeling a sense of justice). The author feels the lack of obtaining judgments against multinational corporations being accused of human rights abuses means nothing to the future commencement of such suits. To the contrary, the most recent litigation expanding the ATS and including the theory of aiding and abetting as a viable

Therefore, implementing sound CSR measures tailored at avoiding a corporation's involvement with international law violations, specifically human rights violations, is an important step to avoid litigation—for the corporation may initially balance the costs of litigation as purely economic, but the general public and any potential plaintiffs see such litigation as much more damaging.

1. Globalization Facilitates Communication—Reputations are Ruined with Ease

One such damage occurs through an otherwise profitable movement—globalization. Although globalization has proved profitable to many corporations as increased trading and financial opportunities have come with the lowering of trade barriers and the freer movement of goods and services, there are also potential downfalls to these corporations as the improvement of technology has also increased the speed of communication.[180] Globalization facilitates communication—both good and bad.

The public notification that certain companies are not acting in accordance with internationally recognized human rights norms is now communicated at a much faster pace.[181] Therefore, the initial filing of an ATS lawsuit against a multinational corporation can bring immediate reputational damage. If companies implement sound CSR measures that will avoid such violations on the front end, they can likewise create a positive reputation on the front end, perhaps making an immediate tarnish to its reputation more implausible. If the public sees the company as one that invests in the assurance that human rights norms are being respected down the chain of command, it will be less likely to make snap judgments on the immediate filing of an ATS suit.

2. Considerations of Local Laws and Policies

Importantly, companies must also address local culture and government when doing business overseas and implementing CSR

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federal claim to be used against corporations, seems to suggest that more suits will be filed.

180. *See supra* Part I.

181. *See supra* Part I.

measures to avoid ATS litigation and reputational harm: "effective implementation of corporate social accountability standards requires a refined approach that considers local circumstances in developing countries."[182] For example, if the local government is corrupt or run by a military regime notorious for committing human rights violations,[183] companies should consider doing business elsewhere, or should at least be aware of the possible costs associated with both defending against an ATS suit and obtaining a poor reputation.

However, when focusing on the ATS, corporations can create more of a "one-size-fits-all" approach as international law and U.S. case law precedent have provided certain red flags for corporations to avoid.[184] Multinational corporations have been put on notice that the general public is paying more attention to the overseas activities of companies—those individuals directly affected are reaching out to seek legal redress in the U.S. courts under the ATS and the customers and investors of such corporations are making more informed decisions about their personal connection to the product or the company, choosing to buy from or invest in companies that have sound CSR measures.[185]

Therefore, multinational companies need to be aware of these implications and learn from the mistakes of other corporations when

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182. *E.g.*, Lin, *supra* note 30; *see also Going Global: CSR is Spreading Around the World, but in Different Guises*, ECONOMIST, Jan. 19, 2008 (indicating that multinational corporations must consider the differing cultural values and individualized priorities of each country—"a one-size-fits-all approach to corporate responsibility may not work. What is right for Europe may not be appropriate for India.").

183. *See Unocal* discussion, *supra* Part II.C.

184. *See supra* Parts I-II.

185. *See supra* Part I; *see also The Good Consumer,* ECONOMIST, Jan. 19, 2008, at 16 ("In 2005 ABC Home Furnishings allowed two Harvard University researchers, Michael Hiscox and Nicholas Smyth, to conduct an experiment on two sets of towels. One lot carried a label with the logo 'Fair and Square' and the following message: *These towels have been made under fair labour conditions, in a safe and healthy working environment which is free of discrimination, and where management has committed to respecting the rights and dignity of workers.* The other set had no such label. Over five months, the researchers observed the impact of making various changes such as switching the label to the other set of towels and raising prices. The results were striking: not only did sales of towels increase when they carried the Fair and Square label, they carried on increasing each time the price was raised.").

operating overseas. For example, evidence showed that Unocal was informed by its consultants of the militarized state in Myanmar, and of the fact that human rights abuses were ongoing.[186] Based on such knowledge, Unocal should have considered the ramifications of such abuses, if not for the individuals who objected to forced labor in Myanmar then for the benefit of the company's shareholders.[187] The proactive use of CSR measures regarding human rights enable corporations to act in both offensive and defensive manners, initiating a solid company reputation and blocking ATS litigation.[188]

B. Legislative CSR vs. Voluntary CSR

Some advocate the legislation of CSR, forcing minimum standards on companies with fear of sanction or other penalties for failure to comply.[189] Although implementing legislative CSR measures regarding human rights may ease a corporation's concerns regarding ATS litigation, legislation would not necessarily solve the problem and would create additional costs and inefficiencies for U.S. corporations and foreign investors alike. Moreover, government involvement in CSR may lead to the result that former President Bush and others have feared regarding human rights legislation—the downfall of international investment and the economy.[190] One of the major incentives for transnational companies seeking to do business overseas is the lower cost of production. Increasing costs through increased overhead associated with regulatory operating costs may deter companies from doing business abroad, or it may put companies at a disadvantage if similar restrictions are not imposed on competitors in other countries.[191]

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186. *See supra* Part II.C.

187. *See supra* Part II.C.

188. *See supra* Part I.

189. *See* McInerney, *supra* note 18, at 189 (discussing McInerney's argument that it is a state's responsibility to regulate and that in doing so they could offer "monetary incentives and disincentives" (such as taxing)).

190. *See* THE ANATOMY OF TORTURE, *supra* note 106.

191. *See* Joseph, *supra* note 49, at 80 ("Home States are . . . reluctant to [regulate] . . . as they perceive that such regulation puts their corporations at a competitive disadvantage with other countries' corporations.") (citing D. Cassel, *International Security in the Post Cold-War Era: Can International Law Truly*

Instead, companies should take a more proactive voluntary CSR approach regarding human rights compliance to avoid possible litigation under the ATS and to prevent the enactment of regulations and compliance programs under direct government supervision. Alternatively, if ATS litigation continues to rise and corporations become notorious for the facilitation of human rights violations, the public may demand more government involvement. Such a government reaction occurred in response to insider trading and the scandals of Enron, WorldCom, Healthcare and Tyco, resulting in the creation of the Sarbanes-Oxley Act of 2002.[192] Some argue that the government overstepped its boundaries in response and, in a sense, overcompensated for a preexisting problem.[193] Additional arguments suggest that creating these strict regulations places U.S. companies (or companies trading on the U.S. National Exchange) at a competitive disadvantage because companies in other countries are not forced to comply with such detailed regulations.[194]

Corporations may face the same dramatic overregulation if their human rights protections are inadequate. However, regardless of whether the government will become involved in a corporation's CSR

Effect Global Political and Economic Stability?—Corporate Initiatives: A Second Human Rights Revolution?, 19 FORDHAM INT'L L.J. 1963, 1975 (1996)).

192. Pagnattaro & Peirce, *supra* note 46, at 393, 399 (citing The Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002)). The Sarbanes-Oxley Act contained "five specific objectives: increasing accountability of corporate executives and board members; increasing the accuracy of financial information and encouraging complete disclosure; improving disclosure of information by eliminating conflicts of interest both internally and externally; fostering an ethical climate in which employees at all levels are encouraged to report unethical behavior to management; and ensuring that those who reported would be protected from retaliation." *Id.* at 399-400.

193. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 234-35 (2007) ("Sarbanes-Oxley is a deterrent that has made the U.S. capital markets too costly for those issuers able to opt for other listings. So viewed, overregulation appears to be a force that constrains and retards financial development.").

194. *Id.*; *see also* Carl J. Nelson, *Hedge Fund Regulation: A Proposal to Maintain Hedge Funds' Effectiveness Without Sec Regulation*, 2 BROOK. J. CORP. FIN. & COM. L. 221, 237 (2007) (discussing the recent shift towards deregulation due to encourage rather than inhibit investment in U.S. markets, and stating that the same negative impacts may affect hedge funds if such strict regulations are imposed).

measures regarding human rights overseas, corporations should nevertheless take a proactive approach to distance themselves from possible human rights violations and maintain a positive reputation with shareholders and stakeholders alike.[195]

C. Proactive CSR: Specific Human Rights Related CSR Measures to Avoid ATS Litigation

One way for companies to effectively avoid litigation under the ATS is to abstain from committing the specific crimes previously recognized by the U.S. courts as violations of the law of nations. For example, torture, slavery, and forced labor are among the recognized violations of international law which will afford an alien a cause of action.[196] Therefore, companies can look to U.S. case law for guidance when implementing CSR measures linked to human rights.

Once companies have implemented internal CSR procedures related to human rights they can start looking at ways to profit beyond the avoidance of ATS litigation. To gain the effective marketing edge while simultaneously benefiting its stakeholders, a company must publicize its CSR measures in a manner that allows stakeholders to trust that the company did implement such measures. For example, the use of third party organizations to monitor and report on a company's CSR measures related to human rights would be one way to attain this goal.[197]

A company should follow both internal and external codes of conduct. In addition to having a third party monitor a corporation's human rights compliance, there should be an internal compliance officer (perhaps comparable to compliance officers created after Sarbanes Oxley, only utilized voluntarily by corporations instead of forced upon them through legislation). This internal officer could also maintain independence as an organizational *ombudsman*,[198] hired to help monitor problems and offer suggestions in advance.

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195. *See supra* Part I.

196. *See supra* Part II.

197. *See* discussion *supra* Part I.

198. BLACK'S LAW DICTIONARY 1196 (9th ed. 2009) (defining "*ombudsman*": "1. An official appointed to receive, investigate, and report on private citizens' complaints about the government. 2. A similar appointee in a nongovernmental organization (such as a company or university).").

Further, this internal compliance officer should be involved in decision making at the front end of investments overseas (e.g., manufacturing plants, oil, etc.). There should be someone inside determining costs and benefits, including human rights violations as a major cost (both reputational and potential litigation costs).[199] The internal officer, although paid by the corporation, should have some independent basis for objectivity, like a Certified Public Accountant whose reputation as an accountant would take precedence over the temptation to commit fraud or other crimes on behalf of the company. The internal officer should maintain objectivity by sustaining a level of attenuation similar to the preexisting independent model created by Social Accountability International ("SAI"), a third party group that certifies a company is in compliance with certain human rights measures.[200] However, this additional step also certifies independent specialists to work in various corporate fields, serving an "in-house" function to monitor the corporation's compliance with human rights norms, especially those found to be violations of "international law" under previous ATS case precedent.[201]

Therefore, external standards and independent auditors could be created in a manner similar to those created under SAI, however, with more of an emphasis on violations of human rights.[202] Although the focus of SAI is more generally focused on labor standards which sometimes overlap with human rights violations, it is a good example of the type of third party organization which could be instrumental in monitoring the human rights measures more specifically geared at avoiding ATS litigation.

Another possible accreditation procedure could be similar to that of the U.S. Food and Drug Administration,[203] whereby companies are given ratings according to their compliance with international human rights norms. The ratings could be publicly available for investors and

199. *See supra* Part I.

200. *See supra* Part I.C.

201. *See supra* Part II.

202. *See supra* Part I.C.

203. *See* U.S. Food and Drug Administration, *available at* http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DevelopmentResources/Over-the-CounterOTCDrugs/ucm106841.htm (follow "Drugs"; then follow "Development and Approval Process (Drugs)"; then follow "Development Resources" hyperlink) (last visited Jan. 9, 2010).

customers to view on either a government website or through an independent corporation such as SAI. Again, the focus will generally be on a corporation's complicity in human rights violations as businesses are less likely to be directly involved in such violations.[204]

CONCLUSION

Publicly-traded multinational corporations face an immense amount of pressure in today's globalized society as they are not only expected to maintain profits while competing against corporations around the world, but are also now expected to take on a somewhat governmental role in dealing with their overseas business ventures. These corporations must ensure that such operations do not implicate the corporation in human rights violations, for failure to do so could bring a highly publicized suit against the corporation under the ATS. However, if corporations enact proactive human rights CSR measures internally and obtain certification for implementing independent external standards they can avoid ATS litigation while simultaneously improving their reputation among stakeholders.

204. *See* Kinley & Tadaki, *supra* note 151, at 970.