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The Alien Tort Statute, Civil Society, and Corporate Responsibility

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THE ALIEN TORT STATUTE, CIVIL SOCIETY, AND CORPORATE RESPONSIBILITY

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The topic of this panel is civil participation in the global trading system, with a particular focus on *Doe v. Unocal Corp.*[1] and use of the Alien Tort Statute (ATS) to enforce fundamental human rights norms against multinational corporations. These comments will therefore attempt to locate *Doe v. Unocal* and other ATS litigation in the broader efforts of civil society to establish and maintain normative principles for corporate responsibility in the global trading regime. This comment first explains the role of ATS litigation in the broader civil society context and the contribution of ATS cases to the development and enforcement of international human rights law. It then briefly responds to two recent criticisms of ATS litigation: that ATS litigation is spiraling out of control and that suits under the ATS improperly infringe on U.S. foreign relations. I argue that ATS litigation has played an important role in the recent overall global development of enforceable human rights norms, that traditional procedural and prudential mechanisms are working effectively to identify appropriate ATS claims, and that extraordinary measures such as the current administration's attempts to obtain dismissal of corporate ATS suits are contrary to longstanding U.S. human rights policy and simply damage the United States' standing as an international leader in the promotion and protection of human rights.

I. THE ATS AND GLOBAL CIVIL SOCIETY

The *Unocal* case and other suits under the ATS represent the flipside of the relationship between civil society and the World Trade Organization (WTO) considered in the first half of this symposium. Unlike the situation at the WTO, where civil society is knocking for admission at the door of an established international institution with

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1. Doe v. Unocal Corp., No. 00-56603, 2002 WL 31063976 (9th Cir. 2002), *reh'g en banc granted, opinion vacated by* Doe v. Unocal Corp., No. 00-56628, 2003 WL 359787 (9th Cir. 2003) (settlement entered March 2005).

enforcement capacity over a body of international law, in the ATS context, nongovernmental organizations (NGOs) and other members of civil society are searching for a venue in which they can enforce established international norms. I am reminded a bit of the Pirandello play, *Six Characters in Search of an Author*.[2] Here, we have six figurative human rights plaintiffs in search of a forum. They are looking for some place in the world where they can enforce their claim, because no international tribunal or institution currently exists that is capable of enforcing international human rights norms in most contexts, even universally recognized norms like genocide and torture. 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, in the limited circumstances discussed below.

The *Unocal* case arose from a contact between a law student and the General Secretary of the Federation of Trade Unions of Burma, U Maung, who was living as a refugee in Thailand following his involvement in the 1988 pro-democracy uprising in Burma. U Maung had read a story in *Reader's Digest* about an American couple who had successfully sued for damages after their dog was accidentally over-anesthetized by a veterinarian. U Maung read the story and thought that if it was possible under U.S. law to sue your veterinarian for the accidental death of your dog, shouldn't you be able to sue for damages when a U.S. corporation used forced labor to build a billion dollar pipeline in a country like Burma? He asked this question to a U.S. law student. Apparently it was an extremely diligent law student who went back and researched possible causes of action, and the *Doe v. Unocal* litigation was born.[3]

Recent corporate ATS cases such as *Unocal* have been the product of three converging forces in civil society and the global trading regime. The first force is the development of the international human rights regime. The post-World War II era, and particularly the past several decades, has seen the proliferation and universal acceptance of fundamental international human rights norms. This process has occurred through the development of international instruments such as the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social, and Cultural Rights; specialized treaty regimes such as the Torture and Genocide Conventions and the Convention on the Rights of the Child,

2. LUIGI PIRANDELLO, *Six Characters in Search of an Author*, *in* PIRANDELLO'S MAJOR PLAYS 65, 65-120 (1991).

3. *See* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 187 (2002).

and regional human rights instruments. This promulgation of human rights instruments has been complemented by the establishment of international and regional bodies charged with overseeing compliance with fundamental human rights norms. The resulting multifaceted network of law and institutions has helped create the body of norms being enforced through the ATS.

The second force impacting corporate ATS litigation is the globalization of the international economy. Corporations now are scouring the far corners of the earth in search of profits and entering transnational business arrangements as they never have before.[4] The increasingly global reach of multinational corporations leads them to places like Burma, where they may, on occasion, enter into joint ventures with governments that are gross human rights violators, or otherwise aid and abet egregious human rights abuse.

The third critical force in this process is the development of the internet and global telecommunications. Increasingly worldwide access to rapid and inexpensive communication systems allows global civil society to know what is happening in places like Burma, to coordinate international responses in distant locations, and to report developments instantaneously around the world.

Suits brought under the ATS to enforce fundamental human rights norms are part of a very broad, decentralized but concerted transnational effort by international civil society to try to articulate, disseminate and integrate fundamental human rights into domestic practices.[5] *Doe v. Unocal*, for example, simply represents one very important thread in an elaborate fabric that civil society has crafted targeting human rights violations in Burma. Since the Burmese military junta violently suppressed the 1988 democratic uprising and refused to recognize the democratically elected government in 1990,

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4. Sarah H. Cleveland, *Why International Labor Standards?*, *in* INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 141 (Robert J. Flanagan & William J. Gould, IV, eds., 2003) (discussing capital mobility).

5. As McDougal and Reisman have observed, international law is created through a "staggering[ly]" diverse process of communication within the global community:

> The peoples of the world communicate to each other expectations about policy, authority, and control, not merely through state or intergovernmental organs, but through reciprocal claims and mutual tolerances in all their interactions. The participants in the relevant processes of communication . . . include not merely the officials of states and intergovernmental organizations but also the representatives of political parties, pressure groups, private associations, and the individual human being qua individual with all his or her identifications.

Myres S. McDougal & W. Michael Reisman, *The Prescribing Function: How International Law Is Made*, 6 YALE J. WORLD PUB. ORD. 249 (1980), *reprinted in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 84 (1981).

the international community has united in condemning human rights conditions in that state. The U.N. General Assembly and the U.N. Human Rights Commission have adopted annual resolutions condemning Burma's human rights practices.[6] The 1991 Nobel peace prize was awarded to Aung San Suu Kyi, the democratically elected leader of Burma who has been under house arrest for most of the time since 1990.[7] The United States and the European Union have imposed sanctions on Burma and denied travel visas to members of the Burmese junta.[8] Efforts by states and regional and international inter-governmental bodies have coalesced with those of a range of "transnational norm entrepreneurs"[9]—unions, religious groups, journalists, activists, human and labor rights organizations, consumer advocates, and other international and national NGO's—to engage in complementary efforts to condemn violations and bring some kind of human rights change in that country.[10]

The issue of labor standards has played a very important role in the global criticism of Burma. The United States and the European Union have withheld Generalized System of Preferences tariff benefits as a result of Burma's use of forced labor.[11] The International Labor Organization (ILO) also has issued numerous reports condemning the use of forced labor in that state. Most notably, in 1997 the ILO appointed a commission of special inquiry to conduct an extensive review of Burma's forced labor practices. The

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6. *See, e.g.*, Situation of Human Rights in Myanmar, G.A. Res. 53/162, U.N. GAOR, 53d Sess., 85th mtg., Supp. No. 49, U.N. Doc. A/RES/53/162 (1998), *available at* http://www.unhchr.ch/Huridocda (last visited Feb. 20, 2005); *see also* Situation of Human Rights in Myanmar, Comm'n on Human Rights Res. 1999/17, U.N. ESCOR, 53d Sess., 52d mtg., U.N. Doc. E/CN.4/RES/1999/17 (1999), *available at* http://www.unhchr.ch/Huridocda (last visited Feb. 20, 2005).

7. *Aung San Suu Kyi*, BRITTANICA CONCISE ENCYCLOPEDIA, *available at* www.brittanica.com/ebc/article?tocId=9356143 (last visited Oct. 15, 2004).

8. *See, e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 3, 6, 117 Stat. 864 (2003) (ban on imports and visas); 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104- 208, § 570, 110 Stat. 3009, 166 (1996) (authorizing a range of U.S. investment and other sanctions against Burma); Proclamation No. 6245, 3 C.F.R. 7, 7-9 (1992), *reprinted in* 105 Stat. 2484, 2484-86 (1991) (suspending Burma's preferential status under U.S. generalized system of preferences); Proclamation No. 5955, 3 C.F.R. 29, 29-31 (1990), *reprinted in* 103 Stat. 3010, 3011-13 (1989) (same); Council Regulation No. 552/97 of 24 Mar. 1997 Temporarily Withdrawing Access to Generalized Tariff Preferences From the Union of Myanmar, 1997 O.J. (L 085) 1, 8 (European Union).

9. *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 647-48 (1998) (discussing the role of transnational norm entrepreneurs in transnational legal process).

10. *See* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 7-18 (2001) (examining the range of transnational efforts condemning Burma's human rights practices).

11. *See* sources cited *supra* note 8.

commission issued a major report[12] that provided much of the factual information for the *Unocal* suit.[13] And the ILO recently took the unprecedented step of acting under Article 33 of its Constitution to call upon ILO members to review their relationships with Burma and ensure that they were not contributing to the use of forced labor in that country.[14] So to some extent the *Doe v. Unocal* suit is serving as an enforcement arm for the ILO prohibition against the use of forced labor. This is a classic example of what Harold Koh has labeled transnational public law litigation: a process by which a human rights principle articulated in an international forum is then elaborated through the sieve and ferment of civil society and is finally transferred to a domestic forum, in this case U.S. federal courts, where the norm is further refined and enforced.[15]

II. CONTRIBUTIONS TO INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT

Litigation under the ATS has played an important role in the articulation of international human rights norms and the development of international principles of individual accountability. The statute has generally been heralded by foreign governments, international organizations, and U.N. agencies as a significant mechanism for enforcing international human rights norms.[16] The ATS has contributed to the efforts of global civil society in developing

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12. *Forced Labour in Myanmar (Burma), Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention*, ILO Doc. 1930 (No. 29) (1998), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm (last visited Feb. 20, 2005).

13. *See* Doe v. Unocal Corp., No. 00-56603, 2002 WL 31063976, at *4 (9th Cir. 2002), *reh'g en banc granted, opinion vacated by* Doe v. Unocal Corp., No. CV-96-06959, 2003 WL 359787 (9th Cir. 2003) (citing ILO findings regarding use of forced labor in Burma).

14. *Resolution on the Widespread Use of Forced Labour in Myanmar*, ILO, 87th Sess. (June 1999), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-myan.htm (last visited Sept. 11, 2004). In November 2000, the ILO Governing Body reaffirmed its 1999 resolution and called upon ILO members to ensure that their relations with the Burmese government "do not perpetuate or extend the system of forced or compulsory labour in that country." Press Release, ILO, ILO Governing Body Opens the Way for Unprecedented Action Against Forced Labour in Myanmar (Nov. 17, 2000), *available at* http://www.ilo.org/public/english/bureau/inf/pr/2000/44.htm (last visited Sept. 11, 2004).

15. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349, 2395, 2397 (1991) (describing norm articulation and transfer through transnational legal process).

16. *See* Brief of Amici Curiae International Jurists in Support of Affirmance, at 13-20, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339) [hereinafter Brief of International Jurists] (collecting sources).

the human rights regime in at least five ways.

First, ATS judgments have helped define and clarify the *substantive content* of fundamental norms of international human rights law, such as torture. Other tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), have invoked substantive norms recognized in ATS litigation as violations of fundamental international human rights law.[17]

Second, ATS suits have helped identify which fundamental international rights norms require *state action* and which do not. In *Kadic v. Karadžić*,[18] for example, the Second Circuit held that acts of genocide and war crimes do not require state action.[19] The ICTY has relied upon the *Kadic* reasoning to conclude that crimes against humanity likewise do not require state action for the imposition of international criminal liability under international law.[20]

Third, the ATS has played an important role in developing the concept of *universal civil jurisdiction* under international law. The principle of universal jurisdiction allows a state to exercise prescriptive jurisdiction—e.g., to regulate conduct that occurs in another country—without a territorial, national, or protective nexus to that state.[21] Although international law recognizes universal criminal jurisdiction over international crimes such as genocide, torture, war crimes, and crimes against humanity,[22] whether international law authorizes states to exercise universal *civil* jurisdiction is less firmly established.[23] In their joint concurrence in the *Congo v. Belgium* case, the British, Dutch, and U.S. judges of the International Court of Justice cited ATS litigation as part of the process of developing universal jurisdiction over major human rights

17. Prosecutor v. Furundzija, 38 I.L.M. 317, 347 (1999) (citing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), as recognizing a "universal revulsion against torture"); *see also Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 284 n.683, U.N. Doc. A/56/10 (2001) (citing the ATS approach to show that national tribunals have recognized the peremptory character of certain fundamental rights), *available at* www.un.org/law.ilc/reports/2001/2001report.htm (last visited Feb. 20, 2005).

18. 70 F.3d 232 (2d Cir. 1995).

19. *Id.* at 236.

20. Prosecutor v. Tadic, 36 I.L.M. 913, 945 (1997) (citing *Kadic*, 70 F.3d at 232).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (1987) (discussing bases for prescriptive jurisdiction).

22. COMMITTEE ON INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 5-8 (2000) [hereinafter FINAL REPORT].

23. *See* RESTATEMENT, *supra* note 23, § 404 cmt. b ("[I]nternational law does not preclude the application of non-criminal law on this [universal] basis, for example, by providing a remedy in tort or restitution for victims of piracy.").

violations.[24] One of the leading contemporary international law treatises also cites the *Filártiga* case in support of the proposition that serious violations of human rights, such as torture, are subject to universal jurisdiction,[25] and the Report on Universal Jurisdiction of the International Law Association notes that the United States has exercised universal civil jurisdiction "with some success."[26] Finally, in *Sosa v. Alvarez-Machain*, the European Commission cited ATS practices as generally consistent with the development of international civil universal jurisdiction.[27]

Fourth, the ATS has inspired the development abroad of *mechanisms for human rights enforcement*. In the *Pinochet* litigation, the British Law Lords invoked litigation under the ATS in support of the proposition that violations of the international prohibition against torture are justiciable in national courts.[28] The British Court of Appeal recently went further and recognized the right to sue in Britain for acts of torture committed abroad, relying at length on U.S. jurisprudence under the ATS.[29] Many European states allow private citizens to bring an "*action civile*," in which civil claims may be appended to criminal prosecutions for fundamental violations.[30] Under this mechanism, the French oil company Total, which was Unocal's partner in the Yadana pipeline project and was originally sued in the *Unocal* case,[31] is currently under criminal investigation

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24. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 1, ¶¶ 47-48 (Feb. 14, 2002) (Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal, JJ.).

25. 1 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 469-70 n.23 (9th ed. 1996).

26. FINAL REPORT, *supra* note 24, at 2-3 n.6.

27. Brief of Amici Curiae European Commission in Support of Neither Party, at 14-25, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339) [hereinafter EC Brief] (discussing development of universal civil jurisdiction and proposing that ATS litigation exercising such jurisdiction should be allowed where a traditional forum is unavailable).

28. *See* Regina v. Bow St. Metro. Stipendiary Magistrate and Others, *Ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 198 (1999) (judgments of Lord Browne-Wilkinson and Lord Hope of Craighead).

29. Jones v. Saudi Arabia, [2004] EWCA Civil 1394, 1, ¶¶ 61-68 (Oct. 28, 2004) (discussing ATS cases).

30. *See* Brief of International Jurists, *supra* note 16, at 23-25; *Sosa*, 124 S. Ct. at 2783 (Breyer, J., concurring in part and concurring in the judgment) (citing EC Brief, *supra* note 29, at 21 n.48)); *see also Compilation of International Norms and Standards Relating to Disability*, Division for Social Policy and Development of the United Nations Secretariat, § 1.2 (Draft, July 2002), *available at* http://www.un.org/esa/socdev/enable/discom101.htm (noting that the *Filártiga* case demonstrates the domestic enforceability of customary international law) (last visited Feb. 20, 2005).

31. The claims against Total were dismissed for lack of personal jurisdiction. *See* Doe I v. Unocal Corp., 27 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd*, 248 F.3d 915 (9th

in France for complicity in the forced labor practices implicated by the pipeline. A Swiss court recently allowed Gypsies to pursue a civil tort action against IBM for Holocaust violations.[32] The ATS also has been recognized as a model for establishing national remedies for human rights abuses by U.N. special rapporteurs,[33] and India's National Commission on Human Rights has invoked the ATS as an example for the development of domestic legal remedies for human rights violations in that state.[34] Belgium recently adopted a criminal statute allowing private citizens to initiate criminal proceedings for gross human rights abuses based on principles of universal jurisdiction, though the jurisdictional scope of the statute was ultimately severely limited, ironically in response to U.S. pressure.[35]

As the most significant corporate ATS suit to date, *Doe v. Unocal* itself contributed importantly to many of these developments in human rights accountability. *Doe v. Unocal* helped establish that forced labor, as a derivative form of slavery, constitutes a specific, universal, and obligatory norm of customary international law that is actionable under the ATS.[36] The Ninth Circuit panel opinion established that state action is not required for claims based on forced labor,[37] and helped establish that state action is not required for other human rights violations such as torture if they occur in the course of other violations, such as forced labor, that have no state

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Cir. 2001).

32. Tallahassee Democrat, *Swiss Court Allows Gypsies to Sue IBM over Alleged Holocaust Link*, June 22, 2004, *available at* http://www.tallahassee.com/mld/tallahassee/business/technology/8983143.htm (last visited Feb. 20, 2005).

33. *See The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the High Commissioner for Human Rights*, U.N. ESCOR, Human Rights Comm'n, 59th Sess., Provisional Agenda Item 11, at ¶ 114, U.N. Doc. E/CN.4/2003/63 (2002) (offering the ATS as an example for states to "provide remedies for violations occurring outside their territory"); *see also Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. ESCOR, Human Rights Comm'n, 50th Sess., Provisional Agenda Item 6, at app., ¶ 52, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) (applauding the ATS for providing a forum for redress when foreign fora are inadequate).

34. *See* Sadar Patel Bhawan, Nat'l Human Rights Comm'n, Case No. 1/97/NHRC, at ¶ 23 (Aug. 4, 1997), *available at* http://www.punjabjustice.org/legalbattles/nhrcdocs/aug97.htm (last visited Feb. 20, 2005).

35. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888-89 (2003) (discussing Belgian statute). The statute was amended to limit it to claims where either the victim or the defendant is a citizen or resident of Belgium. *Id.* at 891.

36. Doe v. Unocal Corp., No. 00-56603, 2002 WL 31063976, at *10 (9th Cir. 2002).

37. *Id.* at *10.

action requirement.[38]

Finally, and perhaps most importantly, the Ninth Circuit panel decision in *Unocal* was a major step forward in the effort to define and clarify the appropriate standard for *corporate complicity* in fundamental human rights violations. The Nuremberg cases of *Flick*, *Krauch*, and *Krupp* addressed this issue,[39] among others, so the question was not unprecedented. But few, if any, modern courts had addressed the legal question of corporate complicity in gross international human rights violations.[40] The Ninth circuit decision in *Doe v. Unocal* looked back to the cases at Nuremberg, as well as to more modern decisions by the international criminal tribunals and the statute of the International Criminal Court, to help determine the international law standard for when a private actor (in this case a corporation), could be held liable for the acts of another party.[41] The standard that the majority adopted was that the entity must engage in "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[42] In other words, mere investment by a corporation in a country where the government engages in human rights abuses does not give rise to liability. The corporation must engage in "practical assistance or encouragement" that has a substantial, direct effect on commission of the violation. Interestingly, the European Commission's *amicus* brief in *Sosa v. Alvarez-Machain* agreed with the use of this international standard in the ATS context.[43]

Ultimately, of course, the goal of civil society in pursuing corporate human rights litigation is to try to encourage corporations to review their human rights practices and to engage in more responsible investment conduct. ATS supporters seek to encourage corporations to invest internationally in ways that do not aid and abet the grossest forms of human rights abuse. The evidence in the *Unocal* case, for example, tended to establish that Unocal knew of

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38. *Id.* at *15.

39. United States v. Krauch, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1081, 1140 (1952) (the I.G. Farben case); United States v. Krupp, 9 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10, 1436 (1952); United States v. Flick, 6 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10, 1442 (1950).

40. Paul Hoffman & Daniel Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 70-71 (2003) (discussing aiding and abetting principles under international law).

41. *Unocal*, 2002 WL 31063976, at *12.

42. *Id.* at *10.

43. EC Brief *supra* note 29, at 11-12 (citing with approval the *Doe v. Unocal* aiding and abetting standard).

the government's human rights abuses, knew or should have known forced labor would occur as a result of the pipeline project, and benefited from the practice.[44] Indeed, before investing in Burma, Unocal hired a consultant who warned that forced labor would necessarily be implicated in the project, and that Unocal likely could not avoid the use of forced labor if the company engaged in this particular project.[45] Suits like *Unocal* may encourage future companies to heed such advice, and thus form a small but important element in the move toward greater global corporate responsibility.

In addition to contributing to the development of human rights norms, ATS corporate litigation promotes broader civil society developments regarding corporate responsibility. In August 2003, the U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted new U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, which set forth standards for responsible corporate behavior under international law norms relating to human rights, the environment, consumer protection and other areas.[46] The Norms and their accompanying commentary themselves were produced through the concerted efforts of international civil society organizations, with the hope that corporations will look to the Norms for a checklist on how to conduct themselves consistently with fundamental international law requirements. Corporate suits like *Unocal* may help encourage corporations to look to, and utilize, those Norms in reviewing their investment behavior. And conversely, compliance with internationally recognized standards such as the U.N. Norms could help provide guidance to corporations on how to conform their economic activities to the minimum requirements of international law and avoid possible liability under the ATS. Together, corporate ATS suits and the U.N. Norms thus may create a mutually reinforcing dialogue for promoting both global corporate responsibility and the international rule of law.

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44. *Unocal*, 2002 WL 31063976, at **4-6, 10, 15.

45. *Id.* at *4 ("Before Unocal acquired an interest in the Project, it hired a consulting company, Control Risk Group, to assess the risks involved in the investment. In May 1992, Control Risk Group informed Unocal that '[t]hroughout Burma the government habitually makes use of forced labour to construct roads.' Control Risk Group concluded that '[i]n such circumstances UNOCAL and its partners will have little freedom of manoeuvre.'").

46. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, Human Rights Comm'n, 55th Sess., Agenda Item 4, at 1, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?Opendocument (last visited Feb. 20, 2005).

III. OBSTACLES TO ATS ENFORCEMENT

Contrary to the claims of many corporate representatives that there are "no limits on this thing,"[47] the ATS is a very limited and difficult mechanism that is available to enforce only the narrowest, most universally recognized forms of human rights violations. As noted above, and as the Supreme Court recognized in *Sosa,* in order to be actionable under the ATS, a human rights norm must be "specific, universal and obligatory."[48] Lower courts accordingly have recognized that litigants have standing to raise claims only of such core human rights violations as genocide and war crimes,[49] crimes against humanity,[50] torture,[51] summary execution,[52] disappearance,[53] and in the *Unocal* case, forced labor. Courts have routinely dismissed cases that fail to satisfy this rigorous standard for determining claims actionable under the modern law of nations.[54]

Furthermore, litigants must clear formidable procedural and prudential hurdles in order to bring a successful corporate ATS suit. The plaintiff must obtain personal jurisdiction over the defendant within the United States,[55] must satisfy any applicable statute of limitations, and must prevail over requests for dismissal based on the act of state doctrine, the political question doctrine, principles of international comity, and the doctrine of *forum non conveniens.* Litigants suing a corporate defendant often must pierce the corporate veil to recover from the corporate parent. If state action is required for the human rights norm being enforced, litigants suing a private corporation may have to demonstrate the defendant's complicity in acts taken under color of law by a third party.[56] Foreign states or

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47. Statement of Daniel O'Flaherty, Vice President of the National Foreign Trade Council, Rutgers School of Law Symposium, Mar. 5, 2004; *see generally* GARY HUFBAUER, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003) (emphasizing the potential for abuse of ATS litigation).

48. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 (2004) (quoting Hilao v. *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

49. Kadic v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1995).

50. *Sosa,* 124 S. Ct. at 2783 (Breyer, J., concurring in part).

51. Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Hilao v. *In re* Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994).

52. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (summary execution and cruel, inhuman or degrading treatment).

53. Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988).

54. *E.g.,* Flores v. S. Peru Copper Corp., 343 F.3d 140, 160-61 (2d Cir. 2003) (affirming dismissal of action alleging violations of the rights to life and health from intrastate pollution).

55. *E.g.,* Doe v. Unocal Corp., 27 F. Supp. 2d 1174 (C.D. Cal. 1998) (dismissing claims against Total for lack of personal jurisdiction).

56. For further discussion of the substantive and procedural barriers to ATS litigation, see Harold Hongju Koh, *Separating Myth from Reality About Corporate*

leaders that are sued under the ATS are entitled to sovereign or head-of-state immunity.[57] And of course, any litigant must successfully prove, not merely plead, satisfaction of the difficult substantive legal standards comprehended by the ATS. Finally, these cases are extremely expensive to bring due to the international discovery and travel that they often involve.[58] Indeed, no ATS case to date has resulted in a finding of liability against a corporate defendant, and only the *Unocal* case has resulted in a settlement for payment to the plaintiffs.

One should also note that corporations that wish the ATS would go away are simply ignoring the availability of other legal mechanisms to reach this type of conduct. While the *Doe v. Unocal* suit was pending in California federal court, analogous claims against Unocal proceeded to trial in California state courts, not under the ATS but under California state law claims. The Torture Victim Protection Act[59] also potentially allows for liability by corporations for acts of torture and summary execution. For all of these reasons, governmental and corporate hysteria over the limitless bounds of the ATS appears greatly exaggerated.

IV. INTERFERENCE WITH U.S. FOREIGN RELATIONS

The second primary criticism raised recently regarding ATS suits is the claim by the Bush administration that ATS litigation improperly interferes with U.S. foreign relations. This is a new development. In *Filártiga*, the Carter administration submitted an *amicus* brief indicating that the litigation was consistent with the United States' responsibility to promote human rights internationally.[60] The State and Justice Departments jointly

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Responsibility Litigation, J. Int'l Econ. L. 263, 269 (2004); Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1565-66,1575-78 (1998) (book review); see also Koh, *supra* note 15, at 2382-94 (discussing the availability of ordinary procedural mechanisms to filter out inappropriate suits).

57. British courts have observed that the U.S. courts have limited the application of the ATS in appropriate cases by doctrines such as foreign sovereign immunity. *See* Regina v. Bow St. Metro. Stipendiary Magistrate and Others, *Ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. at 243-44 (judgment of Lord Hope of Craighead) (citing Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992)); Al-Adsani v. Gov't of Kuwait, 107 I.L.R. 536, 547-48 (Eng. C.A. 1996) (same).

58. *See* Collingsworth, *supra* note 3, at 202 (noting that "the costs and time involved in bringing an ATCA case require that it be viewed as an extraordinary remedy").

59. 28 U.S.C. § 1350 (2004) (note).

60. *See* Memorandum of Amicus Curiae United States, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 602-03 (1980) (citations omitted) ("[I]n nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain cases directly enforceable in domestic courts.").

observed that "[s]uch suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."[61] The Reagan administration represented in the Marcos litigation that the suits against former head of state Ferdinand Marcos "would not embarrass the relations between the United States and the Government of the Philippines."[62] In *Kadic*, the Solicitor General and the Legal Advisor of the State Department likewise submitted a joint brief in support of the litigation.[63] The government indicated that the possibility that the defendant might one day be recognized as a head of state by the executive branch did not bar the suit's justiciability.[64] In 1997, the California district court asked the Clinton administration about the foreign affairs implications of the *Unocal* case, and the administration indicated that "adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."[65] Indeed, prior to this administration, executive branches consistently have either actively supported litigation or remained neutral in such cases. It appears that no prior administration formally opposed ATS litigation on foreign relations grounds.

But the current administration on several occasions has submitted State Department statements of interest and *amicus* briefs objecting to ATS litigation against corporations and urging dismissal on the grounds that the suit negatively infringes on U.S. foreign relations.[66] The government's strategy proved successful in *Sarei v. Rio Tinto*, a case involving environmental claims in Papua New Guinea, which was dismissed based in part on the United States' representation that the litigation was disrupting a dubious indigenous peace negotiation.[67] In *Doe v. Unocal*, the administration submitted multiple amicus briefs urging dismissal on, *inter alia*

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61. *Id.* at 603.

62. Brief of Amicus Curiae United States, at 32, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (Nos. 86-2448, 86-15039).

63. Brief of Amicus Curiae United States, at 2, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

64. *Id.* at 1.

65. Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 335 (C.D. Cal. 1997).

66. *See generally* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

67. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1178-79 (C.D. Cal. 2002).

foreign relations grounds.[68] In *Doe v. Exxon Mobil*, alleging human rights violations by Exxon Mobil in Indonesia, the administration submitted a statement of interest stating that the lawsuit could alienate the Indonesian government and detrimentally affect Indonesia's willingness to cooperate with the United States in the war on terror.[69] Most recently, the administration urged that a suit alleging human rights violations by Occidental Petroleum in Colombia "will have an adverse impact on the foreign policy interests of the United States."[70]

The administration's position appears both politically motivated and contrary to firmly entrenched U.S. human rights policy goals. Promotion of international human rights has long been a core part of U.S. foreign policy and is currently advanced, among other things, through the annual State Department Country Reports on human rights practices as well as through numerous U.S foreign economic assistance, military assistance, and trade laws that condition benefits on foreign states' human rights compliance.[71] The United States also has imposed a variety of non-economic sanctions on human rights violators.

Both the *Unocal* and *Exxon Mobil* suits are fully consistent with longstanding U.S. foreign policies regarding human rights violations in those countries. With respect to Burma, for example, the United States has repeatedly condemned the Burmese government for human rights violations, has withheld diplomatic relations, and has imposed a range of sanctions on the country. Federal law denies trade preferences to Burma, bars U.S. investment in Burma, and prohibits the importation of Burmese goods into the United States.

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68. *E.g.*, Supplemental Brief of Amicus Curiae the United States, at 14, Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003) (Nos. 00-56603, 00-56628) (arguing that recognition of corporate aiding and abetting liability in ATS cases "would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices") (on file with author).

69. Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, to the Honorable Louis F. Oberdorfer, U.S. District Court Judge for the District of Colombia (July 29, 2002), *available at* http://www.laborrights.org [hereinafter Taft Letter] (last visited Feb. 20, 2005). One can wonder how much the administration's position had to do with the fact that Exxon was the second largest contributor to the Bush presidential campaign in 2000, after the Enron Corporation. Peter Waldman & Timothy Mapes, *White House Sets New Hurdles For Suits Over Rights Abuses*, WALL ST. J., Aug. 7, 2002, *available at* http://www.laborrights.org/press/wsj080702.htm (last visited Feb. 20, 2005).

70. Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, at 1 (discussing Mujica v. Occidental Petroleum Corp., CV 03-2860-WJR (Dec. 23, 2004)) (on file with the author).

71. Cleveland, *supra* note 10, at 31-48 (cataloguing U.S. economic sanctions tied to human rights compliance).

The United States denies immigration visas to members of the Burmese government.[72] Likewise, the U.S. State Department repeatedly has criticized the Indonesian government for the same human rights violations alleged in the *Exxon Mobil* case.[73] Congress has condemned Indonesia for human rights abuses[74] and suspended military assistance to Indonesia for much of the 1990's on this grounds.[75] U.S. courts also have found high-ranking members of the Indonesian military responsible for human rights violations in that country.[76]

The U.S. policy of promoting international human rights has extended to ensuring human rights compliance by U.S. corporations. In 2001, for example, the United States and the United Kingdom entered an agreement establishing joint principals governing the human rights practices of companies in the extractive industries, such as oil and mining[77]—the same companies that are most commonly subject to ATS suits.

Nor has ATS litigation provoked significant objection from foreign governments. In their concurrence in *Congo v. Belgium*, the British, Dutch, and U.S. judges observed that litigation under the ATS "has not attracted the approbation of states generally."[78] The

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72. *See* sources collected *supra* note 8.

73. *See, e.g.*, U.S. Dep't of State, *Indonesia Country Reports on Human Rights Practices - 2001* (2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8314.htm (last visited Feb. 20, 2005) ("[T]he military continues to play a substantial internal security role in areas of conflict, such as Aceh. . . . Members of both the TNI and the police committed numerous serious human rights abuses."); U.S. Dep't of State, *Indonesia Country Reports on Human Rights Practices - 2000* (2001); U.S. Dep't of State, *Indonesia Country Reports on Human Rights Practices - 1999* (2000); U.S. Dep't of State, *Indonesia Country Reports on Human Rights Practices - 1997* (1998). Indeed, the State Department's Statement of Interest in the *Exxon Mobil* case "reaffirm[s] [the State Department's] condemnation of human rights abuses by elements of the Indonesian armed forces in locations such as Aceh." Taft Letter, *supra* note 71, at 2.

74. *See, e.g.*, S. Res. 91, 107th Cong., 147 CONG. REC. S6531, at 4 (2001) (urging Indonesia to end "the climate of impunity" that shields human rights violators in the Indonesian military from justice).

75. Cleveland, *supra* note 10, at 38.

76. *E.g.*, Doe v. Major Gen. Johnny Lumintang, No. 00-674, (D.D.C. 2001); Todd v. General Panjaitan, No. 92-12255WD, (D. Mass., Oct. 25, 1994).

77. U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, *Voluntary Principles on Security and Human Rights* (Dec. 20, 2000), at 1, *available at* http://www.state.gov/www/global/human_rights/001220_fsdrl_principles.html (last visited Feb. 20, 2005) (providing guidelines for companies in the extractive industries for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms").

78. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 1, at ¶ 48 (Feb. 14, 2002) (Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal, JJ.).

Sosa litigation likewise did not attract a great deal of commentary from foreign governments. If frivolous ATS litigation were in fact proliferating against foreign nationals and industries and creating friction with foreign states, one might have expected a vociferous appearance from foreign governments in that case. However, Mexico, whose national was being sued, did not appear as an amicus. In fact, only one foreign government amicus brief was submitted in support of the defendant in *Sosa*, and that was the *amicus* brief of Great Britain, Switzerland and Australia[79]—three countries whose companies have been sued in the South African apartheid litigation.[80] This international response is in stark contrast to that in the 1994 *Barclays Bank* case[81] regarding the constitutionality of California's worldwide combined reporting taxation law, which many countries viewed as double taxation in violation of international law. Numerous foreign countries and corporate interests filed amicus briefs vociferously protesting that practice in the U.S. Supreme Court.[82] The U.S. government, however, took the position that California's law had no negative impact on U.S. foreign relations,[83] and the Supreme Court upheld the California law.

In *Sosa,* the Supreme Court recognized the "possibil[ity]" of "case-specific deference to the political branches,"[84] noting that in circumstances such as the *South African Apartheid* cases,[85] "there is a strong argument that federal courts should give serious weight to

79. Brief of Amici Curiae Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland in Support of the Petitioner, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339), *available at* http://www.nosafehaven.org (last visited Feb. 20, 2005) [hereinafter Brief of the Governments of the Commonwealth of Australia].

80. *In re* S. Afr. Apartheid Litig., 2004 WL 2722204 (S.D.N.Y. 2004) (granting defendants' motion to dismiss). Indeed, in Jones v. Saudi Arabia, the British Court of Appeal observed with approval that "sensitive issues involving judgments about the treatment or protection that would be received in other countries not infrequently arise in a human rights context, and have been no bar to the exercise of jurisdiction over foreign states in respect of systematic torture in the United States." Jones v. Saudi Arabia, [2004] EWCA Civil 1394, ¶ 92 (Oct. 28, 2004).

81. Barclays Bank, PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994).

82. Proceedings and Orders, Barclays Bank, PLC v, Franchise Tax Bd. of Cal. (No. 92-1384-CSX) (on file with author).

83. Brief for Amicus Curiae the United States, at 10, Barclays Bank, PLC v. Franchise Tax Board of California 512 U.S. 298 (No. 92-1384) ("Further review by this Court is not needed to achieve, and could potentially destabilize, the accommodation of state, national and international interests that has been reached on this issue.").

84. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766, n.21 (2004).

85. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (finding that multinational corporations merely doing business in apartheid South Africa was not a violation of international law to support jurisdiction under ATS).

the Executive Branch's view of the case's impact on foreign policy."[86] The democratically elected government of South Africa has strongly objected to that litigation, indicating that the suits may undermine the South African Truth and Reconciliation process and are contrary to the investment desires and policies of the South African government.[87] Even for ATS cases that provoke significant foreign relations tensions, however, a wide range of effective procedural and prudential mechanisms exist for addressing these concerns, as noted above. Suits under the ATS must be narrowly targeted to address very fundamental, gross human rights violations. Indeed, by limiting the claims that may be litigated under the ATS to international norms enjoying universal recognition, the *Sosa* Court attempted to avoid most foreign relations concerns about ATS cases.[88]

It may be that certain rare cases should be dismissed in deference to the successor home sovereign's request that the claims be adjudicated domestically where truly effective mechanisms for doing so exist. Both *forum non conveniens* and domestic exhaustion principles require courts to consider whether the litigation should more properly proceed in the home forum. Both the European Commission and the Supreme Court suggested in *Sosa*, for example, that suits involving foreign defendants perhaps should not be brought under the ATS until available and appropriate domestic remedies had been exhausted in the state where the claim arose.[89] The Second Circuit dismissed the *Aguinda v. Texaco* case on *forum non conveniens* grounds, based on the Ecuadorian government's request that the litigation be pursued in Ecuador,[90] and the litigation has proceeded there. In a small number of cases, such action may be appropriate. Even in such cases, however, the proper grounds for dismissal might be a narrow requirement of exhaustion of appropriate and available domestic remedies, rather than more nebulous foreign relations grounds. Indeed, a generalized doctrine of deference to the political branches would thwart principles of judicial

86. *Sosa*, 124 S. Ct. at 2766, n.21.

87. Brief of the Governments of the Commonwealth of Australia, *supra* note 81, at app. B, 5a (Declaration by Penuell Mpapa Maduna, Minister of Justice and Constitutional Development of the Republic of South Africa).

88. *Sosa*, 124 S. Ct. at 2763 (recognizing that because recognition of "*new* norms of international law would raise risks of adverse foreign policy considerations, they should be undertaken, if at all, with great caution") (emphasis added).

89. *Sosa*, 124 S. Ct. at 2766 n.21 (noting the possibility of a domestic exhaustion requirement for ATS cases); EC Brief, *supra* note 29, at 22 (arguing that ATS suits based on universal jurisdiction should "be limited to conduct that would otherwise fall beyond effective sanction").

90. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002) (affirming dismissal of environmental injury suit by citizens of Peru and Ecuador on grounds of *forum non conveniens*).

independence and collapse the separation of powers.[91]

Moreover, to conclude from the fringe cases that core cases such as *Unocal* should not be brought grossly undermines the legitimacy of the United States' international human rights posture. The United States repeatedly has pointed to the ATS in its representations to U.N. bodies as an example of how the United States is working to comply with its international obligations.[92] Suits under the ATS, and particularly the United States' willingness to tolerate ATS suits against U.S. corporations, enhance the international credibility of the United States' commitment to human rights at a time when that commitment is being widely questioned. By contrast, the administration's interventions in ATS cases against U.S. multinational corporations simply reinforce the view that the United States is a hypocritical actor that seeks to impose human rights standards on the outside world while being unwilling to accept them itself.

CONCLUSION

Despite the narrow scope of the ATS, litigation under it has contributed in incremental but important ways to the ongoing development of a global human rights regime. The statute has offered human rights litigants and civil society both a limited forum in which to seek redress for atrocities and a model for the exploration of human rights enforcement mechanisms by other states. Adjudication of human rights violations in foreign states necessarily has the potential to agitate foreign governments. But carving out a space for corporate human rights litigation under the ATS also plays an important role in preserving the United States' capacity for global leadership in the defense of human rights.

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91. *Cf.* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004) (opinion of O'Connor, J.,) (noting that rather than respecting separation of powers, judicial deference to the executive "serves only to *condense* power into a single branch of government")

92. *See* Brief of International Jurists, *supra* note 16, at 9-10 (noting that "[t]he Executive Branch has repeatedly relied on *Filártiga* and the ATCA in representations to the United Nations," and gathering sources).