

## A Call for the Codification of the Unocal Doctrine

David I. Becker

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# A Call for the Codification of the *Unocal* Doctrine

David I. Becker\*

Introduction .....	184
I. Background .....	186
A. Precarious Project Finance: The Unocal Litigation.....	186
B. The Evolution of the ATCA: The Judiciary Act of 1789, the Filartiga Line, and the TVPA.....	189
1. <i>The Alien Tort Statute</i> .....	189
2. <i>Filartiga and Its Progeny</i> .....	190
3. <i>Congress and the TVPA</i> .....	192
4. <i>Recent Caselaw Expanding the Bounds of ATCA</i> <i>Accountability</i> .....	193
II. Analysis: The Inadequacy of the Status Quo.....	195
A. The Futility of Municipal Tort Claims.....	195
B. Limited Scope of Relief Afforded by the ATCA.....	198
III. Proposal: A Call for Federal Legislation .....	200
A. The Remedial Law Should Come from New Federal Legislation, Not Future ATCA Litigation .....	200
B. The Look of the Proposed Legislation .....	202
C. Explication of the Proposed Legislation .....	203
D. Arguments in Favor of the Proposed Legislation.....	205
1. <i>The Migration of U.S. Business into Transitional</i> <i>Markets Necessitates the Proposed Legislation</i> .....	205
2. <i>The Proposed Legislation Would Actually Benefit U.S.</i> <i>Business Interests</i> .....	205
3. <i>The Proposed Legislation Fittingly Calls a Crime a</i> <i>“Crime”</i> .....	206
4. <i>How Can We Have the FCPA and not Legislation of</i> <i>this Sort?</i> .....	207
5. <i>Proposed Legislation Comports with the Emerging</i> <i>View of a “World Society”</i> .....	207
Conclusion .....	207

*“Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home.”<sup>1</sup>*

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1. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring).

## Introduction

Since the ratification of the Constitution, we have opened our courts to disputes between foreign plaintiffs and domestic defendants.<sup>2</sup> Since the New Deal, we have actively regulated the conduct of U.S. businesses, both at home and abroad, to ensure a baseline degree of accountability.<sup>3</sup> In spite of these two long-standing traditions, a significant, albeit narrow, gap has persisted in our legal regime. Until recently, foreign nationals have been effectively denied the opportunity to extend accomplice liability to U.S. businesses whose foreign affiliates commit human rights violations on foreign soil. There have been at least two barriers to such suits. First, as a matter of procedure, the doctrine of *forum non conveniens* enables a court, at its discretion, to decline jurisdiction when it determines that the convenience of the parties and ends of justice would be better served if the action were brought and tried in another forum.<sup>4</sup> Second, as a matter of substance, municipal tort law generally fails to reach such defendants under a theory of concerted action.<sup>5</sup>

In March 1997, U.S. District Judge Richard Paez issued a preliminary jurisdictional ruling in the case of *Doe v. Unocal*<sup>6</sup> which, if upheld on appeal, should mitigate this lapse in accountability. The *Unocal* litigation<sup>7</sup> involves claims brought by Burmese citizens against Unocal Corp., a California-based energy company, for human rights violations committed in Burma by Unocal's foreign business associate. These asserted violations furthered Unocal's pecuniary interests. Believing there is no functioning

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2. See U.S. CONST. art. III, § 2 ("The judicial power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.")

3. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 21-24 (1990).

4. See *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985) (discussing tort claims by Costa Rican agricultural workers harmed in Costa Rica by exposure to defendant's pesticides on grounds of *forum non conveniens*); *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996) (discussing tort claims by Peruvian citizens harmed by toxic emissions stemming from defendant's smelting operations in Peru on grounds of *forum non conveniens*); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (discussing tort claims by Ecuadoran plaintiffs against U.S. corporation for the alleged contamination of the air, ground, and water in Ecuador on grounds of *forum non conveniens*).

5. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 46, at 322-24 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* §§ 875, 876, 877 (1977). See also *Developers Must Pick Local Partners Carefully*, *POWER GENERATION TECHNOLOGY & MARKETS*, Aug. 8, 1997, available in LEXIS, World Library, Allwld File ("Hire local partners to smooth the way when developing a power project abroad is the usual sage advice offered at U.S. power development seminars.")

6. 963 F. Supp. 880 (C.D. Cal. 1997).

7. A related action was also filed by the National Coalition Government of the Union of Burma, the Federation of Trade Unions of Burma, and four Burmese refugees. See *National Coalition Government of the Union of Burma v. Unocal*, No. 96 Civ. 6112 RAP (C.D. Cal. filed Sept. 3, 1996). On November 5, 1997, the district court issued a ruling granting in part and dismissing in part Unocal's motion to dismiss. See *National Coalition Government of the Union of Burma v. Unocal*, No. 96 Civ. 6112, 176 F.R.D. 329 (C.D. Cal. Nov. 5, 1996). Judge Paez' ruling parallels its analysis and holding in *Doe v. Unocal*.

judiciary in their home country (and fearing the wrath of the military regime currently in power there), the *Unocal* plaintiffs have turned to the U.S. courts for redress.<sup>8</sup> To avoid the substantive and procedural obstacles mentioned above, they have bypassed traditional municipal causes of actions and have rested their claims on the controversial Alien Tort Claims Act<sup>9</sup> (ATCA), a statute that renders a narrow class of conduct actionable in U.S. courts.<sup>10</sup>

This innovative use of the ATCA to fill the aforementioned gap in U.S. human rights jurisprudence was attempted only once before and proved unsuccessful.<sup>11</sup> Nonetheless, in a landmark ruling, Judge Paez held that the *Unocal* plaintiffs had in fact stated a colorable ATCA claim against the U.S. corporation for the extra-territorial conduct of its foreign affiliate.<sup>12</sup>

The *Unocal* holding is certainly appealing as a matter of fundamental fairness: U.S. corporations should not be allowed to intentionally or recklessly ravage third world populations in pursuit of the almighty dollar. Also appealing is its proscription of a limited range of conduct. *Unocal* does not speak to poor working conditions or low wages; it addresses only the most egregious forms of conduct.

Despite such favorable attributes, the "Unocal doctrine"<sup>13</sup> has weaknesses and limitations – most of which can be attributed to its shaky grounding in customary international law. This note will argue that the doctrine could be both bolstered and authenticated through legislation codifying what currently exists as judge-made law. Part I surveys the *Unocal* litigation and, by charting the evolution of the ATCA, places Judge Paez's groundbreaking ruling in context. Part II analyzes the current causes of action available to foreign plaintiffs seeking redress for vicarious extra-territorial torts – municipal tort claims and ATCA proceedings – and underscores their inadequacy. Part III argues that new federal legislation rooted in the Commerce Clause would be the optimal cure for the plight of the *Unocal* plaintiff. It advances a prototype of the legislation contemplated as well as policy arguments that support it.

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8. See *Doe*, 963 F. Supp. at 884.

9. 28 U.S.C. § 1350 (1994).

10. See *id.*

11. See *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988). In *Carmichael*, a British national was imprisoned and tortured by Saudi Arabian authorities because of his outstanding debts to various creditors (including five U.S. businesses). He brought suit against the U.S. creditors under the ATCA alleging that they were vicariously responsible for his maltreatment. The Fifth Circuit denied his claim holding that the district court lacked jurisdiction over the action as there was no evidence that the U.S. defendants "in any way conspired with or aided and abetted" the Saudi officials. *Id.* at 115.

12. See *Doe*, 963 F. Supp. at 896.

13. A term coined by Gregory Wallace in *Fallout From Slave-Labor Case is Troubling*, 150 N.J. L.J. 896, Dec. 8, 1997, at 24, available in LEXIS, World Library, Allwld File.

## I. Background

### A. Precarious Project Finance: The Unocal Litigation

In 1991, an international consortium of oil companies entered into negotiations with the military government of Burma — the State Law and Order Restoration Council (SLORC)<sup>14</sup> — and the country's state-owned oil company — the Myanmar Ministry for Oil and Gas Enterprises (MOGE) — regarding oil and gas exploration in the Yadana gas field.<sup>15</sup> The negotiations blossomed into an ambitious joint venture, a gas drilling project requiring the construction of a gas pipeline to run from the off-shore drilling site, through the Tenasserim region of Burma, into Thailand. As part of the agreement, the SLORC was required to clear the land along the pipeline's path and provide the labor, materials, and "security" necessary for its construction.<sup>16</sup> In early 1993, Unocal Corp., a California-based energy company, formally agreed to participate in the venture. The corporation received a founders' stake in the project, investing approximately \$340 million in the \$1.2 billion enterprise.<sup>17</sup>

The cerebation behind the joint construction project is regarded as flawless — the perfect meld of First World capital and Third World markets.<sup>18</sup> Its execution, however, is perceived as heartless. In 1996, farmers from the Tennasserim region, represented by a coalition of attorneys, including the Center for Constitutional Rights in New York, brought a class action suit in the U.S. District Court for the Central District of California against Unocal and its senior executives, Total S.A.,<sup>19</sup> the SLORC, and the MOGE.<sup>20</sup> Their complaint alleged that Unocal's Burmese government partners "used and continue to use violence and intimidation to relocate whole villages, enslave farmers living in the area . . . and steal farmers' property for the benefit of the pipeline."<sup>21</sup> While the complaint did not assert that Unocal directly participated in any of these actions, it maintained that Unocal and Total "subsidized" their local partners' actions and "were aware of, and benefitted from, and continue to be aware of and benefit from, the use of forced labor to support . . . the gas pipeline project."<sup>22</sup>

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14. The SLORC assumed power in 1988. It is known for its repression of a vigorous pro-democracy movement as well as its mistreatment of minority tribes. The SLORC has been widely reviled internationally; even its attempt to change Burma's name to Myanmar has been rejected by the U.S. State Department, by human rights groups, and by the democratically elected government-in-exile. See Steve Barth, *U.S. Stands Alone on Burma Sanctions*, *WORLD TRADE*, July 1997, at 13, available in 1997 WL 7470910.

15. See Joseph D. Pizzurro & Nancy E. Delaney, *New Peril for Companies Doing Business Overseas; Alien Tort Claims Act Interpreted Broadly*, *N.Y. L.J.*, Nov. 24, 1997, at S5.

16. See *id.*

17. See Dev George, *Unocal or Unoburm*, *OFFSHORE*, July, 1997, at 8, available in LEXIS, World Library, Allwld File.

18. See Tristram Kortzen, *Unocal on Trial for Burma Crimes: L.A. Case Could Change the Rules of World Trade*, *L.A. WEEKLY*, Oct. 24, 1997, at 15.

19. Total S.A. is a French oil company implicated in the Yadana project.

20. See *Doe*, 963 F. Supp. at 883-84.

21. Frank G. Long, *Social Policy: Abuses Can Cost You*, *ARIZ. BUS. GAZETTE*, Sept. 11, 1997, at 14.

22. *Id.*

As a result, Unocal and its partners “caused the local residents to suffer death of family members, assault, rape and other torture, forced labor and the loss of their homes and property. . . .”<sup>23</sup>

The complaint invoked federal jurisdiction via the Alien Tort Claims Act (ATCA)<sup>24</sup> and asserted two federal causes of action: (1) a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO); and (2) a “substantive” violation of ATCA triggered by conduct proscribed by customary international law,<sup>25</sup> i.e., “forced labor,” “torture,” “violence against women,” and “arbitrary arrest and detention.”<sup>26</sup> In calling for injunctive, declaratory, and compensatory relief, the complaint rationalized its resort to the U.S. judicial system as follows: “[t]here is no functioning judiciary in Burma and any suit against defendants would have been and would still be futile and would result in serious reprisals.”<sup>27</sup>

Unocal’s first defensive tactic at the pleading stage was a motion for dismissal pursuant to Rule 19.<sup>28</sup> Its argument was straightforward: co-defendants SLORC and MOGE were immune from jurisdiction under the Foreign Sovereign Immunities Act (FSIA);<sup>29</sup> as the two were necessary parties under Rule 19, the suit could not proceed without them. While District Judge Paez agreed with the former contention (that the SLORC and MOGE were immune under the FSIA), he disagreed with the latter and held that the co-defendants, alleged in the complaint to be joint tortfeasors, were not necessary parties within the meaning of Rule 19.<sup>30</sup>

Unocal’s second defensive maneuver at the pleading stage was a Rule 12(b)(1) motion that questioned the court’s subject matter jurisdiction.<sup>31</sup> Without considering the jurisdictional possibilities generated by diversity, RICO, or the Torture Victim Protection Act,<sup>32</sup> Judge Paez ruled that plaintiffs pleaded sufficient facts to establish subject matter jurisdiction based on the Alien Tort Claims Act.<sup>33</sup>

23. *Id.*

24. 28 U.S.C. § 1350 (1994).

25. The first case to definitively hold that the ATCA provided a private cause of action was *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). See generally Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 540 (1997). The *Filartiga* decision and the controversy surrounding its interpretation of the Act will be addressed in turn.

26. *Doe*, 963 F. Supp. at 883-84. The complaint also asserted various state law claims pursuant to the supplemental jurisdiction provision 28 U.S.C. § 1367. These state claims include wrongful death, battery, false imprisonment, assault, intentional infliction of emotional distress, conversion, and negligent supervision. See *id.* at 884-85.

27. *Doe*, 963 F. Supp. at 884.

28. FED. R. CIV. P. 19.

29. 28 U.S.C. §§ 1330, 1601-11 (1976). Under the FSIA, foreign states and state-related entities are immune from civil suits in U.S. federal (and state) courts unless such suits fall within one of six enumerated exceptions. 28 U.S.C. § 1605.

30. See *Doe*, 963 F. Supp. at 889.

31. FED. R. CIV. P. 12(b)(1).

32. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992).

33. See *Doe*, 963 F. Supp. at 892 n.11.

Unocal's third affirmative defense was a Rule 12(b)(6)<sup>34</sup> motion, which argued that the plaintiffs' allegations of abuse by foreign government officials in a foreign land did not state a claim against Unocal upon which relief could be granted.<sup>35</sup> Judge Paez held that the class's complaint did not merely allege that Unocal was an unknowing business partner of the SLORC and MOGE;<sup>36</sup> rather, it alleged that Unocal was either a co-conspirator or joint tortfeasor fully aware of the atrocities being committed. As such, the facts alleged in the complaint (accepted as true for purposes of the 12(b)(6) motion) sufficiently stated a claim against Unocal.<sup>37</sup>

These preliminary rulings on the pleadings were released in an order entered in March, 1997.<sup>38</sup> Judge Paez's treatment of Unocal's first two affirmative defenses was unremarkable. His interpretation and application of the FSIA, in regards to the first, were consistent with existing U.S. Supreme Court and Ninth Circuit caselaw.<sup>39</sup> Similarly, his interpretation of the ATCA as providing a federal forum for violations of *jus cogens* norms,<sup>40</sup> in regards to the second, was also consistent with existing Ninth Circuit caselaw.<sup>41</sup> The truly novel aspect of the *Unocal* order (and the reason the preliminary order has drawn the attention of corporate lawyers across the country) is Judge Paez's treatment of the defendant's third affirmative defense – the 12(b)(6) motion. Before the March order, no court had held that a corporation (or any other private defendant) could be liable under the ATCA by acting in concert with a foreign government in violating universally recognized human rights standards.<sup>42</sup> The following overview places this ruling in its proper historical context.

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34. FED. R. CIV. P. 12(b)(6).

35. See *Doe*, 963 F. Supp. at 896.

36. Had it done so, Judge Paez maintained, the 12(b)(6) motion would have been granted. *Id.* (“[U]nocal contends that plaintiffs’ allegations establish the presence of a business relationship with SLORC and MOGE and nothing more. Were this the case, Unocal would clearly be entitled to a dismissal.”).

37. See *id.* Two other affirmative defenses raised by Unocal but omitted from the discussion above were (1) the running of the applicable statutes of limitation for the plaintiffs’ claims, and (2) the prudential concerns embodied in the act of state doctrine. Judge Paez rejected the former on the ground that the defense raised a question of fact and the latter on the grounds that the only defendant remaining in the suit was a domestic entity and that the conduct alleged was so universally condemned. *Id.* at 892-97.

38. See *id.* at 880.

39. See *Holden v. Canadian Consulate*, 92 F.3d 918, 920 (9th Cir. 1996), *cert. denied*, *Canadian Consulate v. Holden*, 519 U.S. 1091 (1997); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 323 (9th Cir. 1996); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992).

40. A *jus cogens* norm “is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Siderman de Blake*, 956 F.2d at 714 (citing Vienna Convention on the Law of Treaties), May 23, 1969, art. 53, 1155 U.N.T.S. 332, 8 I.L.M. 679.

41. See *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467, 1473 (9th Cir. 1994) (“Estate II”); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 498-500 (9th Cir. 1992) (“Estate I”).

42. See Pizzurro & Delaney, *supra* note 15, at 85.

B. The Evolution of the ATCA: The Judiciary Act of 1789, the *Filartiga* Line, and the TVPA

1. *The Alien Tort Statute*

The Alien Tort Statute, currently embodied in § 1350,<sup>43</sup> originated from a clause in the first Judiciary Act of 1789.<sup>44</sup> The original clause, penned by Oliver Ellsworth, read: “[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>45</sup>

On three subsequent occasions, Congress modified the wording of the clause.<sup>46</sup> In its current form, the Alien Tort Statute reads: “[T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>47</sup>

Notwithstanding the subtle, and perhaps meaningless,<sup>48</sup> alterations in its text, the Alien Tort Statute was largely ignored for nearly two centuries.<sup>49</sup> Plaintiffs rarely pleaded subject-matter jurisdiction under the Act, and when they did, courts generally dismissed jurisdiction on the grounds that the defendants’ alleged conduct did not violate the law of nations.<sup>50</sup> According to Professor Gary Born,<sup>51</sup> the courts upheld Alien Tort jurisdiction only twice prior to 1980 — once in 1795<sup>52</sup> and once in 1961.<sup>53</sup> Besides the courts’ reluctance to find violations of the nebulous “law of nations,” the dormancy of the statute over this period can be explained by the dearth of information available as to its intended purpose.<sup>54</sup> Judge Friendly, commenting on the statute’s mysterious past, dubbed the statute a “Legal Lohengrin” (after a shadowy character in a Wagner opera) and

43. 28 U.S.C. § 1350 (1994).

44. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789).

45. *Id.*

46. See Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445, 448-49 (1995). Congress first modified the clause in rendering Section 563 (Sixteenth) in the Revised Statutes of 1873. *Id.* The second modification by Congress occurred when Section 563 became Section 24 (Seventeenth) of the Act of March 3, 1911. *Id.* Congress made its third and final modification when the clause in Section 24 became Section 1350 of Title 28 of the United States Code. *Id.*

47. 28 U.S.C. § 1350 (1994).

48. See Sweeney, *supra* note 46, at 450 (“The changes in the text of the clause, whether useful or pointless, did not affect the jurisdiction originally granted by the clause to the federal courts.”).

49. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 36 (1996).

50. See *id.*

51. Professor Born is a prominent scholar in the field of international civil litigation.

52. *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (ruling that the Alien Tort Statute provides an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas).

53. See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (ruling that the Alien Tort Statute serves as basis for jurisdiction over a child custody suit between aliens); See BORN, *supra* note 49, at 36.

54. See BORN, *supra* note 49, at 36.



remarked that "no one seems to know from whence it came."<sup>55</sup>

## 2. *Filartiga and Its Progeny*

In 1980, the Alien Tort Statute left the shadows when the Second Circuit handed down *Filartiga v. Pena-Irala*,<sup>56</sup> the first major appellate court interpretation of the statute. In *Filartiga*, Paraguayan citizens Joel and Dolly Filartiga alleged that Americo Norbeto Pena-Irala, a former Inspector General of Police in Paraguay, violated the law of nations by torturing and killing Joelito Filartiga (their son and brother respectively) while acting in his official capacity. They asserted that their cause of action arose, *inter alia*, under the ATCA. Never reaching the merits of the case, the district court dismissed the claim and held that the statute was inapplicable to the facts of the case.<sup>57</sup> More specifically, the court held that under existing Second Circuit caselaw, the "law of nations" (for purposes of § 1350) should be construed narrowly so as to exclude the law that governs a state's treatment of its own citizens.<sup>58</sup>

In a landmark decision, a panel of the Second Circuit reversed, holding that the Filartigas did in fact allege violations of *jus cogens* norms.<sup>59</sup> The court rested its conclusion on two premises.<sup>60</sup> The first was that the "law of nations" is a dynamic rather than static body of law.<sup>61</sup> The second was that the present state of customary international law, as defined by "the usage of nations, judicial opinions and the works of jurists," prohibits official (state-sponsored) torture.<sup>62</sup> As such, the court concluded that the Filartigas did in fact allege conduct "in violation of the law of nations."<sup>63</sup>

In allowing the suit to proceed, the court rejected the defendant's argument that federal jurisdiction could not be exercised consistent with Article III of the Constitution<sup>64</sup> and, more remarkably, reached the unprecedented conclusion that the Alien Tort Statute confers not only federal jurisdiction but also a substantive cause of action.<sup>65</sup> Although never explicitly stating as much, the court indirectly advances this proposition twice in the opinion.<sup>66</sup>

Besides being the first case to hold that the ATCA creates a substantive cause of action,<sup>67</sup> the *Filartiga* decision is significant in at least two more respects. First, it is the earliest case to hold that plaintiffs could litigate human rights abuses in federal court notwithstanding that the alleged acts

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55. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

56. 630 F.2d 876 (2d Cir. 1980).

57. *See id.* at 880.

58. *See id.*

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

60. *See id.* at 880-84.

61. *See id.* at 881 ("[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").

62. *Id.* at 884.

63. *Id.* at 878.

64. *See id.* at 886.

65. *See id.* at 889.

66. *See id.*

67. *See Walker, supra* note 25, at 540.

occurred abroad and that neither party was a U.S. citizen.<sup>68</sup> Second, by relying on a modern view of customary international law, the decision opened the door for other courts to do the same.<sup>69</sup>

Since the Second Circuit boldly proclaimed that the ATCA provides both a federal forum and a cause of action, two of the three Circuits to reach the issue have concurred in the *Filartiga* formulation.<sup>70</sup> The first to do so was the Ninth Circuit in 1994;<sup>71</sup> the Eleventh Circuit followed in 1996.<sup>72</sup>

The D.C. Circuit is the only circuit to date that has declined to follow *Filartiga's* reading of the ATCA as providing a substantive cause of action.<sup>73</sup> In *Tel-Oren v. Libyan Arab Republic*,<sup>74</sup> a panel consisting of Circuit Judges Edwards, Bork, and Robb dismissed the claims brought by survivors of those murdered by the Palestine Liberation Organization ("PLO") during an attack on a civilian bus in Israel in 1978. While the short per curiam opinion reveals only the facts of the case and a seven-word summation of the holding,<sup>75</sup> each judge wrote a separate and lengthy concurrence setting forth his own view as to the proper legal basis for dismissal.

Judge Edwards' concurrence endorsed *Filartiga's* holding that the ATCA provides a cause of action as well as a federal forum.<sup>76</sup> He also accepted the Second Circuit's position that international law forbids a state from torturing its citizens and that individuals have a right to be free from such torture.<sup>77</sup> He pushed for dismissal, however, because of his belief that "the law of nations [does not impose] the same responsibility or liability on non-state actors . . . as it does on states and persons acting under color of state law."<sup>78</sup> Thus, the PLO could not violate the law of nations because it was not a recognized nation within its own territory.

Judge Bork's concurrence was sharply at odds with both the *Filartiga* formulation and Judge Edwards' concurrence. In Bork's view, the ATCA does not provide a cause of action but only a federal forum.<sup>79</sup> The cause of action, if any, would have to come from another source. As a corollary to this argument, Judge Bork maintained that individual plaintiffs cannot turn to customary international law to provide a right of action because it can-

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68. See *id.* at 546-47.

69. See *id.* at 547.

70. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11<sup>th</sup> Cir. 1996); *Estate II*, 25 F.3d at 1475-76; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985).

71. See *Estate II*, 25 F.3d at 1475 ("We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards. . .").

72. See *Abebe-Jira v. Negewo*, 72 F.3d at 848 ("[The ATCA] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.").

73. See *Tel-Oren*, 726 F.2d at 774.

74. *Id.*

75. See *id.* at 775 ("We affirm the dismissal of this action.").

76. See *id.* at 777-82.

77. See *id.* at 777.

78. *Id.* at 776.

79. See *id.* at 801.

not fairly be treated as self-executing<sup>80</sup> or as part of the federal common law.<sup>81</sup>

In the third *Tel-Oren* concurrence, Judge Robb argued that dismissal of the plaintiffs' claims was proper for prudential reason because the claims implicated nonjusticiable political questions.<sup>82</sup> In his view, "[i]nternational terrorism consists of a web that the courts are not positioned to unweave."<sup>83</sup> He warned that in attempting to do so, courts will become entangled in foreign policy, and in doing so, jeopardize the flexibility of the Executive Branch to deal with international issues diplomatically.<sup>84</sup>

### 3. Congress and the TVPA

While the Supreme Court has heretofore refrained from contributing to, or altogether resolving, the ATCA controversy, Congress has not been so passive. In 1993, it passed the Torture Victim Protection Act (TVPA),<sup>85</sup> which creates federal causes of action as follows:

An individual who, under actual or apparent authority or color of law, of any foreign nation-

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>86</sup>

According to at least one scholar, the enactment of the TVPA lends itself to "contrary inferences as to the view Congress takes of the Alien Tort Statute."<sup>87</sup> On one hand, the passage of the TVPA could mean, consistent with Judge Bork's view, that Congress intends for only those torts it expressly enumerates to be actionable in U.S. courts.<sup>88</sup> Conversely, the House Report accompanying the Act, after explicitly referring to the fact that "[a]t least one Federal judge . . . questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action,"<sup>89</sup> continues:

Official torture and summary execution merit special attention in a statute expressly addressed to those practices. At the same time, claims based on

80. *See id.* at 809-10.

81. *See id.* at 811. Quoting Judge Bork:

To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate instances, in municipal courts. It is not to say that, like the common law of contract and tort . . . by itself it affords individuals the right to ask for judicial relief.

*Id.*

82. *See id.* at 825-26.

83. *Id.* at 823.

84. *See id.* at 824.

85. 28 U.S.C. § (2)(a) (1992).

86. *Id.*

87. Walker, *supra* note 25, at 551.

88. *See id.*

89. H.R. Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86.

torture or summary execution do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.<sup>90</sup>

#### 4. Recent Caselaw Expanding the Bounds of ATCA Accountability

Once *Filartiga* and, arguably, the TVPA established that the law of nations could generate civil liability for private acts of state-sponsored violence, alien plaintiffs sought to expand the limits of this newly gained accountability. One direction in which they pushed was toward defendant liability absent state action.<sup>91</sup> The Second Circuit's decision in *Kadic v. Karadzic*<sup>92</sup> indicated that alien plaintiffs have made substantial headway along this path.

*Kadic*, a consolidation of two suits, involved claims brought by Croatian and Muslim citizens of Bosnia against Radovan Karadzic, president of the self-proclaimed Bosnian-Serb republic of "Srpska."<sup>93</sup> The plaintiffs contended that Karadzic, as commander of the Bosnian-Serb military forces, engineered a pattern of atrocities against the Croat and Muslim populations, including rape, forced prostitution, torture, and summary execution.<sup>94</sup> They alleged that these acts were part of a genocidal campaign conducted during the course of the Bosnian Civil War.<sup>95</sup> The district court dismissed their complaint, holding that the action could not be maintained under the Alien Tort Statute because the Bosnian-Serb military faction, headed by Karadzic, was not a state actor.<sup>96</sup>

In reversing the district court's dismissal, the three-judge panel explained that the law of nations, as understood in the modern era, is not confined in its reach to state action; in certain circumstances, private individuals as well as nations are capable of violating international law.<sup>97</sup>

90. *Id.* See also *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) ("The TVPA codifies the holding in *Filartiga v. Pena-Irala* . . .").

91. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996) (involving a suit against a non-state actor for human rights violations whose military regime was not a recognized state); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (involving a suit against private U.S. corporations for human rights abuses and environmental torts committed abroad).

92. *Kadic*, 70 F.3d at 232.

93. *Id.* at 236-37.

94. See *id.* at 237.

95. See *id.*

96. See *id.* at 237.

97. See *id.* at 239. According to the court, § 702 of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS sets forth a list of conduct that qualifies as such *if precipitated by a state actor*; this list includes: "(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." *Id.* at 240 (citing the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986)). Similarly, § 404 of the Restatement sets forth a partially overlapping list of offenses *capable of being committed by non-state actors*; this list includes, "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war

More specifically, war crimes and genocide were proscribed under customary international law even where committed by non-state actors.<sup>98</sup> In contrast, the "tort" of torture requires a finding of state implication to be actionable under the ATCA.<sup>99</sup>

Another direction in which post-*Filartiga* plaintiffs have pushed the bounds of the ATCA is toward extending liability *beyond* the direct perpetrators of the violence.<sup>100</sup> The first wave of this movement involved suits against military commanders for the abuses committed by their troops.<sup>101</sup> The second wave concerned the extension of liability to civilians close to the military who conspired in the commission of human rights violations.<sup>102</sup> The third wave, of which *Unocal* is representative, now seeks to extend liability to U.S. corporations for the human rights violations committed abroad by their subsidiaries or foreign business associates.<sup>103</sup> In *Beanal v. Freeport-McMoran, Inc.*,<sup>104</sup> Indonesian citizens unsuccessfully brought suit under the ATCA against U.S. corporations for the alleged human rights violations committed by Indonesian subsidiaries.<sup>105</sup> In the pending *Wiwa v. Royal Dutch Petroleum Co.*<sup>106</sup> litigation, the family of a man executed by the Nigerian government has sued the Shell Oil Company, charging it with complicity.<sup>107</sup> As addressed above, *Doe v. Unocal*<sup>108</sup>

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crimes, and perhaps certain acts of terrorism." *Id.* at 240 (citing the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986)).

98. See *Kadic*, 70 F.3d at 239-42.

99. See *id.* at 243.

100. See Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 597 (1997).

101. See *id.* See also *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) (finding ATCA cause of action stated against Argentine general for abuses committed by troops under his command), *rev'd on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (finding ATCA cause of action stated against Haitian military leader for abuses committed by troops under his command); *Xuncax v. Gramajo*, 886 F. Supp. 162, 198-99 (D. Mass. 1995) (finding ATCA cause of action stated against Guatemalan Minister of Defense for abuses committed by military forces under his command).

102. See *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496, at \*2 (S.D.N.Y. filed Apr. 9, 1996) (finding ATCA cause of action stated against Rwandan political leader for his role in the torture and murder of thousands of citizens); *Balance v. FRAPH*, No. 94 Civ. 2619 (E.D.N.Y. filed June 1, 1994) (pending suit brought by a woman allegedly tortured by members of a Haitian paramilitary group who established an office in New York).

103. See Stephens, *supra* note 100, at 599. As discussed above, the first use of the ATCA by a foreign national as a means of asserting a claim against a U.S. company for "vicarious" human rights violations committed abroad is found in *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5<sup>th</sup> Cir. 1988).

104. 969 F. Supp. 362 (E.D. La. 1997).

105. *Id.* The district court dismissed the complaint holding that, *inter alia*, (1) the plaintiff failed to allege facts sufficient to establish the state action component necessary for non-genocide related claims, and (2) the plaintiff failed to state a genocide claim under the ATCA. *Id.* at 373-80.

106. Civ. No. 96-8386 (S.D.N.Y. filed Nov. 8, 1996).

107. See Gail Appleton, *Royal Dutch/Shell Sued in Human Rights Case*, REUTERS, NOV. 8, 1996, available in LEXIS, World Library, Allwld File.

108. 963 F. Supp. 880 (C.D. Cal. 1997).

is meaningful as the first “successful” suit<sup>109</sup> in this wave of corporate accountability litigation.<sup>110</sup> If upheld on appeal, its jurisdictional holding – that a U.S. corporation can be liable for the human rights violations committed by a foreign government partner – will have a strong foothold in ATCA caselaw.

## II. Analysis: The Inadequacy of the Status Quo

This Note argues for the enactment of legislation to facilitate suits by aliens who are the victims of extra-territorial human rights abuses abetted by U.S. companies. Logically, the need for such legislation can only be established by illustrating first how the causes of action currently available to such foreign plaintiffs – municipal tort claims and now ATCA claims – are insufficient vehicles for redress.

### A. The Futility of Municipal Tort Claims

One viable cause of action in a U.S. court is a municipal tort action initiated in any state in which the defendant company is subject to suit. In bringing such a such a tort action, an alien plaintiff faces at least two formidable obstacles – one procedural and one substantive – and consequently a low probability of success.<sup>111</sup>

A procedural impediment to the alien plaintiff’s suit is the doctrine of *forum non conveniens* which, considering the extra-territorial nature of the litigation, the corporate defendant is sure to invoke. *Forum non conveniens* is a precept of federal common law<sup>112</sup> that has won substantial, but not universal, following in state courts.<sup>113</sup> Section 1.05 of the Uniform Interstate and International Procedure Act defines the doctrine as follows: “When the court finds that in the interest of substantial justice the action

109. As addressed above, the *Doe* plaintiffs were successful from a jurisdictional perspective.

110. See Pizzurro & Delaney, *supra* note 15.

111. Indeed, our legal regime’s inefficacy in dealing with tort claims by aliens against U.S. corporations is the topic of much scholarly debate. See, e.g., WARREN FREEDMAN, *FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS* (1988); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens & Antisuit Injunctions*, 68 *TEX. L. REV.* 937 (1990); Molly M. White, Comment, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and its Effects on International Environment Litigation*, 26 *LOY. L.A. L. REV.* 491 (1993); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 *CORNELL L. REV.* 650 (1992); Stephen J. Darmody, Note, *An Economic Approach to Forum Non Conveniens Dismissal Requested by Multinational Corporations – The Bhopal Case*, 22 *GEO. WASH. J. INT’L L. & ECON.* 215 (1989).

112. *Forum non conveniens* has been promulgated in federal courts through its implementation in three U.S. Supreme Court Decisions: (1) *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); (2) *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947); and (3) *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

113. See BORN, *supra* note 49, at 298. A minority of states has either rejected the *forum non conveniens* doctrine or remained uncommitted. States that have declined to adopt the doctrine include Georgia, Louisiana, Mississippi, North Dakota, and Texas. *Id.*

should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."<sup>114</sup>

Once *forum non conveniens* is invoked, the trial court must first determine the substantive law that governs the case under the relevant choice of law rules.<sup>115</sup> If the court concludes that a foreign law will govern the case, it may consider this as a factor weighing in favor of dismissal.<sup>116</sup> Next, the court must determine whether an "adequate" alternative forum exists; the doctrine presupposes at least two fora in which the defendant is amenable to process.<sup>117</sup> A foreign forum is "adequate" when the parties will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits they might receive in a U.S. court.<sup>118</sup> If no acceptable alternative exists, the case should not be dismissed regardless of the additional burden borne by the defendant.<sup>119</sup> If the trial court determines that an acceptable forum does exist, the judge must then consider all the relevant factors of public and private interest to determine whether justice would be better served if the alternative jurisdiction adjudicated the case.<sup>120</sup> Factors of *private interest* are those considerations that make the trial of the case relatively easy, expeditious, and inexpensive for the parties.<sup>121</sup> One significant factor is the deference given to the plaintiff's choice of forum.<sup>122</sup> Other factors include: (1) the "relative ease of access to sources of proof;" (2) the "availability of compulsory process" to secure the attendance of unwilling witnesses; (3) the cost of obtaining willing witnesses; and (4) the potential need to observe first-hand the *situs* of the controversy.<sup>123</sup> Factors of *public interest* are those that pertain to the burden placed on the adjudicating forum.<sup>124</sup> They include: (1) the administrative difficulties flowing from court congestion; (2) the localized interest in having localized controversies decided at home; (3) the interest in conducting the trial in a forum that is familiar with the law that must govern the action; (4) avoiding conflict of laws problems, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated

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114. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, 13 U.L.A. § 1.05 (1986).

115. See *McClelland Engineers, Inc., v. Munusamy* 784 F.2d 1313, 1316-17 (5<sup>th</sup> Cir. 1986) ("Before deciding a motion to dismiss a case under the doctrine of *forum non conveniens*, a district court 'should first ascertain whether U.S. or foreign law governs the suit.'").

116. See J. HAZARD, CIVIL PROCEDURE § 2.31 (1985).

117. See *Gulf Oil*, 330 U.S. at 506-07.

118. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5<sup>th</sup> Cir. 1987).

119. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. c at 251 (1971) ("[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff.").

120. See *Gulf Oil*, 330 U.S. at 511-512.

121. See *id.* at 508.

122. See *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1365-66 (S.D. Tex. 1995) ("[district courts] ordinarily should respect an American plaintiff's forum choice.").

123. See *Gulf Oil*, 330 U.S. at 508.

124. See *id.* at 508-09.

forum with jury duty.<sup>125</sup>

From the foregoing, it should come as no surprise that claims of foreign “torts” by foreign plaintiffs are commonly defeated by *forum non conveniens* challenges.<sup>126</sup> One can posit at least four explanations. First, in regards to the choice-of-law determination, the default rule for personal injury torts is *lex loci delictus* – a conclusion which supports deferral to the alternative forum.<sup>127</sup> Second, the “adequate alternative forum” standard does not appear to be especially demanding. In *Torres v. Southern Peru Copper Corp.*,<sup>128</sup> the district court held that the Peruvian courts were not “inadequate” for *forum non conveniens* purposes despite plaintiffs’ testimony that those courts were “corrupt” and “in total disarray.”<sup>129</sup> Third, the Supreme Court has stated that the deference usually afforded to the plaintiff’s choice of forum should cease where the plaintiff is not a U.S. citizen.<sup>130</sup> Fourth, most, if not all of the so-called public interest factors work against a foreign plaintiff, especially where a personal injury tort is at issue and *lex loci* governs.

A substantive impediment to the alien plaintiff’s suit is the inherent difficulty in establishing complicity or concerted action for purposes of

125. *See id.*

126. *See Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11<sup>th</sup> Cir. 1985) (dismissing tort claims by Costa Rican agricultural workers harmed in Costa Rica by exposure to defendant’s pesticides on grounds of *forum non conveniens*); *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996) (dismissing tort claims by Peruvian citizens harmed by toxic emissions stemming from defendant’s smelting operations in Peru on grounds of *forum non conveniens*); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (dismissing tort claims by Ecuadoran plaintiffs against U.S. corporation for the alleged contamination of the air, ground, and water in Ecuador on grounds of *forum non conveniens*).

127. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 146, 156 (1971).

§ 145. (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . .

(2) Contacts to be taken into account . . . to determine the law applicable to an issue include:

(a) the place where the injury occurred,  
 (b) the place where the conduct causing the injury occurred,  
 (c) the domicile, residence, nationality, place of incorporation and business of the parties, and  
 (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 146. In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . in which event the local law of the other state will be applied.

§ 156. (1) The law selected by an application of the rule of § 145 determines whether the actor’s conduct was tortious.

(2) The applicable law will usually be the local law of the state where the injury occurred.

128. 965 F. Supp. 899 (S.D. Tex. 1996).

129. *Id.* at 903.

130. *See Piper Aircraft*, 454 U.S. at 256 n.23 (“Citizens or residents deserve somewhat more deference than foreign plaintiffs[.]”).



tort liability. Assuming the application of domestic tort law,<sup>131</sup> the Restatement (Second) of Torts<sup>132</sup> provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.]" On its face, § 876 appears to reach a U.S. corporation whose foreign affiliate commits human rights violations in furtherance of a joint initiative where the plaintiffs establish the requisite *knowledge* and *substantial assistance*. However, a major limiting principle – and the probable Achilles heel of the plaintiffs' case – is the extent to which the foreign affiliate's actions are *foreseeable*. As stated in the comment to § 876(b): "although a person who encourages another to commit a tortious act may be responsible for other acts by the other, ordinarily he is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him."<sup>133</sup> Understood in conjunction with traditional agency principles, as long as the U.S. company does not explicitly order the affiliate to commit the violations, the corporation should be shielded from liability to the extent that the affiliate's outrageous conduct was outside the scope of the business relationship.<sup>134</sup> Illustration 11 in the comment to § 876(b) elucidates this point:

A supplies B with wire cutters to enable B to enter the land of C to recapture chattels belonging to B, who, as A knows, is not privileged to do this. In the course of the trespass upon C's land, B intentionally sets fire to C's house. A is not liable for the destruction of the house.<sup>135</sup>

Prosser and Keeton's view on concerted action corroborates the above:

There are . . . occasional statements that mere knowledge by each party of what the other is doing is sufficient "concert" to make each liable for acts of the other; but this seems clearly wrong. Such knowledge may very well be important evidence that a tacit understanding exists; but since there is ordinarily no duty to take affirmative steps to interfere, mere presence at the commission of the wrong, or failure to object to it, is not enough to charge one with responsibility.<sup>136</sup>

## B. The Limited Scope of Relief Afforded by the ATCA

The other viable cause of action – since Judge Paez released the *Unocal* order – is an ATCA claim. While the ATCA alternative is certainly a step in right direction (it expands the scope of corporate accountability), the

131. Applying the aforementioned *forum non conveniens* analysis to a case involving an abetted extraterritorial tort, it is likely that a U.S. court would retain jurisdiction only where that court first determined that municipal tort law was the rule of decision.

132. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

133. *Id.* § 876(b) cmt. d.

134. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").

135. RESTATEMENT (SECOND) OF TORTS § 876(b) cmt. d, illus. 11 (1979).

136. KEETON ET AL., *supra* note 5, at 323-24.

redress it affords is available to only a small class of plaintiffs in relatively few courts.

To begin with, an alien plaintiff's choice of forum within the United States is considerably restricted. In theory, her ATCA suit could be brought in state court considering that: (1) state courts are fora of general jurisdiction, and (2) the Alien Tort Statute does not grant the federal courts exclusive jurisdiction over such suits.<sup>137</sup> Nonetheless, it is likely that a state court would decline to exercise jurisdiction over the suit because of the prudential concern that a state court is not the appropriate forum for the resolution of issues implicating foreign affairs.<sup>138</sup> As a practical matter, the alien plaintiff would probably be required to assert her claim in a federal court. Even still, not every federal court could be regarded as a hospitable forum for her claim. Again, only three Circuits have officially endorsed *Filartiga's* interpretation of the ATCA. Accordingly, any suit brought in one of the other ten circuits risks a more restrictive reading of the Alien Tort Statute in line with the interpretation advanced by Bork in *Tel-Oren*.

Accepting, for the sake of argument, that the alien plaintiff is heard in a federal forum that espouses *Filartiga*, she must still allege a "tort" that constitutes a violation "of the law of nations or a treaty of the United States."<sup>139</sup> As few treaties generate private rights of action,<sup>140</sup> she would likely be required to turn to the nebulous "law of nations" to find a violation. Adopting *Kadic* as the prevailing view, she would not be afforded relief unless the conduct complained of was inflicted by individuals acting under the color of state authority; only the offenses set out in § 404 of the Restatement of Foreign Relations – piracy, participation in the slave trade, attacks on aircraft, genocide, war crimes, and certain (heretofore identified) acts of terrorism – ostensibly would be actionable absent state action.<sup>141</sup> Even if she could establish state implication,<sup>142</sup> her allegations

137. 28 U.S.C. § 1350. See also *Alomang v. Freeport-McMoran Inc.*, 1996 WL 601431, 4 (E.D.La. 1996) ("[T]here is simply no indication that the Alien Tort Statute makes federal courts the exclusive forum for all tort claims asserted by aliens.")

138. See *Zschernig v. Miller*, 389 U.S. 429 (1968) (invalidating an Oregon probate statute on the ground that it affects international relations and subsequently must give way because it impairs the effective exercise of the Nation's foreign policy). Justice Stewart's concurrence in *Zschernig* illustrates the court's rationale: "We deal here with the basic allocation of power between the States and the Nation. . . . [T]he conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several states." *Id.* at 443. See also *Tel-Oren*, 726 F.2d at 804-05 n.11 (Bork, J., concurring) ("A state court suit that involved a determination of international law would require consideration . . . [of] the principle that foreign relations are constitutionally relegated to the federal government and not the states.")

139. 28 U.S.C. § 1350.

140. See *Tel-Oren*, 726 F.2d at 808 (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts.")

141. See *Kadic*, 70 F.3d at 239-40 (citing the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986)).

142. This is no easy task; courts have struggled to define the concept in a consistent manner. *Doe*, 963 F. Supp at 890 (citing *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9<sup>th</sup> Cir. 1996)) ("Both the Ninth Circuit and the Supreme Court have recog-

would still have to conform to the limited class of offenses set out in § 702 of the Restatement and the TVPA.<sup>143</sup>

### III. Proposal: A Call for Federal Legislation

From the foregoing, it should be apparent that the present causes of action available to foreign plaintiffs seeking redress for extraterritorial torts are inadequate. Accepting that increased corporate accountability in this context is in fact desirable — a proposition that will be established in turn — the obvious question becomes, what is the most appropriate way to foster such accountability? At least two approaches are conceivable, one “passive” and one “active.” The passive approach entails a continued, somewhat optimistic reliance on the developing ATCA remedy. Given the constant modernization of customary international law and the synchronous expansion of ATCA accountability, it is only a matter of time before the Alien Tort Statute affords comprehensive relief to alien plaintiffs seeking redress against U.S. corporations for extraterritorial torts. The active approach, in contrast, entails the enactment of new federal legislation to facilitate such suits. For all the reasons discussed below, the active approach is the sounder methodology.

#### A. The Remedial Law Should Come from New Federal Legislation, Not Future ATCA Litigation

As discussed above, the ATCA, as currently interpreted, affords a limited scope of relief for alien plaintiffs vicariously victimized by U.S. corporations. It is certainly plausible, given the evolutionary character of ATCA jurisprudence, that the statute will eventually provide a more sweeping form of redress. Nonetheless, there are at least three reasons why continued reliance on the Alien Tort Statute is an inferior alternative to the enactment of new federal legislation. First, there is simply no guarantee that courts will continue to stretch the ATCA to provide a wider scope of relief. Second, enacting new legislation would certainly take less time than waiting for favorable developments in ATCA jurisprudence. Third, the ATCA's very grounding in customary international law renders it an inappropriate remedial device. More specifically, it is ideologically unsound to route what in effect are municipal tort claims through customary international law simply because our own legal system is unable (or perhaps, unwilling) to address them.

When an alien brings suit for a foreign tort *committed exclusively by a foreign defendant* [e.g., when a Burmese plaintiff sues a Burmese defendant in a U.S. court for torture carried out in Burma] we effectually channel the claim through customary international law by affording the alien plaintiff no viable cause of action other than an ATCA suit. Our deferral to custom-

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nized that ‘cases deciding when private action might be deemed that of the state have not been a model of consistency.’”)

143. See *Kadic*, 70 F.3d at 240 (citing the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986)).

ary international law in such a scenario is logical because there would exist no applicable U.S. law to apply to the case. Indeed, one can make a strong argument that any domestic law proffered to govern the suit (other than an attempt to codify international law principles in the tradition of the TVPA) would be invalid as (1) beyond the scope of Congress' article I authority,<sup>144</sup> (2) "extraterritorial"<sup>145</sup> as a matter of legislative jurisdiction, or (3) the inapplicable law to resort to under a modern, interest-based choice of law determination.<sup>146</sup> In contrast, when an alien plaintiff brings suit for human rights violations committed abroad *yet facilitated or abetted by a U.S. corporation* [e.g., when a class of Burmese nationals brings suit against a California energy company in a California district court for extraterritorial human rights violations], resort to customary international law is not only circuitous, but in some sense "dishonest" because domestic law — i.e., newly enacted federal legislation — *could* govern such suits without triggering any of the three concerns discussed above.<sup>147</sup>

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144. See U.S. CONST. art. I, § 8. Of Congress's enumerated powers set forth in Article I, Section 8, only two deal with the regulation of extraterritorial affairs outside the realm of national defense. *Id.* The Commerce Clause (Section 8, Clause 2) discusses only the power "to regulate commerce with foreign Nations" and would clearly fail as the justification for U.S. law proscribing human rights violations among wholly foreign parties on foreign soil. *Id.* Section 8, Clause 10, however, grants Congress the Power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* On its face, this provision could serve as the grounding for such legislation, but would be valid only insofar as Congress' codification of "the Law of Nations" was accurate.

145. See *Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a long standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 32, at 32 ("It is difficult to conceive, upon what ground a claim can be rested, to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations, or to those of their subjects."). See also BORN, *supra* note 49, at 511 ("Congress has the power to enact legislation that violates international law if that is what it wishes to do. Nevertheless, U.S. Courts have long relied upon the related 'territoriality presumption': . . . that federal legislation will not be interpreted as to apply extraterritorially absent express language requiring this result.").

146. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 127, §§ 145, 146, 156. There is a tangible difference between international limits on legislative jurisdiction ("extraterritoriality" concerns) and national choice of law rules. BORN, *supra* note 49, at 623. Quoting Born:

There is a fundamental distinction between: (a) the limits that international law imposes on a nation's exercise of legislative jurisdiction; and (b) the decision that a nation makes whether to make use of its rights under international law to assert legislative jurisdiction. . . . [I]nternational law will frequently permit two (or more) states to assert legislative jurisdiction over the same conduct or transaction. . . . In these circumstances, national choice of law rules determine whether a nation will apply its laws to conduct that it could properly regulate under international law.

*Id.*

147. First, no one would doubt that domestic law regulating the extraterritorial conduct of U.S. businesses is within Congress's Constitutional authority under the Commerce Clause. U.S. CONST. art. I, § 8 ("Congress Shall have the power . . . [t]o regulate Commerce with foreign nations."). Second, such domestic law could not fairly be regarded as "extraterritorial" as it is well established that a nation may regulate the con-

## B. The Proposed Legislation

The new federal legislation contemplated by this Note borrows from both the TVPA and the Foreign Corrupt Practices Act of 1977 (FCPA) – federal legislation that, *inter alia*, prohibits “corrupt” payments to foreign government and political officials.<sup>148</sup> In pertinent part, the proposed legislation provides as follows:

### SEC. 1. HUMAN RIGHTS PROTECTION.

(a) PROHIBITIONS.—It shall be unlawful for any domestic business concern<sup>149</sup> which makes use of the mails or any means or instrumentality of interstate commerce<sup>150</sup> to engage principally in an extra-territorial business enterprise with or through a foreign affiliate where:

(1) that foreign affiliate was predisposed to commit one or more human rights violations in furtherance of that enterprise when the agreement with it was reached; and

(2) a human rights violation does in fact occur.

(b) PENALTIES.—Any domestic concern that violates subsection (a) of this section shall:

(1) be fined not more than \$4,000,000; and

(2) be liable to the injured party or that party’s legal representative in a legal action.

(c) DEFINITIONS.—For the purposes of this Act—

(1) the term “domestic business concern” means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship which has as its principal place of business the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) the term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign

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duct of its citizens abroad. *See EEOC v. Aramco*, 499 U.S. at 248 (1991) (“Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”). *See also* Restatement (Second) of Foreign Relations Law of the United States § 30 (1965) (“A state has jurisdiction to prescribe a rule of law . . . attaching legal consequences to conduct of a national of the state wherever the conduct occurs.”). Third, domestic legislation would most likely obviate any choice of law controversy as it is generally accepted that in a U.S. court, “[U.S.] law prevails over inconsistent jurisdictional limits.” BORN, *supra* note 49, at 510. *See also* *United States v. Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945) (“We are concerned only with whether Congress chose to attach liability to the conduct outside the United States. . . . [A]s a court of the United States, we cannot look beyond our own law.”).

148. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 & 78dd-2). The Act was amended as part of an omnibus trade bill passed in 1988. *See* Omnibus Trade and Competitiveness Act of 1988, Foreign Corrupt Practices Act Amendments, Pub. L. No. 100-418, tit. V, subtit. A, pt. i, §§ 5001-03, 102 Stat. 1107, 1415-25 (1988).

149. The term “domestic business concern” is borrowed from the FCPA. 15 U.S.C. § 78dd-2(a).

150. Like the FCPA, the proposed legislation is rooted in the Commerce Clause. It is this grounding in the Commerce Clause that renders the statute more constitutionally (as well as ideologically) sound than the ATCA.

country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

- (A) a telephone or any other interstate means of communication, or
  - (B) any other interstate instrumentality.
- (3) the term “foreign affiliate” means any subsidiary or business partner operating in a foreign country; a foreign government or government official qualifies as such.
- (4) a domestic business concern “engages principally” in a business enterprise where it:
- (A) maintains a majority equity interest in the foreign affiliate or in the enterprise itself; or
  - (B) maintains a controlling minority equity interest in the foreign affiliate or in the enterprise itself; or
  - (C) invests \$5,000,000 in cash or capital into the enterprise.
- (5) “predisposition”
- (A) a foreign affiliate is “predisposed” to commit a human rights violation where:
    - (1) it has in the past committed a human rights violation, as defined by this Act, to further a business interest since January 1, 1978; and
    - (2) a reasonable inquiry into the affiliate’s past would have uncovered as much.
      - (B) establishing whether or not an affiliate has in the past committed a human rights violation—while a prior judicial ruling is the most conclusive evidence that a violation had been committed by an affiliate, it is not the only form of evidence. (C) predisposition limitation waived in the context of foreign subsidiaries—in the event that the foreign affiliate is a subsidiary of the defendant, the predisposition limitation is inapplicable.
- (6) “human rights violations” include:
- (A) slavery or slave trade;
  - (B) the murder or causing the disappearance of individuals;
  - (C) prolonged arbitrary detention; or
  - (D) torture or other cruel, inhuman, or degrading treatment or punishment.

## SEC. 2. JURISDICTION OF UNITED STATES DISTRICT COURTS.

- (a) JURISDICTION OVER NEW CAUSE OF ACTION.—Chapter 85 (relating to district court jurisdiction) of title 28, United States Code, is amended to include civil actions brought under this Act.
- (b) DOCTRINE OF FORUM NON-CONVENIENS INAPPLICABLE TO SUITS BROUGHT UNDER THIS ACT.—Civil actions commenced under this Act shall be entertained in the District Courts of United States in spite of the possible existence of an adequate foreign forum or the potential force of the public and private factors weighing in favor of a venue-based dismissal; changes of venue pursuant to 28 U.S.C. § 1404(a)<sup>151</sup> remain permissible.

### C. An Explication of the Proposed Legislation

The federal legislation proposed by this Note bears a strong resemblance to the FCPA in terms of both substance and form. As a matter of substance,

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151. 28 U.S.C. § 1404 (1948) (“For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer a civil action to any other district or division where it might have been brought.”).

the proposed legislation trails U.S. companies as they venture abroad to ensure a baseline standard of moral conduct.<sup>152</sup> As a matter of form, the legislation sets forth a list of prohibited conduct<sup>153</sup> and authorizes criminal as well as civil proceedings to enforce its proscriptions.<sup>154</sup>

Section 1 of the legislation contains its substantive provisions. Subsection (a) censures the vicarious commission of four offenses: (1) slavery, (2) murder or causing the disappearance of individuals, (3) prolonged arbitrary detention, and (4) torture or other cruel, inhuman, or degrading treatment or punishment. This list is derived from the violations delineated in the Restatement (Third) of Foreign Relations at sections 404 and 702;<sup>155</sup> it borrows those offenses applicable in the context of project finance.

A U.S. business violates the Act where it enters into an agreement with a foreign affiliate "predisposed" to commit any of the aforementioned human rights violations and where one such violation occurs in furtherance of the enterprise. An affiliate is "predisposed" where "it has committed a human rights violation, as defined by [the] Act, to further a business interest since January 1, 1978,"<sup>156</sup> and "a reasonable inquiry into the affiliate's past would have uncovered as much." Where the entity committing the human rights violation is a subsidiary of the defendant, the "predisposition" limitation does not apply.<sup>157</sup>

The statute confines liability to "predisposed" non-subsidiary affiliates to limit the scope of its application. While the initiative aims to expand corporate accountability, it strives to do so without unduly chilling foreign investment or placing U.S. business interests at a competitive disadvantage. Thus, a domestic business concern does not subject itself to liability where it deals with a non-subsidiary affiliate never before implicated in a human rights violation to further its economic interests. Only a company that associates itself with a foreign affiliate with a dubious track record assumes the risk of liability.

A domestic business concern "engages principally" in an enterprise where it maintains a majority or controlling interest in the enterprise or in

152. See JEFFREY P. BIALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES* 24 (1997) (explaining that Congress and the Ford Administration pushed for the FCPA "to restore public confidence in the integrity of the American business community.").

153. The FRCP contains such a list at § 78dd-2(a). See 15 U.S.C. § 78dd-2(a).

154. See 15 U.S.C. § 78dd-2(g) ("Any domestic concern that violates [the anti-bribery proscriptions] shall be fined not more than \$2,000,000 . . . [and] shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General."). One point of divergence between the two statutes is that the proposed legislation's civil suit provision is available to private litigants as well as the Attorney General.

155. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 404, 702, *supra* note 97.

156. The statute restricts its scope to human rights violations committed within the last twenty years — an interval arbitrarily chosen — to limit its application. Without some form of temporal restriction, most, if not all government affiliates could potentially trigger liability.

157. The statute assumes that a parent company generally has sufficient knowledge of and/or control over the activities of its subsidiaries to know whether they are predisposed to commit a human rights violation.

the foreign affiliate itself. Engagement is also established where a U.S. business invests \$5,000,000 in cash or capital in the enterprise.

As stated above, a domestic business concern that violates the statute subjects itself to both civil and criminal liability. In regards to the potential criminal sanctions, a conviction under the act can result in a \$4,000,000 fine — twice the maximum penalty for a criminal violation of the FCPA.<sup>158</sup> Considering that the proposed legislation seeks redress for the commission of a human rights violation — an offense substantially more egregious and blameworthy than the corruption of a foreign government official — such a penalty is appropriate if not too lenient.

Section 2 of the proposed legislation addresses the procedural aspects of the initiative. Subsection (a) amends title 28 of the U.S. Code to create the federal cause of action necessary to enable the Section 1(b)(2) civil actions. Subsection (b) preempts the application of the *forum non conveniens* doctrine to suits commenced under the new Act.<sup>159</sup>

#### D. Arguments in Favor of the Proposed Legislation

Having set forth the proposed legislation, this Note now turns to the practical and theoretical arguments that support it.

##### 1. *The Migration of U.S. Business into Transitional Markets Necessitates Such Legislation*

There has been significant growth in U.S. business activity in economically “transitional” nations.<sup>160</sup> As many of the regimes in these nations have weak human rights traditions, there exists an increased likelihood of dollar-backed inequity. The recent proliferation of vicarious human rights litigation instituted by foreign plaintiffs against U.S. corporations corroborates this conclusion.<sup>161</sup>

##### 2. *The Proposed Legislation Would Benefit U.S. Business Interests*

While some may argue that the proposed legislation would unduly burden U.S. business interests, the stronger view is that the initiative would actually benefit them. In the wake of *Unocal*, U.S. companies investing in Third

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158. See 15 U.S.C. § 78dd-2(g).

159. The use of legislation to preempt the application of *forum non-conveniens* in transnational tort actions is by no means unprecedented. In 1913, the Texas legislature statutorily abolished the doctrine in suits brought under section 71.031 of the Texas Civil Practice and Remedies Code, a provision that in limited circumstances creates a cause of action for the death or personal injury of “a citizen of [Texas], of the United States, or of a foreign country” that occurs abroad. TEX. CIV. PRAC. & REM. CODE ANN. § 1.001(a) (West Supp. 1989). See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990) (“We conclude that the legislature has statutorily abolished the doctrine of *forum non conveniens* in suits brought under section 71.031.”).

160. See BIALOAS & HUSISIAN, *supra* note 152, at 55. Key transitional markets include: Burma, China, Indonesia, India, Malaysia, the Philippines, and Thailand. See *Developers Must Pick Local Partners Carefully*, *supra* note 5.

161. See generally *Wiwa v. Royal Dutch Petroleum Co.*, Civ. No. 96-8386 (S.D.N.Y. filed Nov. 8, 1996); *Beneal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La. 1997); *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).



World or transitional countries face a legitimate threat of vicarious human rights liability. As this liability stems from an evolving body of judge-made law, its most menacing facet — from the standpoint of U.S. business — is its sheer *indeterminacy*. In short, U.S. companies have no bright line rules to follow to avoid liability. Gregory Wallace, a partner at the New York office of Kaye, Scholer, Fierman, Hays, & Handler, explains the dilemma as follows:

[The *Unocal* holding] strikes a blow for human rights against an alleged violator, but it offers virtually *no guidance* to companies that want to avoid a violation. All the doctrine does is warn companies *very generally* that they should not knowingly benefit from a governmental business partner's violations of human rights. But, how direct must the benefit be to come under this doctrine? What degree of knowledge is required? What kinds of human rights abuses?<sup>162</sup>

The proposed legislation addresses Wallace's concern by providing guidelines for U.S. corporations who seek to engage in business activities abroad. Not only does it set forth with great specificity the conduct which gives rise to liability, it defines such conduct in objective terms. The "pre-disposition" inquiry, for example, is largely factual as it is rooted in the human rights track record of the foreign affiliate. The "engagement" inquiry is similarly objective as it is driven by three bright line rules.<sup>163</sup>

In addition to such predictability, another beneficial aspect of the legislation — from the standpoint of U.S. business — is its carefully tailored scope. As discussed above, the initiative is not designed to chill foreign investment. Rather, it is constructed to facilitate *thoughtful* foreign investment by restricting liability to those firms which voluntarily or recklessly contract with unsavory foreign affiliates. Furthermore, because the legislation penalizes only those human rights violations committed "in furtherance" of the business enterprise, U.S. corporations will not be held accountable for the ancillary indiscretions of their foreign affiliates. This stipulation enables U.S. business interests to contract with "transitional" foreign governments without assuming an inordinate degree of risk.

### 3. *The Proposed Legislation Fittingly Calls a Crime a "Crime"*

As discussed above, the two forms of relief currently available to a foreign plaintiff complaining of a U.S. corporation's extra-territorial violation of fundamental human rights are: (1) a municipal tort suit, and (2) an ATCA suit. As wholly *civil* measures, neither makes a normative statement about the defendant's conduct; private litigation, unlike criminal prosecution, "does not offer the full force of society's condemnation of human rights abuses."<sup>164</sup> Accordingly, an argument in favor of the proposed legislation is that, in affording criminal as well as civil sanctions, the initiative fittingly

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162. Wallace, *supra* note 13 (emphasis added).

163. Again, a domestic concern is "engaged principally" where it maintains a majority or controlling interest in the affiliate or the enterprise or where it commits \$5,000,000 to the venture.

164. Stephens, *supra* note 100, at 604.

calls a crime a "crime."<sup>165</sup>

#### 4. How Can We Have the FCPA and not Legislation of this Sort?

As a matter of "regulatory consistency," the existence of extra-territorial anti-bribery legislation (the FCPA) without corresponding extra-territorial human rights legislation is troubling. The striking results of this paradox can be illustrated with the following hypothetical: Widgets International (WI), a U.S. corporation, subjects itself to \$2,010,000 in criminal and civil sanctions where it bribes a foreign trade official through an overseas affiliate;<sup>166</sup> in contrast, WI is effectively immune from redress where it induces a corrupt foreign government to enslave a small village to construct its widget manufacturing plant.

#### 5. Proposed Legislation Comports with the Emerging View of a "World Society"

A strong argument can be made that the proposed legislation – or the *Unocal* doctrine in general – comports with the emerging perspective of a "world society" where concern for fundamental human rights transcends national borders.<sup>167</sup> Under such a normative framework, foreign plaintiffs would not be denied the opportunity for redress simply because of their citizenship. Quoting William Felice in *Taking Suffering Seriously: The Importance of Collective Human Rights*:

Citizenship today, in a "globalizing world," is profoundly different from citizenship in previous centuries. Due to the bountifulness of information, the enhancement of people's analytic skills, and the myriad of ways in which the planet has become smaller to us, some assert that national patriotism has lessened, and document how . . . social movements move across borders. Nations, in fact, appear to be an inappropriate unit to address the proliferation of global concerns for the emerging century. . . . If we can develop a new normative framework to guide the new global society, perhaps some of the structures causing human suffering can be exposed and changed.<sup>168</sup>

### Conclusion

Where conducted properly, U.S. project finance in transitional countries is beneficial to all concerned. U.S. corporate investors gain access to burgeoning foreign markets. Foreign "investees," in turn, receive much needed capital and equally valuable exposure to U.S. practices and ideals – exposure which, in the long run, should speed the transition to democracy. Because of the practice's tremendous "upside," an effort should be made to curb its distressing "downside" – its occasional sponsorship of human rights

165. As laid out above, Section 1(b)(1) of the proposed legislation authorizes up to \$4,000,000 in criminal fines for a violation of its substantive provisions.

166. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2).

167. See WILLIAM F. FELICE, *TAKING SUFFERING SERIOUSLY: THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS* 91 (1996).

168. *Id.* at 105-06.

violations in transitional countries. While Judge Paez's preliminary order certainly qualifies as such, one must question its limited scope, its shaky grounding in customary international law, and its indiscernible parameters. The new federal legislation proposed by this Note is precisely the sort of initiative that is required because it fosters increased investor accountability while simultaneously affording bright line rules to enable parties to avoid unforeseen liability.