

A RESPONSE TO THE CORPORATE CAMPAIGN AGAINST THE ALIEN TORT CLAIMS ACT

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INTRODUCTION

Multinational corporations, along with certain governmental, business, and trade sectors, have begun a full attack against the Alien Tort Claims Act (ATCA).¹ Proponents of the ATCA maintain that the law has been an invaluable tool for holding accountable those who commit international human rights abuses, including corporations. The ATCA allows foreign plaintiffs to file lawsuits in U.S. courts “for a tort only, committed in violation of the law of nations or a treaty of the United States.”² Traditionally, the defendants in ATCA lawsuits have been foreign government officials or foreigners who committed violations of human rights while acting under color of law. In an attempt to break with this tradition, an increasing number of victims have been attempting to successfully hold multinational corporations liable under the ATCA for human rights abuses. Although there is precedent for the proposition that private parties may be held liable in U.S. federal courts under the ATCA for certain violations of customary international law, no American-based corporation has ever faced a trial on the merits under the ATCA. And there is a growing movement seeking to prevent this from happening.

Corporations that have been sued, or that fear being sued under the ATCA, are attempting to weaken the law through lobbying groups such as the International Chamber of Commerce, the National Foreign Trade Council, USA-Engage, the U.S. Chamber of Commerce, and the U.S. Council of International Business. Victims of human rights abuses have also recruited human rights organizations, religious groups, and labor unions to counter this attack. To the victims and their allies, the corporate attack on the ATCA is only an attempt by multinational corporations to avoid accountability for their wrongdoing.

The arguments on both sides of the debate are passionate and complex. The debate has centered not only on whether “corporate ATCA” cases should be decided on the merits, but also on whether the ATCA itself should be repealed and ATCA precedents be overruled. The debate has become more heated in the aftermath of a September 2002 three-judge panel decision in the Ninth Circuit which held that the California-based energy company Unocal

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1. 28 U.S.C. § 1350 (2003).

2. *Id.*

could be held liable for its complicity in certain types of human rights abuses committed by the Burmese³ military.⁴ In essence, the panel found that plaintiffs had presented evidence that Unocal knowingly provided substantial assistance to the military in its commission of forced labor, murder, and rape. Although that decision has been vacated, and there is a possibility that an en banc hearing that took place this past summer might result in a different outcome, the decision has already had a ripple affect because it threatens to be the first case where a U.S. corporation will face a trial for human rights violations actionable under the ATCA.

An ominous struggle thus lies ahead. According to people like Elisa Massimino, D.C. director of the Lawyers Committee for Human Rights, one of the groups defending the ATCA, "[w]hat is at stake is the last 20 years of jurisprudence and the way [the ATCA] can hold human-rights violators accountable."⁵ Probably taking advantage of having a Republican-controlled Congress and an administration that is friendly to corporate interests the business community has already begun a lobbying campaign in Congress to explore ways to prevent the application of the ATCA to corporations conducting business abroad. Multinational corporations and their partners have also established a working group to provide support for companies that have been sued under the ATCA.⁶ The human rights community has also rallied its troops and has begun public awareness campaigns and other efforts to defend the ATCA.⁷

This paper attempts to address what Terry Collingsworth, Executive Director of the International Labor Rights Fund, calls the business community's "series of misleading fictions about the scope and application of the ATCA."⁸ The first topic addressed in the paper is whether private actors, especially U.S. corporations doing business abroad, can be held liable under

3. The military government calls the country Myanmar. See <http://www.myanmar.com> (Myanmar website) (last visited Nov. 5, 2003).

4. John Doe I v. Unocal Corp., Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g granted*, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

5. Tom Carter, *Old Law Finds New Use Against Oppressors*, WASH. TIMES, Mar. 17, 2003, at A12.

6. Kenny Bruno, *De-Globalizing Justice, The Corporate Campaign to Strip Foreign Victims of Corporate-Induced Human Rights Violations of the Right to Sue in U.S. Courts*, 24 MULTINATIONAL MONITOR 3 (Mar. 2003), available at <http://multinationalmonitor.org/mm2003/03march/march03corp2.html> (last visited Sept. 10, 2003) (discussing the various approaches the business community is taking in attacking the ATCA).

7. For example, Earth Rights International (ERI), an environmental NGO that represents plaintiffs in various ATCA lawsuits, has organized a campaign to defend the ATCA. Earth Rights International, <http://www.earthrights.org/atca/index.shtml> (last visited Sept. 10, 2003). On its website, ERI allows visitors to sign an electronic petition, or they could join the "Alliance to Defend the ATCA." *Id.*

8. Terry Collingsworth, *The Alien Tort Claims Act—A Vital Tool for Preventing Corporations from Violating Fundamental Human Rights*, at 2, available at <http://www.laborrights.org/publications/ILRF.pdf> (last visited Nov. 6, 2003) [hereinafter *A Vital Tool*].

the ATCA in the first place. Assuming that the ATCA applies to private actors, the paper addresses some of the other major concerns expressed by the corporate opponents of the ATCA, including policy and economic arguments against its application to multinational corporations doing business abroad. In response to these attacks, the paper then addresses whether there are any viable alternatives to ATCA litigation aimed at holding corporations accountable for their foreign operations, followed by a discussion of the compatibility of human rights concerns with U.S. foreign policy and corporate interests. Lastly, in an attempt to dismiss concerns over whether only investment abroad would expose a corporation to ATCA liability, the paper discusses and analyzes the high legal standards courts have required plaintiffs to meet in order to hold corporations accountable under the ATCA.

I. CAN CORPORATIONS BE LIABLE UNDER THE ATCA FOR VIOLATIONS OF "THE LAW OF NATIONS"?

Although the only subjects of international law have traditionally been states, that is no longer the case. Building on Nuremberg precedent, U.S. courts have held that private actors, such as corporations—foreign and U.S.—may be sued under the ATCA depending upon the nature of the offense.⁹ Through a progression of ATCA decisions, from *Kadic*¹⁰ to *Drummond* (one of the latest ATCA decisions to-date),¹¹ courts have held that corporations may be liable under the ATCA as well as under its sister statute, the Torture Victim Protection Act (TVPA).¹²

Several post-World War II cases laid the groundwork for the application of the ATCA to private parties. In *United States v. Flick*, *United States v. Krauch*, and *United States v. Krupp*, for example, the heads of major German corporations were prosecuted for, *inter alia*, war crimes and crimes against humanity.¹³ By holding individuals responsible for certain violations of international law, these cases transformed the concept of the state as the sole object of international law. Several decades later, building from these post-World War II cases and also from the jurisprudence in the post-*Filartiga*¹⁴ era, in its *Kadic* decision the second circuit incorporated the concept of private party liability into the ATCA, and held that private parties could be held liable

9. See discussion *infra* at IV(A) regarding the types of claims actionable under the ATCA against private parties and state actors.

10. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

11. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

12. See 28 U.S.C. § 1350 (note). The Torture Victim Protection Act provides U.S. citizens as well as aliens a cause of action for acts of torture and extrajudicial killing. See discussion of TVPA *infra* at III(b)(1).

13. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477-78 (2001) (discussing history of post-WWII cases).

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

under the ATCA for certain violations of international law.¹⁵ Subsequent rulings, like *National Coalition Government of Union of Burma v. Unocal, Inc.*¹⁶ in 1997 and *Wiwa v. Royal Dutch Petroleum Co.*¹⁷ in 2002, extended the holding in *Kadic*, finding that corporations, like other private actors, may be liable under the ATCA for aiding and abetting in certain violations of international law. Subsequent rulings have expanded on *Unocal* and *Wiwa*, increasing the number of offenses actionable against private parties under the ATCA.¹⁸ Other rulings have made clear that the number of actionable offenses under the ATCA is limited to violations universally condemned and readily definable.¹⁹ Recent decisions have also held that corporations can be held liable under the TVPA as well as under the ATCA,²⁰ as after all, private corporations are also "persons" under the law and have no immunity as such under domestic or international law.²¹ In total, a little more than two-dozen cases have been filed against U.S. and multinational corporations so far.²² To date, no U.S. corporation has faced trial in an ATCA case.

15. *Kadic*, 70 F.3d at 239.

16. *Nat'l Coalition Gov't of the Union of Burma v. Unocal* 176 F.R.D. 329, 348 (C.D. Cal. 1997) (noting that a private company utilizing slave labor may be subject to liability under the ATCA).

17. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

18. *See, e.g.*, *Estate of Rodriguez*, 256 F. Supp. 2d at 1250 (holding that violation to right of association is actionable under the ATCA). In *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), Judge Allen G. Schwartz of the U.S. District Court in New York City rejected Talisman's argument that a corporation is "legally incapable of violating the law of nations." *Id.* at 308. The court added that, "given private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations." *Id.*

19. *See Beanal v. Freeport-McMoran*, 197 F.3d 161 (5th Cir. 1999) (rejecting cultural genocide as an actionable claim under the ATCA); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002) (rejecting actions based on environmental harms even if pled as violations of the right to life).

20. *See, e.g.*, *Sinaltrainal v. Coca Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D.Fla. 2003) ("Bearing in mind that a corporation is generally viewed the same as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so."); *Estate of Rodriguez* 256 F. Supp. 2d at 1263 (holding that the TVPA applies to corporations).

21. *See Jordan J. Paust, Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803 (2002).

22. There has been a recent increase in corporate ATCA lawsuits. For example, on April 24, 2003, a suit was filed against Occidental Petroleum and its security contractor, Airscan, Inc., for their role in the murder of innocent civilians in the hamlet of Santo Domingo, Colombia on December 13, 1998. Lisa Girion, *Occidental Sued in Human Rights Case*, L.A. TIMES, Apr. 25, 2003. On April 5, 2003, attorney Ed Fagan filed a 6.1 billion dollar lawsuit in New York and Nevada on behalf of former workers of the diamond companies Anglo American and De Beers, alleging that the former workers were wrongly fired for labor strikes, subjected to forced labor, and were attacked, imprisoned, and tortured during labor protests. Nicol Degli Innocenti, *Chemical Groups Face Legal Action from Apartheid Victims*, FIN. TIMES, Apr. 14, 2003, at 23.

II. OBJECTIONS TO THE ATCA

Corporate attacks on the ATCA have focused primarily on policy and economic considerations.²³ On the policy side, some say that corporate ATCA lawsuits improperly intrude upon foreign relations, which is an area exclusively reserved for the executive branch. On the economic side, some say that corporate ATCA cases discourage foreign investment, which negatively affects the interests of the U.S., the corporations, and the foreign countries where the corporations are doing business.

A. Policy Arguments Against the ATCA

One of the major arguments against the application of the ATCA in general, as well as in particular to multinational corporations, centers on the notion that courts are an improper forum to judge U.S. foreign policy.

23. Judicial attacks on the ATCA, on the other hand, have focused more on Constitutional arguments. For example, in a recent concurring opinion in the D.C. Circuit in a case concerning detainees at Guantánamo Bay, *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003), Judge Randolph suggests that the ATCA is an unconstitutional exercise of power. The argument is rooted in a separation of powers analysis and centers on whether Congress clearly expressed an intent to provide a cause of action for violations of the law of nations under Article III jurisdiction. *Id.* at 1147-48. Further, Judge Randolph questions whether the law of nations really is part of federal common law and suggests that the ATCA was meant to apply only to torts existing in 1789, like piracy. *Id.* Although such a radical interpretation of the ATCA is isolated and contradicts the vast ATCA jurisprudence that has been established in the past twenty-three years, some corporate defendants in ATCA cases have expressed an interest in adopting Judge Randolph's position in future cases. Nevertheless, all jurisdictions that have addressed these issues in a majority opinion have rejected Judge Randolph's apprehensions about the constitutionality of the ATCA, the incorporation of the law of nations into federal common law, as well as the jurisdictional nature of the act. *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) ("§1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action"); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (joining the Second Circuit "in concluding that the [ATCA] creates a cause of action for violations of specific, universal and obligatory international human rights standards. . ."); *Kadic*, 70 F.3d at 246 (rejecting Judge Bork's concurring opinion in *Tel-Oren* and holding that the ATCA provides a cause of action for "violations related to genocide, war crimes, and official torture"); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 289 (holding that "ATCA provides a cause of action in tort for breaches of international law"); *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1130-31 (C.D. Cal. 2002) (holding that "the ATCA both confers federal subject matter jurisdiction and creates an independent cause of action for violations of treaties or the law of nations"); *John Doe I*, 2002 WL 31063976 at *8 (stating that the ATCA also provides a cause of action, as long as "plaintiffs . . . allege a violation of 'specific, universal, and obligatory' international norms as part of [their] ATCA claim"); *Estate of Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1358 (S.D. Fla. 2001) (holding the same as *John Doe I*); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1539 (N.D. Cal. 1987); *Paul v. Avril*, 812 F.Supp. 207, 212 (S.D. Fla. 1993) (holding that "[t]he plain language of the statute and the use of the words 'committed in violation' strongly implies that a well pled tort if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]"); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1993).

Although the lawsuits name corporations as the defendants, opponents to the act suggest that the factual setting in these cases necessarily involves passing judgment on the acts of foreign governments with whom the corporations have a relationship. In effect, therefore, courts presiding over corporate ATCA cases would be determining U.S. foreign policy.

Pati Waldmeir, a columnist for the London Financial Times, recently wrote an article criticizing ATCA judicial activism as "the naked arrogance of American power."²⁴ "Altering the behavior of foreign states" she says, "is the business of diplomats or soldiers but not of judges."²⁵ The executive branch, not the judicial branch, has been constitutionally given foreign affairs powers, and therefore judges have neither the authority nor the expertise to preside over such matters.

Thabo Mbeki, current President of South Africa, also criticizes the notion that U.S. courts can or should preside over claims that arise through actions in foreign countries. Speaking on the recently filed lawsuits for apartheid damages, discussed below, President Mbeki recently stated that "[it is] completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."²⁶ In this sense, ATCA lawsuits are perceived to undermine not only the exclusive role of the executive branch in foreign affairs, but foreign sovereign immunity as well.

Further, opponents of the ATCA argue that such lawsuits also undermine U.S. interests in the "war on terrorism." Peter Nickles, defense lawyer for Southern Peru Copper Corporation in an ATCA case, argues that "[g]iven the current need to foster consensus regarding the fight against international terrorism, and the need of our Executive Branch to conduct foreign relations without interference from the judiciary, constant interference by U.S. courts with foreign affairs threatens to work as a powerfully counterproductive force."²⁷

The State Department seems to agree, to some extent, with this argument. On July 29, 2002, per a request from the judge presiding over the *Exxon* case,²⁸ the State Department's Legal Advisor, Mr. William H. Taft IV, wrote a letter asserting that "adjudication of this lawsuit at this time would in

24. Patti Waldmeir, *An Abuse of Power*, LONDON FIN. TIMES, Mar. 14, 2003, available at www.ft.com.

25. *Id.*

26. Emonitors, *For the Week Ending April 22, 2003*, available at <http://www.worldmonitors.com/emonitors.html> (last visited Nov. 6, 2003).

27. Peter J. Nickles et al., *Court Properly Limits Scope of Alien Tort Claims Act*, 18 LEGAL BACKGROUNDER 2 (2003), available at <http://www.cov.com/publications/325.pdf> (last visited Sept. 10, 2003).

28. *John Doe, I v. Exxon Mobil Corporation*, No. 01-1357 (LFO) (D.D.C.) (involving allegations of rape, torture, and kidnapping by Indonesian soldiers paid to protect an Exxon Mobil natural gas plant in the province of Aceh in Indonesia).

fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism," and added that adjudication of the lawsuit may diminish U.S. efforts to promote human rights in Indonesia.²⁹ Although the State Department's letter was addressing a particular case under particular circumstances, opponents of the ATCA say that the policy considerations outlined above are applicable to all ATCA cases, or at least those that involve multinational corporations as defendants.

Opponents of the ATCA also warn that the judiciary will be detrimentally affected by foreign plaintiffs who will fill the dockets with a "crippling wave" of ATCA lawsuits concerning personal injuries that have no connection to the United States.³⁰ Some opponents have even characterized the ATCA "movement" as having evolved into a "free-for-all in which foreign plaintiffs invoke the ATCA as an all-encompassing basis for jurisdiction in routine personal injury cases involving any conduct occurring abroad."³¹ Michael Freedman, the writer for *Forbes* magazine who also wrote a recent article "warning" companies about the dangers of the ATCA, wrote earlier this year that "[e]verybody loves America. Especially foreign tort plaintiffs who are doing a little forum shopping."³²

There is something to be said about this argument. The U.S. legal system does provide certain advantages and incentives for foreign plaintiffs who lack proper domestic and international judicial mechanisms to address their harms.³³ For example, unlike many other domestic courts, U.S. courts allow for civil remedies that include not only high damage awards, but also punitive damages.³⁴ Corporations have traditionally opposed high punitive

29. Taft Letter, July 29, 2002, available at <http://www.laborrights.org/projects/corporate/ Exxon/stateExxonmobil.pdf> [hereinafter Taft *Exxon* Letter].

30. Nickles et al., *supra* note 27.

31. *Id.*

32. Michael Freedman, *Ich bin ein Tort Lawyer*, *FORBES*, Jan. 6, 2003, available at <http://www.forbes.com/global/2003/0106/017.html> (last visited Sept. 20, 2003).

33. See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT'L L.* 1, 2 (2002) (arguing that "[g]iven the absence of effective international mechanisms, enforcement generally occurs within domestic legal systems."). See also Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 *VA. J. INT'L L.* 545, 550 (2000) (arguing that international fora are often inadequate, especially to redress human rights violations by transnational corporations).

34. The following is a brief survey of some of the high damages awarded by U.S. courts in ATCA cases:

- Estate of Marcos, 978 F.2d at 493: \$760 million in compensatory damages and 1.2 billion in punitive damages.
- Abebe-Jira, 72 F.3d at 844: \$1.5 million
- Kadic, 70 F.3d at 232.: \$4.5 billion
- Forti, 672 F Supp. at 1531: \$80 million
- Paul, 812 F. Supp. at 207: \$41 million
- Romagoza Arce v. Garcia, *NO. 99-8364 (S.D. Fla. 2002)*: \$54.6 million

damage awards. Foreign plaintiffs, on the other hand, see such punitive damages available in the United States as a possible deterrent for future human rights violators, while at the same time sending a message to current or previous abusers that they may be held accountable for their violations.³⁵ In addition to the high monetary awards, plaintiffs in U.S. courts do not have to worry about paying for the costs of litigation should they lose the case. The availability of contingent agreements between clients and lawyers also provides another incentive for foreign plaintiffs to use U.S. courts to redress their harms. Procedurally, the U.S. legal system also provides certain incentives. The broad discovery tools available in U.S. courts, for example, are often not available in some foreign countries. Critics of the ATCA say these advantages provide an incentive for frivolous claims by foreign plaintiffs.

Ultimately, opponents suggest that this abuse of the U.S. judicial system will result in enormous legal costs to corporations that engage in business activities abroad. Corporations say they should not have to defend themselves from lawsuits that have no real connection to the United States. According to the U.S. Chamber of Commerce, "U.S. national interests require that we not allow the continuing misapplication of this 18th century statute to 21st century problems by the latter day pirates of the plaintiffs' bar."³⁶

B. Economic Arguments Against the ATCA

Probably the main catalyst for the recent increase in opposition to the ATCA has been a class action suit brought by apartheid victims against over 100 U.S. firms that engaged in business activities with the apartheid regime in South Africa. The plaintiffs claim that the apartheid regime could not have maintained apartheid for so long had it not been for the support of multinational corporations.³⁷ To many corporations, this is the type of frivolous lawsuit that epitomizes how the expansionist movement is abusing the ATCA.³⁸

35. See Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, at http://www.pbs.org/wnet/justice/law_background_torture.html (last visited Sept. 20, 2003) (commenting on the effect, use and benefits of civil remedies in U.S. courts for gross human rights violations).

36. Press Release, John E. Howard, Vice-President of International Policy and Programs for the U.S. Chamber of Congress, U.S. Chamber of Commerce, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. Chamber of Commerce Press Release (Oct., 2002), available at <http://www.uschamber.com/press/opeds/0210howardlitigation.htm> (last visited Sept. 20, 2003).

37. Wambui Chege, *S. Africa Asks U.S. Court to Dismiss Apartheid Cases*, REUTERS, (July 29, 2003), available at <http://www.forbes.com/newswire/2003/07/29/rtr1041980.html> (last visited Nov. 6, 2003).

38. Similar suits have been filed recently. On March 28, 2003, for example, *Makhetha v. Credit Commercial De France* was filed in federal court in the Eastern District of New York, seeking to hold French and Swiss banks and other financial institutions responsible for allegedly aiding and abetting the apartheid regime in South Africa by providing the funds that enabled

John E. Howard, vice president of international policy and programs at the U.S. Chamber of Commerce, recently asked corporations the following:

Did you know that, under current U.S. law, foreigners could sue your company in U.S. courts—if you simply did business, paid taxes and complied with the laws of a foreign country in which those foreigners allege that an atrocity occurred? Did you know that foreign nationals could sue your company if your products or resources were used in a U.S. military campaign against terrorists in those foreign nations? Did you know that your company could be sued if it was present in a country where that country's government had engaged in actions to put an end to riots, rebellion or other disorders, whether or not you played any role in the disorders or the government's response?³⁹

In his article, John Howard warned that, under the ATCA, “all of this is possible.”⁴⁰

The danger, according to the U.S. Chamber of Commerce and other corporate groups, is not only that ATCA suits are an unacceptable extra-territorial extension of U.S. jurisdiction, but also that a U.S. company could be liable simply by virtue of the fact that it did business in, paid taxes to, and otherwise complied with the laws of the country in which the violations occurred. It does not matter if a company had nothing to do with the actual violations or any participants therein. This is one of the main battle-cries of ATCA opponents; namely, that a company that does business in certain countries with questionable human rights records may be liable under the ATCA “simply for having invested there.”⁴¹ Therefore, critics say, application of the ATCA to corporations investing abroad might discourage U.S. companies from investing abroad, and possibly discourage foreign companies from investing in the United States. For these reasons, opponents of the ATCA say that these lawsuits are frivolous, they discourage foreign investment, and they constitute an abuse of the judicial system by opportunistic plaintiffs.

III. OBJECTIONS TO IMPUNITY

Those who defend the ATCA say that civil lawsuits are one of the few ways to hold companies accountable for their role in violations of international

South Africa to expand its police and security structures. See Business and Human Rights – A Resource Website, at <http://208.55.16.210/Complicity.htm> (last visited Nov. 7, 2003).

39. Howard, *supra* note 36.

40. *Id.*

41. Michael Freedman, *Supping With The Devil*, FORBES, April 28, 2003, available at <http://www.forbes.com/global/2003/0428/034.html> (last visited Nov. 6, 2003).

human rights norms. Without any effective alternative to ATCA civil litigation, corporations could literally get away with murder. Moreover, the goals of ATCA litigation, namely the protection and promotion of human rights, are goals shared both by the United States in its foreign policy, especially in the "war on terrorism," as well as by socially responsible corporations. ATCA advocates emphasize that corporations that respect the law of nations should not fear being haled into U.S. courts under the ATCA. ATCA liability should be a concern only of those corporations whose conduct violates one of the very few actionable claims under ATCA. Even then, U.S. courts have put in place numerous and complex legal hurdles to prevent frivolous suits from surviving pre-trial motions.

A. *No Effective Alternative to ATCA Litigation*

Proponents of the ATCA attempt to focus the debate on the issue of accountability. Within this framework, human rights advocates suggest that there is no effective alternative to the ATCA. Voluntary initiatives of self-regulation, for example, are unenforceable and therefore ineffective in achieving the goal of accountability.

For example, in December 2000, after two years of negotiation under the auspices of the governments of the United States and United Kingdom, several leading human rights groups and extraction companies established the *Voluntary Principles on Security and Human Rights*, which provide guidelines for companies working in extractive industries in countries such as Indonesia for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."⁴² Critics of these codes of conduct point out that because the codes are voluntary in nature, and lack any significant enforcement mechanism, they fail to force companies to truly address social concerns.

In the context of the anti-sweatshop campaign, for example, author S. Prakash Sethi says that companies "have been all too willing to make promises in the form of codes of conduct whenever they're forced to respond to public concern, but they have treated these promises as harmless paper exercises that they will not need to put into practice anytime soon—if ever."⁴³ ATCA advocates suggest that companies that have signed these voluntary codes of conduct or similar initiatives should not complain about being held accountable for

42. Voluntary Principles on Security and Human Rights Fact Sheet, Feb. 20, 2001, DEP'T STATE FACT SHEET, available at <http://www.state.gov/g/drl/rls/2931.htm> (last visited Sept. 20, 2003).

43. Aaron Bernstein, *Nike: Free Speech or "False Promise"?*, BUS. WK. (Apr. 9, 2003); S. Prakash Sethi, *Setting Global Standard: Guidelines for Creating Codes of Conduct in Multinational Corporations* (2003) (book review), available at http://www.businessweek.com/bwdaily/dnflash/apr2003/nf2003049_6634_db021.htm (last visited Sept. 11, 2003).

their signed agreements to respect human rights.⁴⁴ According to ATCA proponents, the fact that companies are complaining about being held accountable “raises questions about the nature of their putative commitment to honor the principles of [such initiatives].”⁴⁵

Furthermore, Sethi argues, these codes of conduct also diminish incentives for more strenuous government regulations. For example, Rio Tinto, a UK signee of the Voluntary Principles, has a dreadful environmental and human rights record in Indonesia. According to the environmental NGO Friends of the Earth, UK regulations are too lenient to have any real effect on the corporation’s accountability for their overseas operations.⁴⁶ The UK has failed to strengthen its regulations on the mining industry in part because of the belief that such companies will regulate themselves through the observance of initiatives like the Voluntary Principles. Human rights advocates, on the other hand, say that without real enforcement mechanisms, and without stricter government regulations, the companies need only pay lip service to concerns about human rights violations. Therefore, in practical terms, the absence of any enforcement mechanism prevents voluntary codes of conduct from achieving the goal of corporate accountability with the same effectiveness as ATCA litigation.

The recent creation of the United Nation’s *Draft Norms on the Responsibility of Transnational Corporations* has certainly been well-received by international non-governmental organizations as a step above and beyond the scope of the voluntary codes of conduct.⁴⁷ The draft Norms, and the accompanying Commentary, constitute a comprehensive checklist of international human rights principles and obligations which every transnational corporation should follow when doing business abroad.⁴⁸ The Norms, if fully adopted by the U.N. Human Rights Commission, will undoubtedly mark a step in the right direction towards corporate accountability for violations of international human rights norms. Nevertheless, the enforcement of such norms, or even their adoption by the full U.N. Human Rights Commission, is not guaranteed. The international business community, in the U.S. and abroad, concerned that the draft Norms marks a move away from voluntary principles, is already mounting yet another offensive in order to prevent the draft Norms from being

44. Collingsworth, *supra* note 8.

45. *Id.*

46. See Indonesia: *Friends of the Earth Challenges Rio Tinto on Mining ‘Impact’*, EMonitors (Apr. 23, 2003), available at <http://www.worldmonitors.com/emonitors.html> (last visited Nov. 6, 2003).

47. Lawyer’s Committee for Human Rights’ Press Statement, *Nongovernmental Organizations Welcome the New UN Norm on Transnational Business*, Aug. 13, 2003, available at <http://www.lchm> (last visited Nov. 6, 2003).

48. See Commentary for the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/38 (2003), available at <http://www1.umn.edu/humanrts/links/CommentApril2003.html> (last visited Nov. 6, 2003).

adopted.⁴⁹ If adopted, the Norms could possibly do for the accountability of multinational corporations what the United Nation's Declaration of Human Rights has done for the accountability of states. The Norms could serve as a guide for the relevant law that transnational corporations should follow. Yet, unless and until the Norms are adopted with strong enforcement mechanisms—whether at the national or international level—ATCA-type litigation will remain the best alternative for multinational corporate accountability.

Similarly, pressure by a corporation's shareholders is another important, yet less effective tool than the ATCA in achieving corporate accountability. For example, shareholders of Sears Canada have unsuccessfully put forward for the past three years a proposal to ensure that the company purchase merchandise manufactured solely from factories providing fair working conditions.⁵⁰ Unfortunately, only a small percent of shareholders vote in favor of this and other similar proposals.⁵¹

The alternatives to ATCA litigation, therefore, seem to fall short of the ultimate goal of accountability.⁵² ATCA litigation seems like the best way, albeit not the only way, to hold corporations accountable for their acts abroad in violation of the law of nations. Neither codes of conduct, nor self-policing reports, nor shareholder pressure is as effective as the ATCA would potentially be in preventing and remedying corporate human rights violations, or in promoting socially responsible corporate practices.

B. The Goals of ATCA Litigation are Shared by the United States and Socially Responsible U.S. Corporations.

By signing voluntary codes of conduct or similar initiatives, corporations have made clear that, at least theoretically, they agree that corporate interests are not incompatible with human rights concerns. In fact, these voluntary initiatives cover a much broader range of rights than the few fundamental human rights covered under the ATCA. Thus, opponents of the ATCA are not arguing that corporations do not have to act socially responsible in their business activities abroad. Indeed, having an image of a socially responsible corporation is in their best interest. Rather, opponents of the ATCA challenge

49. Jonathan Birchall, *Companies Face UN Scrutiny on Human Rights*, FIN. TIMES, Aug 13, 2003, available at http://www.lchr.org/workers_rights/wr_other/wr_ft_article.htm (last visited Nov. 6, 2003).

50. See *Canada: Sears Canada Shareholders seek anti-sweatshop policy*, Emonitors (Apr. 23, 2003), available at <http://www.worldmonitors.com/emonitors.html> (last visited Sept. 22, 2003).

51. *Id.*

52. Another alternative to civil litigation aimed at holding corporations accountable for their actions has been the lobbying efforts in favor of disclosure requirements for U.S. businesses operating abroad. See *International Right to Know Report: Empowering Communities Through Corporate Transparency*, available at <http://www.irtk.org/irtkreport.pdf> (last visited Sept. 22, 2003).

the judicial enforcement of their voluntary commitments. Among the many reasons for their opposition to ATCA litigation, opponents consider such litigation as an improper intrusion by the judicial branch in matters of foreign affairs.

i. The Legislative and Judicial branches favor adjudication of violations of the "law of nations" in U.S. courts.

Specifically, opponents question whether Congress really intended for claims of violations of fundamental human rights to be heard by federal courts through ATCA lawsuits. Proponents answer by saying that even if congressional intent in legislating the ATCA in 1789 is unclear,⁵³ Congress spoke on this issue in modern times when it passed the Torture Victim Protection Act in 1992 and sided with the human rights activists.

The TVPA provides aliens as well as U.S. citizens a cause of action in federal courts for claims of torture and extrajudicial killing.⁵⁴ The TVPA was expressly designed by Congress "[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."⁵⁵ In adopting the TVPA, Congress observed that "[the ATCA] 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."⁵⁶ By enacting the TVPA and expressly affirming the ATCA, Congress decided that adjudicating human rights lawsuits in U.S. courts is consistent with U.S. foreign policy and support for human rights worldwide.⁵⁷

Thus, Congress is not as concerned as the opponents of the ATCA about the foreign policy implications of judicial decisions involving fundamental human rights abuses committed abroad. In a very basic sense, ATCA lawsuits implicate foreign relations in that foreign governments will not receive with open arms allegations of violations of fundamental human rights norms committed within their borders. Nevertheless, Congress has clearly expressed its intent that such suits should be heard by U.S. courts despite separation of

53. In a pre-*Filártiga* decision, the Second Circuit noted that "although [the ATCA] has been with us since the first Judiciary Act . . . no one seems to know from whence it came." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

54. 28 U.S.C. § 1350 (note); Pub. L. No. 102-256, 106 U.S. Stat. 73 (1992).

55. *Id.* pmbl.

56. H.R. REP. NO. 102-367, at 4 (1991). *See also* S. REP. NO. 102-249, at 4-5 (1991).

57. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105-06 (2d Cir. 2000) (finding that Congressional intent as expressed in the TVPA was to allow the types of human rights violation raised by plaintiffs to be heard in U.S. courts).

powers concerns.⁵⁸ The Supreme Court has agreed with this principle, although not in an ATCA context. In *Japan Whaling*, the Supreme Court stated that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because our decision may have significant political overtones."⁵⁹ Therefore, despite possible foreign policy implications, Congress has clearly expressed its intent to provide an effective remedy in U.S. courts for human rights abuses. Any concerns about the propriety of opening up U.S. courts to aliens who seek to hold violators of fundamental human rights accountable should be raised with Congress, not with the judiciary.

ii. The protection and promotion of human rights has been an inextricable and vital element of the Executive branch's public foreign policy rhetoric.

The executive branch has also expressed in equally clear terms that the protection of human rights is a crucial component of U.S. foreign policy. Proponents of the ATCA therefore argue that these cases have little chance of disrupting foreign relations or trampling separation of powers concerns because the goals of ATCA litigation are entirely consistent with the Executive's own statements regarding human rights.

On numerous occasions throughout this nation's history, the executive branch has stated that human rights are not incompatible with U.S. foreign policy. For example, Section 502B of the Foreign Assistance Act of 1961, which was adopted in 1974, declares the joint view of the Congress and the President that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."⁶⁰

Similarly, former and current Presidents and Secretaries of State have all regarded accountability and human rights as a primary goal and mechanism of U.S. foreign policy. For example, the first President Bush, in a statement regarding the passing of the TVPA, noted his "strong and continuing commit-

58. *See id.*

[T]he present law, in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits . . . [and] has . . . communicated a policy that such suits should not be facily dismissed on the assumption that the ostensibly foreign controversy is not our business.

Id. (emphasis added). *See also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.").

59. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

60. 22 U.S.C. § 2304(a)(1) (1994).

ment to advancing respect for and protection of human rights throughout the world.”⁶¹ He added that “[t]he United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur . . . [and that] we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.”⁶² Similarly, Madeleine Albright commented in early 2000 that “[s]overeignty carries with it many rights, but killing and torturing innocent people are not among them.”⁶³

The State Department’s website further reiterates the Administration’s commitment to human rights in U.S. foreign policy, stating that “[b]ecause the promotion of human rights is an important national interest, the United States seeks to: [1] Hold governments accountable to their obligations under universal human rights norms and international human rights instruments; [2] Promote greater respect for human rights, including freedom from torture . . . ; [and 3] Promote the rule of law, seek accountability, and change cultures of impunity.”⁶⁴ Secretary of State Colin Powell similarly assured the American people and the world that “President Bush, the Congress of the United States and the American people are united in the conviction that active support for human rights must be an integral part of American foreign policy.”⁶⁵ More recently, Secretary Powell stated during the release of the State Department’s 2002 *Country Reports on Human Rights Practices* that “[i]n a world marching toward democracy and respect for human rights, the United States is a leader, a partner and a contributor. We have taken this responsibility with a deep and abiding belief that human rights are universal [and] their protection worldwide serves a core U.S. national interest.”⁶⁶ He added that “[s]pread of democratic values and respect for human rights around the world is one of the primary ways we have of advancing the national security interests of the United States.”⁶⁷

Furthermore, the executive branch has already criticized the human rights records of some of the specific countries involved in corporate ATCA

61. Statement on Signing the Torture Victim Protection Act of 1991, March 12, 1992, cited in DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS, LAW, POLICY, AND PROCESS* 544 (3d ed. 2001).

62. *Id.*

63. Madeleine Albright, Press Briefing on the Release of Country Reports on Human Rights Practices, 1999 (Feb. 25, 2000), quoted in WEISSBRODT, *supra* note 61, at 545.

64. United States Department of State, *Human Rights*, at <http://www.state.gov/g/drl/hr/> (last visited Nov. 6, 2003).

65. Colin L. Powell & Lorne W. Craner, *Release of the Country Reports on Human Rights Practices for 2001*, Remarks to the Press March 4, 2002, at <http://www.state.gov/secretary/rm/2002/8635pf.htm> (last visited Sept. 11, 2003).

66. Colin L. Powell, *Preface to 2002 Country Reports on Human Rights Practices*, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18132.htm> (last visited Sept. 11, 2003).

67. *Introduction: 2002 Country Reports on Human Rights Practices*, Department of State Bureau of Democracy, Human Rights, and Labor, Mar. 31, 2002, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18134.htm> (last visited Sept. 11, 2003).

cases, thus minimizing the separation of powers considerations. Burma and Colombia are two examples of such countries. In the 2002 *Country Reports on Human Rights Practices*, the State Department characterizes the Burmese military regime's human rights record as "extremely poor."⁶⁸ Regarding Colombia, the Report mentions that "labor leaders nationwide continue[d] to be attacked by paramilitaries, guerrillas, and narcotics traffickers."⁶⁹ Thus, judicial decisions highlighting these abuses would not undermine the executive branch's role in foreign affairs, but would instead reinforce the importance of the protection of human rights as stated in official U.S. foreign policy public statements. Judicial determination of fundamental human rights in ATCA cases is thus absolutely compatible with President Bush's "[pledge] to support all individuals who seek to secure their unalienable rights [and] . . . those who fight for fundamental freedoms"⁷⁰

Despite all these statements in support of accountability for human rights violations abroad, opponents of the ATCA have been somewhat successful in obtaining letters of interest from the State Department supporting the position that judicial determination of at least some corporate ATCA cases would undermine the administration's efforts on the war on terrorism as well as negatively impact U.S. foreign relations with some countries. This was precisely the argument the State Department made in the *Exxon* case. On May 10, 2002, pursuant to a petition by the Exxon-Mobil Corporation, U.S. District Court Judge Louis F. Oberdorfer, the presiding judge in the case, sent a letter to the State Department requesting "out of an abundance of caution, in the tense times in which we are living . . . whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States."⁷¹ The Taft Letter, as the State Department's letter of interest is known, asserts that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism," and that adjudication of the lawsuit "may also diminish [the] ability [of the United States] to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia."⁷² In a recent New York Times article, Arlen Specter, a Republican member of

68. 2002 *Country Reports on Human Rights Practices, Burma*, Bureau of Democracy, Human Rights, and Labor, Mar. 31, 2002, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18237.htm> (last visited Sept. 11, 2003).

69. 2002 *Country Reports on Human Rights Practices, Colombia*, Bureau of Democracy, Human Rights, and Labor, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18325.htm> (last visited Sept. 11, 2003).

70. George W. Bush, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2002, *A Proclamation by The President of the United States of America* (Dec. 9, 2002), available at <http://www.state.gov/g/drl/rls/rm/15808pf.htm> (last visited Sept. 11, 2003).

71. Judge Oberdorfer Letter, May 10, 2002 (on file with author).

72. Taft *Exxon* Letter, *supra* note 29.

the Senate Judiciary Committee, stated that Congress and President George H.W. Bush had already considered this argument in 1992—when the Torture Victim Protection Act became law—and rejected it.⁷³

Unfortunately, proponents of the ATCA say the *Exxon* letter is not an isolated case. Rather, it is an example of the administration's contradiction between U.S. human rights foreign policy and the implementation of that policy. In the *Unocal* case, the State Department saw no conflict between adjudicating claims over human rights abuses by the Burmese military and U.S. foreign relations with that country.⁷⁴ Upon an invitation by District Judge Richard Paez of the Central District of California, Michael Matheson (State Department acting legal advisor) stated in a letter dated July 8, 1997 that "the Department can state that at this time 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."⁷⁵ Concluding that there is simply no public interest in the perpetration of human rights, the court forcefully dismissed this defense. But that letter was written in 1997. In 2001, the State Department, through another Taft Letter, said that pursuit of a lawsuit for similar human rights violations against Rio Tinto, the world's largest mining company, headquartered in Papua New Guinea, would harm American interests.⁷⁶ The case was subsequently dismissed.

Proponents of the ATCA suggest that such letters of interest contradict other policy statements made by all three branches of government as well as statements of support made by the State Department and the Department of Justice in previous non-corporate ATCA cases. For example, when *Filartiga* was decided in 1981, the State Department actively supported the idea of using the ATCA to hold foreign officials liable for certain human rights violations. In *Filartiga*, the State Department and the Department of Justice filed an amicus in support of using U.S. courts to redress torture violations by foreign officials, regardless of sovereign immunity and foreign policy considerations.⁷⁷

"Like many other areas affecting international relations," the amicus argued, "the protection of fundamental human rights is not committed exclusively to the political branches of government."⁷⁸ The amicus continued, stating that when an alien alleges a violation of a human right which has been widely shared to be protected among the world's nations, "there is little danger that

73. Arlen Specter, *The Court of Last Resort*, N.Y. TIMES, Aug. 7, 2003, available at <http://www.nytimes.com/2003/08/07/opinion/07SPEC.html> (last visited Nov. 6, 2003).

74. Matheson *Unocal* Letter, July 8, 1997 (on file with author).

75. *Id.*

76. Taft *Rio Tinto* Letter, Oct. 31, 2001, available at <http://www.state.gov/documents/organization/16529.pdf>.

77. Brief of Amici Curiae U.S. Department of Justice, *Filartiga*, 630 F.2d 876.

78. United States: Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala* (Torture; Human Rights Obligations; Judicially Enforceable Remedies) 19 I.L.M. 585, 603 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, at 423, 430 (1964)).

judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."⁷⁹

The State Department's position in *Exxon* could not be any more different. When the letter became known, human rights organizations, members of Congress, as well as the media, immediately reacted. Fifty members of Congress sent a letter to Secretary of State Colin Powell expressing concern over the Taft *Exxon* Letter.⁸⁰ The following are some examples of reactions from the media and human rights NGOs:

- **New York Times Editorial:** "The Bush administration, promiscuously invoking the war against terrorism, is using its influence inappropriately to assist an American oil company that has been sued for misconduct overseas. The intervention reinforces the impression that the administration is too cozy with the oil industry." The editorial added, "the administration's statement was an invitation to more abuse, a sign that human rights could become a needless casualty of the antiterror campaign."⁸¹
- **Wall Street Journal:** In an article titled *White House Sets New Hurdles for Suits Over Rights Abuses*, the WSJ pointed out that "[a]mong oil and gas companies, Exxon Mobil was the second-largest campaign donor in the 2000 election cycle -- after Enron Corp. -- with 89% of its contributions going to Republicans, according to the Center for Responsive Politics in Washington."⁸²
- **Human Rights Watch:** "It is the height of hypocrisy for the State Department to publicly promote human rights principles for the oil and gas industry and then tell a judge that scrutiny of an oil company's human rights record runs counter to foreign policy."⁸³

79. *Id.* at 604.

80. Taft *Exxon* Letter, *supra* note 29.

81. *Oily Diplomacy*, N.Y. TIMES, Aug. 19, 2002, at A14, available at <http://www.globalpolicy.org/security/natres/oil/indonesia/2002/1028diplomacy.htm> (last visited Sept. 11, 2003).

82. Peter Waldman & Timothy Mapes, *White House Sets New Hurdles For Suits Over Rights Abuses*, WALL ST. J., Aug. 7, 2002.

83. Press Release, Common Dreams Progressive Newswire, *U.S./Indonesia: Bush Backtracks on Corporate Responsibility* (Aug. 7, 2002) (quoting Kenneth Roth, Executive Director of Human Rights Watch), available at <http://www.commondreams.org/news2002/0807-04.htm> (last visited Sept. 11, 2003).

- **Lawyers Committee for Human Rights:** "Intervention by the State Department in this private litigation would send the message that the United States supports the climate of impunity for human rights abuses in Indonesia, and does not support efforts by American extractive companies to develop and implement policies that promote and protect human rights."⁸⁴

Renowned legal scholars were also outraged by the Taft-Exxon Letter. For example, Harold Koh, Professor of international law at Yale who also served as Assistant Secretary of State for Democracy, Human Rights, and Labor in the State Department from 1998 to 2001, filed an affidavit in support of the plaintiffs' position and criticized the Taft Letter. In his affidavit, Professor Koh argues that

it has never been United States policy that honest governmental accounting of Indonesian human rights practices—whether by Congress, the courts or the executive branch—should be relaxed because of the need to conduct cooperative counterterrorism initiatives or because the foreign officials might understand that honest accounting as 'perceived disrespect for its sovereign interests.'⁸⁵

Proponents of the ATCA, therefore, urge courts to dismiss such letters of interest as irrelevant to the status of what constitutes a violation of the law of nations. Contrary to assertions by business interests, adjudication of these cases ultimately serves a core interest of the United States in ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad.

c. Investment Abroad Alone Does Not Rise to a Violation of "the Law of Nations"

Foreign policy and separation of powers considerations aside, opponents argue that corporations should not be liable in U.S. courts for having investments or for conducting business in countries with shady human rights records. The response by ATCA advocates is simply that investment alone is not enough to establish ATCA liability. The standard for liability is much higher, and courts are well-equipped to dismiss improper cases. The fact that courts have dismissed several corporate ATCA cases for failure to allege an

84. Letter to Mr. Taft from Michael Posner, Executive Director of LCHR, available at http://www.lchr.org/workers_rights/wr_indonesia/Ltr_Taft_Exxon070102.pdf (last visited Sept. 11, 2003).

85. Koh Aff. submitted in *Exxon* case ¶ 17 (quoting Taft *Exxon* Letter, *supra* note 29).

actionable claim under the ATCA evidences the capacity of federal judges to dismiss cases that fail to meet the very high standards of ATCA liability.⁸⁶

To date, because of the narrow scope of claims actionable under the ATCA against private parties and because the standard for ATCA liability is so high, no plaintiff has successfully obtained a judgment against a U.S. corporation under the ATCA for actions committed abroad. In essence, the success of claims under the ATCA against a corporation depends on 1) whether the offense is universally condemned and well-defined; 2) whether the offense requires the plaintiff to establish state action; and 3) whether the corporation as a private actor can be held liable for the acts of the state or other parties under theories of third party liability.⁸⁷ If these requirements are met, corporate ATCA cases should move forward. After all, as Professor Koh recently stated, "If we're going to try these [multinational corporations] for violating a nickel-and-dime contract . . . why can't you sue them for genocide?"⁸⁸

i. Offense must be universally condemned and readily defined.

The first hurdle in establishing the liability of corporations under the ATCA is alleging a violation of the "law of nations"; that is, a violation that is universally condemned and well-defined.⁸⁹ The ATCA does not provide a cause of action for any and all violations of international law. In fact, the list of actionable offenses under the ATCA is very limited. U.S. courts have held the following torts to be in violation of the law of nations within the meaning of the ATCA: summary execution,⁹⁰ torture,⁹¹ causing disappearance,⁹²

86. See Bruno, *supra* note, at 3. (arguing that "courts have had no trouble dismissing ATCA cases against corporations, and they are exceedingly difficult to bring.").

87. See Kadic, 70 F.3d at 232 (holding that non-state actors may be liable for certain violations of international law).

88. Adam Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, available at <http://www.nytimes.com/2003/08/03/politics/03LEGA.html?hp> (last visited Nov. 6, 2003).

89. See, e.g., Filartiga, 630 F.2d at 876.

90. See, e.g., Kadic, 70 F.3d at 232; Forti, 672 F. Supp. at 1531, *aff'd on reh'g*, 694 F. Supp. 707 (N.D. Cal. 1988); Xuncax, 886 F. Supp. at 162; Estate of Cabello, 157 F. Supp. 2d at 1345; In re Estate of Marcos, 978 F.2d at 493.

91. See, e.g., Filartiga, 630 F.2d at 876; Kadic, 70 F.3d at 232; Xuncax, 886 F. Supp. at 162; Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D. N.Y. 2002); In re Estate of Marcos, 978 F.2d at 493; Forti, 672 F. Supp. at 1531; Unocal, 176 F.R.D. at 329, *aff'd by*, John Doe I v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2002), *reh'g granted*, No. CV 96-06959-R5WL, 2003 WL 359787 (9th Cir. 2003); Abebe-Jira, 72 F.3d at 844.

92. See, e.g., Forti, 672 F. Supp. at 1531 (holding that the universally recognized tort of "disappearance" has two essential elements: (1) abduction by a state official or by persons acting under state approval or authority; and (2) refusal by the state to acknowledge the abduction and detention). See also Xuncax, 886 F. Supp. at 162.

arbitrary detention,⁹³ cruel, inhuman, or degrading treatment,⁹⁴ kidnapping,⁹⁵ slavery,⁹⁶ war crimes,⁹⁷ forced labor,⁹⁸ rape,⁹⁹ denial of right of association,¹⁰⁰ and genocide.¹⁰¹

Although the number of actionable claims under the ATCA has increased since *Filartiga* was first decided, there are safeguards to prevent the ATCA from providing a cause of action for garden-variety personal injury claims. The limiting principles set forth in *Filartiga*, namely that the violation must be universally condemned and readily definable, have allowed judges to dismiss claims that failed to meet this high standard.¹⁰² For example, in *Flores*¹⁰³ the court concluded that the “plaintiffs [had] not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation’s borders, violate any well-established rules of customary international law,” because there existed no “general consensus among nations” that environmental pollution that causes harm to human health is “universally unacceptable.”¹⁰⁴ Although causes of action involving environmental harms may one day be actionable under the ATCA, courts will only permit this if the twin principles of *Filartiga* are met. Thus, corporations should not be worried about their liability under the ATCA unless they engage in one of the limited, yet expanding, types of torts currently recognized as a violation of the “law of nations.”

93. See, e.g., *Forti*, 672 F. Supp. at 1531; *Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997); *Xuncax*, 886 F. Supp. at 162.

94. Unless the harm rises to the level of torture or other universally recognized violation of the law of nations, cruel, inhuman, or degrading treatment may not by itself be treated as a violation of the law of nations. There is little guidance as to what exactly constitutes cruel, inhuman, or degrading treatment, so the violation is not easily definable. The *Xuncax* court, decided after the ratification of the Convention Against Torture, defined cruel, inhuman, or degrading treatment as an actionable violation under the ATCA but only as defined by the standards applied in the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, rather than as defined by international law. See *Xuncax*, 886 F. Supp. at 186. See also, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Forti*, 672 F. Supp. 1531 (determining that cruel, inhuman, and degrading treatment was not definable and did not have universal consensus).

95. See, e.g., *Jaffe v. Boyles*, 616 F. Supp. 1371 (W.D. N.Y. 1985); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975) (stating that the illegal seizure, removal, and detention of an alien against his will in a foreign country may be in violation of the law of nations).

96. See, e.g., *Iwanowa*, 67 F. Supp. 2d at 424; *Unocal Corp.*, 2002 WL 31063976 (recognizing forced labor as a modern form of slavery).

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

98. *John Doe I v. Unocal Corp.*, No. 00-56603, 2002 WL 31063976 (9th Cir. Dec. 3, 2000).

99. *Id.*

100. *Estate of Rodriquez*, 256 F. Supp. 2d at 1250.

101. *Kadic*, 70 F.3d at 241-42.

102. *Filartiga*, 630 F.2d at 876.

103. *Flores*, 253 F. Supp. 2d at 510.

104. *Id.* at 519. See also *Nickles et al.*, *supra* note 27, at 8.

ii. Some claims have a state action requirement

Even if universally condemned and definable, some offenses may still not be actionable under the ATCA unless the plaintiff can provide evidence to satisfy the state action requirement. Although the only subjects of international law have traditionally been states, the *Karadzic* court held that private parties could also be held liable under the ATCA for certain violations of international law.¹⁰⁵ Currently, only the following four violations of the law of nations are actionable against private parties under the ATCA without a showing of state action: 1) genocide,¹⁰⁶ 2) war crimes,¹⁰⁷ 3) forced labor or slavery,¹⁰⁸ and 4) crimes against humanity.¹⁰⁹ Other violations, such as torture, rape, summary execution, political persecution, causing disappearance, systematic racial discrimination, and arbitrary detention, can also be actionable under the ATCA without a showing of state action, but only when such actions are perpetrated in the context of either genocide, war crimes, forced labor or slavery, and maybe crimes against humanity.¹¹⁰

If a plaintiff alleges a violation that is universally condemned and definable, and the allegation requires a showing of state action, the judge must then decide whether the plaintiff has presented sufficient evidence to satisfy this requirement. In order to do so, a judge can look at the jurisprudence of civil rights actions under 28 U.S.C. § 1983.¹¹¹ In *Kadic*, for example, the court looked to the definition of what constitutes an act "under color of state law" as defined by section 1983 to determine whether the state action requirement was satisfied. Although courts have used various tests under section 1983 jurisprudence to determine this issue,¹¹² the tests that have been the most

105. *Kadic*, 70 F.3d at 239.

106. *Id.* at 232. See also Beanal, 969 F. Supp. at 370.

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

108. *John Doe I v. Unocal Corp.*, No. 00-56603, 2002 WL 3106976 (9th Cir. Sept. 18 2002).

109. *Kadic*, 70 F.3d at 232. See also *Wiwa*, 226 F.3d at 92.

110. The analysis in *Kadic* regarding the state action requirement for claims of crimes against humanity is unclear. In *Wiwa*, the Southern District of NY discussed when state action would be necessary for claims of crimes against humanity, and found that *Kadic* did not foreclose the possibility that other violations, when committed within the context of crimes against humanity, do not require state action. *Wiwa*, 226 F.3d at 88. Further, according to the Rome Statute of the International Criminal Court, certain violations could constitute crimes against humanity, thus eliminating the state action requirement, if committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute of the International Criminal Court, Art. 7, § 1, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Sept. 26, 2003).

111. *Kadic*, 70 F.3d at 243 ("Color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.').

112. The United States Supreme Court has described four alternative tests for establishing the state action requirement: (1) the public function test; (2) the symbiotic relationship test; (3) the nexus test; and (4) the joint action test. See, e.g., *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (applying joint action test); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (applying

relevant to corporate ATCA cases are the joint action test and the symbiotic relationship test.¹¹³ Under the joint action test, a plaintiff must show that a state actor was a willful participant acting jointly or in concert with the actors of the particular deprivation of rights. Applying this test, the *Wiwa* court noted that “where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights, state action is present.”¹¹⁴ Under this test, state acquiescence or approval of the deprivation of rights is probably not enough to establish the state actor requirement. The state actor must have participated, influenced or played an integral part in the conduct.

Therefore, in order for a plaintiff to sue a corporation for torture under the ATCA, the plaintiff first needs to demonstrate that torture is a universally condemned violation that is easily definable. Furthermore, if the alleged torture occurred outside the context of genocide, war crimes, forced labor or slavery, or crimes against humanity, then the plaintiff would have to demonstrate that a state actor played an integral part in the alleged torture. Both of these safeguards minimize concerns about frivolous lawsuits making it to trial.

iii. Plaintiffs must show evidence sufficient to satisfy standards of third-party liability.

Once the plaintiff has satisfied the state action requirement by showing the necessary link between the state and the particular violation, the plaintiff must then show the necessary link between the corporation and the state or third party in connection with the alleged violation.¹¹⁵ Although *Unocal* is not the first time a court has addressed the issue of third-party liability in ATCA

public function and nexus tests); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (applying symbiotic relationship test).

113. See *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 289 (application of joint action test). See also *Estate of Rodriguez*, 256 F. Supp. 2d at 1250; *Sinaltrainal*, 256 F. Supp. 2d at 1345 (application of symbiotic relationship test). See *Beanal*, 969 F. Supp. at 370, for discussion of the various tests.

114. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 at *13 (S.D.N.Y. Feb. 28, 2002) (quoting *John Doe I*, 963 F. Supp. at 891).

115. It is important to distinguish the difference between the analysis for state action requirement and the analysis for establishing the legal culpability or responsibility of the corporation being sued. Both analyses are similar, but third party liability analysis is not the same as state action analysis. The tests described under section 1983 jurisprudence might be relevant to establish third-party liability in ATCA cases, but the liability of third-parties is subject to a separate standard. *Beanal*, for example, addresses the state action analysis, but not the third-party liability analysis. That is, a plaintiff may be able to prove that a state actor played an integral part in the alleged violation, but that does not necessarily mean that the plaintiff has proven that a third-party, in these cases corporations, should be held liable for that act.

cases,¹¹⁶ and even though the decision has been vacated and the case is being reviewed en banc by the Ninth Circuit, the latest *Unocal* decision probably has the best discussion of third-party liability in a corporate ATCA case thus far.

The court in *Unocal* looked at international criminal law jurisprudence in order to determine the standard required to establish third-party liability in ATCA cases. Specifically, the court looked to the aiding and abetting standard described in decisions of the international criminal tribunals of Rwanda and Yugoslavia.¹¹⁷ Under this standard, a third-party can be liable for the acts of others when the third-party knowingly provides practical encouragement or assistance that has a substantial effect on the perpetration of the offense.¹¹⁸

This standard has created some controversy and confusion about the size of the net this standard casts. Although the *actus reus* described by the international tribunals includes actions of "moral support,"¹¹⁹ the majority in *Unocal* decided to take this language out of their decision. As for the *mens rea* element in the international standard, which was also adopted by the majority, it is sufficient that the accomplice, in this case the corporation, know or reasonably should know that its actions would assist the perpetrator in the commission of the crime. Opponents to the ATCA suggest that a standard of liability based on whether a company knowingly provided moral support to a regime is just too broad. In the concurring opinion in *Unocal*, Judge Reinhardt agreed to a certain extent with this analysis. Judge Reinhardt rejected the majority's application of international criminal law standards of third-party liability and urged application of federal common law principles, such as agency, joint venture, and recklessness liability, instead.¹²⁰

In response to Judge Reinhardt's concerns, the majority opinion suggested that "the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the choice between international and domestic law even less crucial."¹²¹ Similarly, the majority attempted to minimize the distinction between presumably broader international criminal law standards and presumably narrower

116. District courts in the Eleventh Circuit have also relied on decisions by the International Criminal Tribunal for the former Yugoslavia and Rwanda to determine the standard to be used in determining third party liability for tort claims under the ATCA. See, e.g., *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D.Ga. 2002); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D.Fla 2002).

117. See, e.g., *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber II, Dec. 19, 1998), reprinted in 38 I.L.M. (1999); *Prosecutor v. Tadic* (Case No. ICTY-94-1), Opinion and Judgment, May 7, 1997, at ¶¶ 691-92; *Prosecutor v. Delalic* (Case No. IT-96-21-T), Judgment, Nov. 16, 1998, at ¶ 326.

118. *John Doe I v. Unocal Corp.*, No. 00-56603, 2002 WL 31063976 at *9-10 (9th Cir. Dec. 3, 2002).

119. *Prosecutor v. Furundzija*, Case No. IT-95-17/1 at ¶ 235.

120. *Unocal Corp.*, 2002 WL 31063976, at *26-35 (Reinhardt, J., concurring). See also Note, 116 HARV. L.REV. 1525 (2003) (supporting Judge Reinhardt's position).

121. *Unocal Corp.*, 2002 WL 31063976 at *11 n.23.

domestic standards of third party liability by suggesting that “there may be no difference between encouragement and moral support”¹²²

The majority may be right. The comment to Section 876 of the Restatement (Second) of Torts states that “encouragement to act operates as a moral support.” Therefore, the choice of law in this particular area may ultimately be irrelevant. The type of evidence plaintiffs would have to show under either a domestic or an international standard would presumably be practically the same. Further, if the moral support standard is shown to be a well-established principle of customary international law, then it is likely that Judge Reinhardt might accept it as being part of federal common law.¹²³ And even if the international moral support standard is simply a statement by a few judges in two international tribunals and therefore fails to reach the level of a customary norm of international law necessary for the incorporation of the standard into federal common law, existing U.S. standards for third-party liability seem to be equally broad.¹²⁴

Although the precise standard for third-party liability in corporate ATCA cases remains unclear, it is sufficient to say that 1) under theories of third-party liability corporations can be held liable in ATCA cases for harms caused by others, and that 2) despite repeated suggestion to the contrary by the business community, investing alone in a foreign country would not satisfy any of the proposed standards for third-party liability. At the very least, according to a Senate report on the TVPA, a third-party must have “ordered, abetted, or assisted” in the violation in order to be held liable.¹²⁵ If a plaintiff can show sufficient evidence that a corporation aided and abetted in the violation, then the corporation may be held liable under a theory of third-party liability to be clarified in future cases.¹²⁶

Therefore, opponents of the ATCA like Daniel O’Flaherty, vice president of the National Foreign Trade Council, are right when they say that “[t]he issue is vicarious liability.”¹²⁷ What is not supported in ATCA jurisprudence is the assumption that the standard for liability is broad enough to

122. *Unocal Corp.*, 2002 WL 31063976 at *13 n.28 (citing RESTATEMENT (SECOND) OF TORTS § 876 (1979)).

123. *Unocal Corp.*, 2002 WL 31063976, at *29 n. 8, (Reinhardt, J., concurring) (citing *Filartiga*). Judge Reinhardt states that “all international legal principles do not automatically become a part of the federal common law; only those that achieve the status of customary international law or are included in international treaties are incorporated as part of federal common law.” *Id.*

124. *Unocal Corp.*, 2002 WL 31063976, at *30-35 (Reinhardt, J., concurring) (analyzing the scope of liability under federal common law standards).

125. See *Mehinovic*, 198 F. Supp. 2d at 1355 (citing S.Rep. No. 249-102, at 8-9 and n. 16).

126. The District Court for the Southern District of New York has also recently tackled this issue. See *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 289 (holding that courts should look at international law standards of third-party liability to determine whether a corporation can conspire to commit, or aid and abet the commission of certain violations of the law of nations, such as genocide or war crimes).

127. Carter, *supra* note 5.

potentially hold liable corporations who are simply present in, pay taxes to, or invest in countries with questionable human rights records. Thus, the concern about "the proliferation of lawsuits against U.S. companies for behavior over which they have no control," seems unreasonably exaggerated and unsupported by precedent.¹²⁸ In fact, no court has ever held that a multinational corporation can be liable under the ATCA for simply doing business overseas. Presence or investment alone, without knowingly assisting or encouraging in the alleged violation, or without some other complicity in the violation, does not open up multinationals to ATCA liability.

d. Money Is Not the Goal of ATCA Litigation

Proponents of the ATCA also challenge the accusations that the ATCA is a tool used by trial attorneys who are pursuing frivolous claims against big multinational companies in order to cash-in large damages awards or settlements in favor of sympathetic victims. The National Foreign Trade Council has called plaintiffs' attorneys in ATCA cases "a new breed of lawyers, unconcerned about the rights of victims and more interested in gouging giant settlements out of U.S. companies with deep pockets."¹²⁹

This Machiavellian perspective may or may not be shared by some trial attorneys, but as a broad generalization, such accusations do not represent an accurate depiction of ATCA plaintiffs' attorneys. For the most part, attorneys representing plaintiffs in ATCA litigation work on a pro-bono basis or for non-profit NGOs. Although some ATCA cases have resulted in rather large judgments, most of them have never been executed, and no U.S. corporation has had to pay any judgments in an ATCA case thus far. All the same, most ATCA advocates would say that money is not the goal of ATCA litigation. Nevertheless, monetary compensation would undoubtedly provide some form of relief for the plaintiffs. Similarly, plaintiffs in ATCA litigation are not suing corporations because they have "deep pockets." They are suing these corporations because their basic human rights have been violated.¹³⁰ For these victims, and for the lawyers that represent them, the real issue is accountability, not money.

CONCLUSION

Rather than attack a law that is sometimes the only remedy available for many victims of gross human rights violations, corporations should take a better look at their own conduct abroad and they should stop being economical with the truth in their statements about the ATCA. Proponents of the ATCA

128. *Id.*

129. *Id.*

130. Sometimes ATCA plaintiffs must even hide their identity and file their complaints under Jane or John Doe for fear of repercussions in their home countries.

should nevertheless engage in a constructive dialogue with the business community and emphasize that 1) the goals of these ATCA cases are consonant with corporate and U.S. interests in foreign relations, including the support for accountability and human rights as an integral part of the war against terrorism; 2) unless corporations agree on more effective means of accountability for their violations of the law of nations, the ATCA or the TVPA will be the only viable alternatives to redress their victims; and that 3) the judicial branch is very capable of, and has been given the authority by Congress to, adjudicate human rights cases involving foreign policy considerations, including dismissing cases that fail to meet the requirements of the ATCA or the TVPA. U.S. courts have done a remarkable job in dismissing ATCA lawsuits where plaintiffs fail to satisfy the multiple high standards necessary to establish ATCA liability. Corporations should feel confident that frivolous claims against them, or actions involving claims not actionable under the ATCA, will continue to be dismissed at the pre-trial stage. By the same token, the victims should also have their day in court if their cases are legitimate.

