TULANE ENVIRONMENTAL LAW JOURNAL

VOLUME 19 SUMMER 2006 ISSUE 2

The Alien Tort Statute, Corporate Accountability, and the New *Lex Petrolea*

Luis Enrique Cuervo*

I. THE ATCA: ITS BASIC ELEMENTS AND EARLY DEVELOPMENTS 163
II. THE REVIVAL OF THE ATCA WITH *FILARTIGA* 166
III. *TEL-OREN V. LIBYAN ARAB REPUBLIC*: THE EXCLUSION OF NONSTATE ACTORS 169
IV. CONGRESS ACTS: THE TORTURE VICTIM PROTECTION ACT 173
V. *KADIC V. KARADZIC*: NONSTATE ACTORS MAY VIOLATE THE LAW OF NATIONS 175
VI. CORPORATIONS ARE ACCOUNTABLE FOR INTERNATIONAL LAW VIOLATIONS 176
VII. THE SUPREME COURT'S CHANCE: *ARGENTINE REPUBLIC V. AMERADA HESS SHIPPING CORP.* 179
VIII. THE ALIEN TORT STATUTE AS AN ENVIRONMENT PROTECTION TOOL 179
- A. *Jota v. Texaco* 179
- B. *Beanal v. Freeport-McMoran, Inc.* 181
- C. *Flores v. Southern Peru Copper Corp.* 183
- D. *Presbyterian Church of Sudan v. Talisman* 185
- E. *Wiwa v. Royal Dutch Petroleum Co.* 189

* Mr. Cuervo is a partner in the firm of Fowler Rodriguez Chalos. He offers expertise in providing legal counsel to multinational companies doing business in Latin America. Since 1993 he has been the attorney in charge of, and resident in, the firm's Bogotá, Colombia, office. Mr. Cuervo received his law degree from Universidad Javeriana, in Bogotá, Colombia. As a Fulbright scholar, he received an LL.M. from Tulane Law School in 1990. Mr. Cuervo's primary areas of expertise include oil and gas, commercial, maritime, and insurance matters.

IX. SOME OF THE DEFENSES AGAINST ALIEN TORT STATUTE CLAIMS 190
A. *The Act of State Doctrine* 191
B. *The Bernstein Exception* 192
C. *The Hickenlooper Amendment* 193
D. *Foreign Sovereign Immunity* 194
X. ARE U.S. COURTS REQUIRED TO INTERPRET AND APPLY INTERNATIONAL LAW OR THE LAW OF NATIONS? 195
XI. INTERNATIONAL ENVIRONMENTAL LAW 199
A. *The Stockholm Declaration* 199
B. *U.N. Framework Convention on Climate Change (UNFCCC)* 201
C. *The Rio Declaration* 202
D. *Agenda 21* 203
E. *The Kyoto Protocol* 205
F. *World Summit on Sustainable Development* 207
G. *Growing Global Concern for Corporate Accountability* 207
H. *Sosa v. Alvarez-Machain* 210
I. *The Alien Tort Statute After Sosa* 212
XII. CONCLUSION 220

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.[1]

> The President never authorized nor condoned torture.[2]

The idea of a globalized world suggests that traditional notions of sovereignty and jurisdiction must change.[3] American corporations must

---

1. Thomas B. Wilner, *Law Free Zone*, WALL ST. J., May 13, 2004, at A12 (quoting Jackson Robert, Chief U.S. Prosecutor at Nuremberg).

2. This was not a statement by a minister from a rogue state, it was a remark by U.S. National Security Advisor Condoleezza Rice. Interview by Juan Williams of Condoleezza Rice, U.S. National Security Adviser, on National Public Radio, June 18, 2004, *available at* http://www.npr.org/templates/story/story.php?storyId=1963759 (last visited Feb. 27, 2006).

3. Kofi Annan has stated:

> The United Nations' achievements in the area of human rights over the last 50 years are rooted in the universal acceptance of those rights enumerated in the Universal Declaration and in the growing abhorrence of practices for which there can be no excuse, in any culture, under any circumstance. Emerging slowly, but I believe surely, is an international norm against the violent repression of any group or people that must and will take precedence over concerns of state sovereignty. Even though we are an organization of Member States, the rights and ideals of the United Nations exists to protect are those of peoples. No government has the right to hide behind national

constantly adjust to compete with Chinese,[4] European, Japanese and Indian corporations[5] that do business internationally.[6] Home-based solutions to problems arising in foreign countries may be inadequate or counterproductive. In addition to speaking the host country's language, understanding its culture and problems is critical to achieving practical solutions. Multinational corporations play an important role in conducting U.S. foreign policy.[7] The role of multinational oil and gas companies was acknowledged in 1974 by the Departments of State, Defense, and Interior in a position paper presented to the National Security Council:

> Since oil is "the principal source of wealth and income in the Middle Eastern countries in which the deposits exist," the "economic and political existence" of these countries "depends upon the rate and terms on which oil is produced." Since the rate and terms in question are to a large extent under the control of the oil companies operating in the area, the "American

---

> sovereignty in order to violate the human rights or fundamental freedoms of its peoples.

Kofi A. Annan, *Human Rights and Intervention in the 21st Century*, HUM. DEV. REP. 2000, at 31, *available at* http://hdr.undp.org/reports/global/2001/en/pdf/hdr_2000_ch2.pdf.

4. "China's economy this year has consistently outpaced expectations." Jason Dean, *China's 9.5% Growth Beat Forecasts*, WALL ST. J., July 21, 2005, at A9 ("The April-June period's 9.5% expansion in gross domestic product from the year earlier period beat an average forecast of a 9.3% increase.").

5.

> According to a confidential memorandum I.B.M. is cutting 13,000 jobs in the United States and in Europe and creating 14,000 jobs in India. From 2000 to 2015, an estimated three million American jobs will have been outsourced. . . . I am here because the country of my ancestors didn't understand the changing world; it couldn't change its technology and its philosophy and its notions of social mobility fast enough to fight off the European colonists, who won not so much with the might of advanced weaponry as with the clear logical philosophy of the Enlightenment. Their systems of thinking conquered our own.

Suketu Mehta, *A Passage from India*, N.Y. TIMES, July 12, 2005, at A23.

6. *See* Amy Myers Jaffe, *Wasted Energy*, N.Y. TIMES, July 27, 2005, at A25.

> [T]here is real reason for American concern about China's suddenly voracious oil thirst. Right now that thirst translates into a willingness to overbid for assets like Unocal. But to what strategies might China turn if Western competitors prevent it from acquiring choice assets? Already, China has secured some very attractive oil acreage in countries with which the United States has had troubled relations—notably Iran, Sudan and, more recently, Venezuela. . . . From economic ties, political and military relationships often follow, and these pose even more fundamental risks to American security. China has begun expanding its light arms trade in many of the countries that supply it with oil.

Id.

7. The role of multinational corporations in conducting U.S. foreign policy has been acknowledged since the 1973 oil crisis. The U.S. government actively supported oil and gas multinational companies securing foreign sources of oil.

oil operations are, for all practical purposes, instruments of our foreign policy toward these countries."[8]

Initially, only corporations at the level of the Seven Sisters assumed of this role.[9] Today, however, many smaller petroleum companies and service providers do business on a worldwide scale and are active players in a contemporary understanding of international law. Notwithstanding the above, companies often become active in countries as a result of indirect effects of financial transactions, instead of as a desired consequence of a previously conceived policy to conduct their business abroad.

If the United States and its corporations seek to maintain world leadership, they must realize that they should no longer do business abroad without an adequate understanding of international law and a clear in-house foreign policy strategy.[10] Not doing so may cost billions and expose the companies to the risk of litigation abroad and before U.S. federal courts. Ultimately, from a local rule of law perspective, corporations should no longer disregard the law of nations since international law is already part of the federal common law.[11]

---

8. *See* U.S. SENATE, SUBCOMM. ON MULTINATIONAL CORPS., MULTINATIONAL OIL CORPORATIONS AND U.S. FOREIGN POLICY—REPORT TOGETHER WITH INDIVIDUAL VIEWS, Jan. 2, 1975, *available at* http://www.mtholyoke.edu/acad/intrel/oill1.htm (last visited Feb. 27, 2006). According to the report, in 1943 the "U.S. Government was faced with the question of how much control it should exercise over a private company whose operations it considered vital to the American national defense." *Id.* For that purpose the Roosevelt government proposed in 1943 the creation of the Petroleum Reserves Corporation. *Id.*

9. The Seven Sisters are also referred to as the "majors" and include Exxon (originally the Standard Oil Company of New Jersey), Royal Dutch Shell, Mobil (Standard Oil of New York), Chevron (Standard Oil of California), British Petroleum-Amoco (Standard Oil of Indiana), and Gulf Oil. With the mergers which created Exxon Mobil and Chevron Texaco, they have been reduced to five.

10. American oil and gas companies doing business abroad must have a foreign policy, for the following reasons (among others): (1) Control of adequate foreign oil and gas sources is a matter of U.S. national security interest, (2) the companies' assets abroad are likely to become the targets of attacks against U.S. policy, (3) the U.S. economy is dependant on foreign sources of oil, (4) since 1944 the "State Department . . . consider[s] international oil as a part of foreign policy," and (5) American corporations doing business abroad frequently become the best lobbyists for the interests of the host country. *See* SUBCOMM. ON MULTINATIONAL CORPS., *supra* note 8; *U.S. Corporations Our New Foreign Policy Allies*, TIMES OF INDIA, Sept. 7, 1997, *available at* http://www.swaminomics.org/articles (last visited Feb. 27, 2006) ("By attracting American investors, India has obtained not just dollars but powerful foreign policy allies. Lobbying by corporate America was the major reason for India's huge triumph on human rights in the US Congress last Thursday, a victory that makes Pakistan green with envy.").

11. *See In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

U.S. corporations doing business abroad may be substantially affected by the way the Executive conducts foreign policy.[12] The Executive's decisions may open or close markets.[13] In conjunction, executive and corporate foreign policy is susceptible to the familiar distinction between one based on pure interests and one in which Wilsonian moral character applies.[14] Thus, there is a choice: when acting on the global market U.S. corporations may behave as modern "pirates" or as responsible world citizens.[15]

International law may be perceived as a useful tool for advancing foreign policy or as an obstacle to the interests of the empire. At one time, the enforcement of international law was the measure of determining whether a nation was a true member of the international

---

12. Consider the potential adverse effects of retaliating against doctrines such as preemption. The Executive's policy regarding international law may be used against the interests of private corporations in transnational litigation scenarios.

13. Consider the differences between Iraq, Lybia, and Cuba where sanctions and the opportunity to do business in those countries depends entirely on U.S. foreign policy. In 1986 the United States imposed economic sanctions against Libya consisting in a total ban on direct import and export trade. *See* U.S. DEP'T OF STATE, BACKGROUND NOTE ON LIBYA, *available at* http://www.state.gov/r/pa/ei/bgn/5425.htm (last visited Feb. 27, 2006).

> On April 23, 2004, the United States eased its economic sanctions against Libya, with a written statement from the White House Press Secretary stating, "U.S. companies will be able to buy or invest in Libyan oil and products. U.S. commercial banks and other financial service providers will be able to participate in and support these transactions." On the same day, Libya's state-owned National Oil Corporation (NOC) announced its first shipment of oil to the United States in over 20 years. On June 28, 2004, the United States and Libya formally resumed diplomatic relations, severed since May 1981. Finally, on September 20, 2004, President Bush signed Executive Order 12543, lifting most remaining U.S. sanctions against Libya and paving the way for U.S. oil companies to try to secure contracts or revive previous contracts for tapping Libya's oil reserves. The Order also revoked any restrictions on importation of oil products refined in Libya, and unblocked certain formerly blocked assets.

ENERGY INFO. ADMIN., LIBYA COUNTRY ANALYSIS BRIEF, *available at* http://www.eia.doe.gov/emeu/cabs/libya.html (last visited Feb. 27, 2006).

14. Morton Kaplan reminds us that in the eighteenth and nineteenth century, nations acted either in terms of "interest" or "sentiment." Morton Kaplan, *International Law and the International System*, *in* GREAT ISSUES OF INTERNATIONAL POLITICS 9, 9 (Morton Kaplan ed., 1970). See Gideon Rose, *Get Real*, N.Y. TIMES, Aug. 18, 2005, at A23, for a comparison between foreign policy pragmatists and fantasists. According to Rose, "[i]n practice, the Bush administration has recently begun to pursue interest rather than ideals and conciliation rather than confrontation . . . all three pillars of the supposedly revolutionary Bush doctrine—pre-emption, regime change, and clear division between those 'with us' and 'against us'—came crashing down." *Id.*

15. The subsidiary of a multinational company in a foreign country may provide the host country's population with its only contact with a different culture and economic model. A U.S. corporation may extend the benefits of democracy and capitalism by promoting values such as transparency, competition and fair dealing. Corporate behavior abroad may also advance ideas of imperialism, colonialism, double standards and war.

community of nations, and distinguished "civilized" from "uncivilized" peoples. The U.S. occupation of Iraq and its preemption doctrine, detentions at Guantanamo of individuals captured as civilians in Afghanistan, U.S. disregard for the International Criminal Court and the Kyoto Protocol,[16] and the role of many U.S. multinational corporations doing business overseas may challenge the relevancy and validity of international law. Such challenges can come at a price.

Free trade agreements extend the application of U.S. laws and regulations extraterritorially.[17] Thus, if we suggest that those standards apply when U.S. corporations seek new business, it would be inconsistent to deny the applicability of international provisions whenever they may affect the investor's interest.

The governments of the United States, the United Kingdom, the Netherlands, and Norway have recognized the influence of companies in the extractive and energy sectors in the promotion and protection of human rights.[18] Awareness of the corporate long term impacts on the

---

16. Climate change was a major issue at the Gleneagles, Scotland, G8 summit conducted between the 6th and the 8th of July 2005. The Group of Eight (G8) members (the United Kingdom, France, Russia, the United States, Germany, Italy, Japan, and Canada) issued the so-called "Gleneagles Communiqué" in which they acknowledged that climate change is a "serious and long term challenge that has the potential to affect every part of the globe" and which requires urgent attention. GLENEAGLES COMMUNIQUÉ, CLIMATE, CHANGE, ENERGY AND SUSTAINABLE DEVELOPMENT (2005), *available at* http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_Communique.pdf (last visited Feb. 27, 2006). Representatives from Brazil, China, India, South Africa, and Mexico were also present at the G8 summit. *Id.* The communiqué signed by the G8 members recognized that the "increased need and use of energy from fossil fuels . . . contributes in large part . . . to greenhouse gases associated with the warming of our Earth's surface." *Id.* It also acknowledged that not all G8 members had ratified the Kyoto Protocol, but those who had welcomed its entry into force and pledged to make it a success. *Id.* British Prime Minister Tony Blair recognized the limitations of a climate change treaty that would not include the United States, China cmo and India. G8 Gleneagles 2005, *British Prime Minister Tony Blair Reflects on Significant Progress of G8 Summit*, *available at* http://www.g8.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1078995903270&aid=1119520262754 (last visited Feb. 27, 2006).

17. "Many democrats including Rep. Richard Gephardt and Sen. John Kerry, have demanded that foreign nations expand their labor protections and environmental standards as preconditions to free trade agreements." George L. Priest, *Supreme Wisdom*, WALL ST. J., June 18, 2004, at A10. NAFTA, the Chilean Free Trade Agreement, discussions with Australia, and the Central American Free Trade Agreement (CAFTA) are all examples of U.S. regulations extended beyond U.S. borders.

18. *See* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2000), *available at* http://www.state.gov/g/drl/rls/2931.htm (last visited Feb. 27, 2006).

> *Emphasizing* the importance of safeguarding the integrity of company personnel and property, Companies recognize a commitment to act in a manner consistent with the laws of countries within which they are present, to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles (e.g., the UN Code of Conduct for Law Enforcement Officials

environment, human rights, and the international community as a whole lead to the promotion of corporate responsibility.[19] The tendency is to go beyond the financial performance of a corporation and analyze its impact on economic development.[20]

Energy demand and supply are global issues central to the western economic system.[21] Control of limited energy sources, nuclear energy use, the environmental impacts of extractive industries, and combating poverty[22] are some global issues[23] that extend beyond the interests and

---

> and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), particularly with regard to the use of force[.]

Id. (emphasis in original). Some of the participating companies include: Amerada Hess Corporation, Anglo American, BHP Billiton, BP, Chevron Texaco, ConocoPhillips, ExxonMobil, Freeport McMoran, Norsk Hydro,Occidental, Shell, Statoil, and Rio Tinto.

19. *See* BUS. FOR SOC. RESPONSIBILITY, *available at* http://www.bsr.org/ (last visited Feb. 27, 2006). The mission of Business for Social Responsibility (BSR) is to "create a just and sustainable world by working with companies to promote more responsible business practices, innovation and collaboration." *Id.* BSR's members include Chevron, Shell, Coca-Cola, Exxon-Mobil, Nike, and the McDonald's Corporation. *Id.*

20. Historically, corporate performance has been measured through a financial analysis or cash valuation; however, "[t]here is an increasing recognition among business and policy makers that the economic impact of corporate activity on poor and disadvantaged communities, domestically and internationally, has important social and environmental outcomes. In the face of civil society's discontent over the boundaries of corporate responsibility, debate is growing over how business should measure, manage and report on their economic performance." Accountability & Business for Social Responsibility, BUSINESS AND ECONOMIC DEVELOPMENT: THE IMPACT OF CORPORATE RESPONSIBILITY STANDARDS AND PRACTICES (June 2003), *available at* http://www.economicfootprint.org/fileadmin/business-economic-dev_2004.pdf (last visited Feb. 27, 2006). The economic performance includes activities beyond the boundaries of an organization such as social and environmental impacts and the outcome for stakeholders (anyone affected or that affects the corporation) at large. *Id.*

21. *See* GLENEAGLES COMMUNIQUÉ, *supra* note 16. "(1)(b) Global energy demands are expected to grow by 60% over the next 25 years. . . (c) Secure, reliable and affordable energy sources are fundamental to economic stability and development. Rising energy demand poses a challenge to energy security given increased reliance on global energy markets." *Id.* at 2. The Communiqué reminds that reliable and affordable energy supplies are essential for economic growth. *Id.* at 4.

22. "The new century opened with an unprecedented declaration of solidarity and determination to rid the world of poverty. In 2000 the U.N. Millennium Declaration, adopted at the largest-ever gathering of heads of state, committed countries—rich and poor—to do all they can to eradicate poverty, promote human dignity and equality and achieve peace, democracy and environmental sustainability." HUM. DEV. REP. 2003, MILLENIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY, *available at* http://hdr.undp.org/reports/global/2003 (last visited Feb. 27, 2006).

23. The United Nations General Assembly Resolution, dated September 8, 2000, and known as the United Nations Millennium Declaration, outlined the values considered essential to international relations in the twenty first century as follows: freedom, equality, tolerance, respect for nature, shared responsibility. United Nations Millenium Declaration, G.A. Res. 55.2, 8th plen. Sess., U.N. Doc. A/55/22 (Sept. 8, 2000), *available at* http://www.un.org/millennium/declaration/ares552e.pdf (last visited Feb. 27, 2006). Paradoxically, the means to translate these values into actions required the following specific actions that have been eroded after 9/11: to

jurisdiction of a single state.[24] The extraordinary economic power of many multinational corporations,[25] and the fact that many perform functions once reserved to the state, confirms both their international influence and the need to implement accountability mechanisms.[26] Through their actions, multinational corporations may be feeding the doom of globalization and even fueling war.[27] Some governments use corporations to perform actions that would not be legitimate otherwise.[28]

---

strengthen the respect for the rule of law in international as in national affairs, to make the United Nations more effective in maintaining peace and security, and implementing the Rome Statute of the International Criminal Court. *Id.* The very notion of human rights as enshrined in the Universal Declaration of Human Rights confirms its global character and nature. *Id.* Article 2 of the declaration provides:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty.

Universal Declaration of Human Rights, G.A. Res. 217A III, art. 2 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html.

24. The following objectives were mentioned by the signatories of the Gleneagles Communiqué: "reducing greenhouse gas emissions, improving the global environment, enhancing energy security, cutting air pollution [and] reduce[ing] poverty." GLENEAGLES COMMUNIQUÉ, *supra* note 16, at 2.

25. The Assistant Secretary of State stated in December 2000, when announcing the Voluntary Principles on Security and Human Rights:

> America's private sector plays a key role in boosting prosperity, not only here in the United States, but world wide. Just in intra-company trade, our companies that operate internationally accounted for 32% of America's total exports in 1998. Collectively, U.S. overseas affiliates employ more than 8 million workers. If we were to combine all U.S. affiliates, the resulting entity would rank between Spain and South Korea as an economic producer.

ANTHONY WAYNE, U.S. DEP'T OF STATE, ANNOUNCEMENT OF VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2000), *available at* www.state.gov/www/policy_remarks/2000/001220_wayne_principles.html (last visited Feb. 27, 2005).

26. In the same statement, Assistant Secretary Wayne noted:

> It is thus not surprising that we are committed to advancing America's international economic engagement consistent with the principles of good governance. These principles are vital to our own economic security here at home and are the only sustainable way for United States companies to engage abroad. It is, after all, a fact of business life that companies want to do business in places where the rule of law prevails, where contracts and laws are enforced, where customs agents work honestly and expeditiously, where the judiciary is fair and effective, and where human rights are respected. . . . Therefore, it is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible.

Id.

27. Niall Ferguson compares the pre-1914 international order which he calls the first age of globalization with current affairs:

The foreign policy of a multinational corporation should dictate and influence the entire scope of its decisions including, but not limited to: the countries in which it will invest, the type of bidding processes in which it agrees to participate, the model contracts it favors, its relations with the host government, its aid policies, its mechanisms of dispute resolution, and its commitment toward the development of the host country. The choice becomes one between a policy based either on self-interest or moral values. Multinational corporations that profit from a concession contract or other form of resource exploitation-granting agreement may adopt a pure interest-based foreign policy designed to aid the government in power and discourage change, regardless of the nature of the regime.[29]

> The last age of globalization resembled the current one in numerous ways. It was characterized by relatively free trade, limited restrictions on migration, and hardly any regulation of capital flows. Inflation was low. A wave of technological innovation was revolutionizing the communications and energy sectors . . . . The U.S. economy was the biggest in the world . . . . China was opening up . . . . [H]owever five factors can be seen to have precipitated the global explosion of 1914-1918[:] . . . imperial overstretch . . . [g]reat power rivalry . . . an unstable alliance system, . . . rogue regimes sponsoring terror, . . . [and] the rise of a revolutionary terrorist organization hostile to capitalism.

Niall Ferguson, *Sinking Globalization*, 84 FOREIGN AFF. 2, 66-69 (2005). Ferguson quotes Bin Laden as follows:

> [T]hose who say that al Qaeda has won against the administration in the White House or that the administration has lost in this war have not been precise, because when one scrutinizes the results, one cannot say that al Qaeda is the sole factor in achieving those spectacular gains. Rather, the policy of the White House that demands the opening of war fronts to keep busy their various corporations—whether they be working in the field of arms or oil or reconstruction—has helped al Qaeda to achieve these enormous results.

Id. at 76; *see also* P.W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 2, 119 (2005) ("Private companies are becoming significant players in conflicts around the world, supplying not merely the goods but also the services of war.").

28. For example, "[t]he increased use of private contractors by the U.S. government in Colombia is one illustration of this trend: by hiring [private military firms], the Bush administration has circumvented congressional limits on the size and scope of the U.S. military's involvement in Colombia's civil war." *See* Singer, *supra* note 27, at 126.

29. The company's policy would correspond to an interested alignment where the company would be indifferent to the nature of the host regime, its values, and the internal social conditions as long as the company profits from its investment. The company's main objective is to preserve what it has rather than becoming instrumental to change. By doing so, it may become unpopular in the host country, where the people may identify the multinational investor as corrupt, inefficient, and sustaining the status quo. The multinational corporation could be regarded as a barrier to the aspirations and hopes of the people. A company that would pursue a foreign policy based on values or morals could build international support in addition to winning popular support. International support is critical in cases of expropriations arising from regime change and may be perceived as a positive influence on the development of the host country, possibly reducing many investment-related risks. References to some of the differences between

Use of its military power may have enabled the United States to change the world's perception of its vulnerability after 9/11.[30] However, pure force has again shown its limitations,[31] and international law with a consistent, adequate foreign policy may be necessary. Further, when adjudicating Alien Tort Claims Act (ATCA) disputes, U.S. courts are required to interpret and apply international law. In doing so, U.S. courts have consistently held that international law is a part of U.S. law.[32]

ATCA claims raise multiple interesting issues, including inter alia, whether local courts should act as courts of universal jurisdiction,[33] and

---

a foreign policy based on interests as opposed to one based on values may be found in Kaplan, *supra* note 14, at 197-98.

30. The consequences of September 11 are as yet undetermined. However, much more than the tragedy itself, the U.S. *reaction* will cause lasting consequences. John Brady Kiesling wrote on February 27, 2003:

> The September 11 tragedy left us stronger than before, rallying around us a vast international coalition to cooperate for the first time in a systematic way against the threat of terrorism. But rather than take credit for those successes and build on them, this administration has chosen to make terrorism a domestic political tool, enlisting a scattered and largely defeated Al Qaeda as its bureaucratic ally. We spread disproportionate terror and confusion in the public mind, arbitrarily linking the unrelated problems of terrorism and Iraq. The result, and perhaps the motive, is to justify a vast mis-allocation of shrinking public wealth to the military and to weaken the safeguards that protect American citizens from the heavy hand of government. September 11 did not do as much damage to the fabric of American society as we seem determined to do ourselves . . . . We are straining beyond its limits an international system we built with such toil and treasure, a web of laws, treaties, organizations, and shared values that sets limits on our foes far more effectively than it ever constrained America's ability to defend its interests.

CHRISTOPHER SCHEER, ROBERT SCHEER & LAKSHMI CHAUDRY, THE FIVE BIGGEST LIES BUSH TOLD US ABOUT IRAQ 28-29 (2003).

31. "We have shown the ability to defeat a fifth rate power like Afghanistan and a third rate power like Iraq." Albert R. Hunt, *The Man Who Stayed Too Long*, WALL ST. J., May 13, 2004, at A13; *see* Grenville Byford, *The Wrong War*, 81 FOREIGN AFF. 4, 34 (2002) (maintaining that wars against common nouns (poverty, crime, drugs) have been less successful than wars against proper nouns (Germany)).

32. *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992). A court applying the alien tort statute must determine "whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it has been violated." *Id.*

33. The notion of a universal jurisdiction is defined as follows in the *Restatement (Third) of Foreign Relations Law*:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987). "A state may exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes or other non-territorial offenses within the state's jurisdiction to prescribe." *Id.* § 423.

whether they should enforce *jus cogens*[34] provisions and rules of customary international law. Justice Powell suggested that

> [u]ntil international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long neglected area if the resolution of [these types of] disputes . . . is relegated to political rather than judicial processes.[35]

More than ten years after the Cold War, constant challenges affect a potential Pax Americana. Today, for the President of the United States and his deputy secretary of defense, the priority of "world security" has become defeating "forces of evil"[36] as if in Gotham City.[37] When uncertain as to whether world security challenges are real, fabricated, or ballooned from desks in Washington D.C., effective checks and balances seem to be required more than ever. In such a scenario, the U.S. federal courts' reminder that "under current law terrorist attacks [do not] amount to law of nations violations" may be troublesome.[38]

International law comes in handy for multinational corporations doing business abroad when they seek to "internationalize" their agreements with foreign local governments or instrumentalities thereof. Corporations often appeal to international arbitration, the sanctity of contract, performance in good faith, stabilization clauses, and references to internationally accepted standards in an effort to limit some of the foreign investment related risks such as local litigation and the risk of expropriation. When doing so, international corporations maintain that the law of nations, as opposed to a foreign local law, governs their contractual relationship and corporate conduct.

The current U.S. administration's ties with the oil industry are substantial and not a secret.[39] Thus, the administration's foreign policy

---

34. A jus cogens norm is defined by the Vienna Convention on the Law of Treaties as a preemptory 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. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679. An analysis of jus cogens and its comparison with a norm of customary international law is found in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-17 (9th Cir. 1992).

35. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972).

36. George W. Bush has referred repeatedly to an "Axis of Evil."

37. *See* Paul Wolfowitz, *The Road Map for a Sovereign Iraq*, WALL ST. J., June 9, 2004, at A12 ("Nothing is more important to world security than defeating the forces of evil by nurturing the seeds of freedom—especially in Afghanistan and Iraq. Our enemies understand that these are now the central battlegrounds in the war on terrorism.").

38. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984).

39. Some of the highest positions in the current administration are held by individuals with strong ties to the oil and gas and energy industry: Vice President (Dick Cheney: CEO of

and the interests of corporations may be difficult to differentiate. The doctrine of preemption has seriously questioned the existence and validity of international law. Such foreign policy could be held against the interests of many multinational companies seeking to enforce international law provisions. U.S. courts applying and enforcing the ATCA could strengthen the notion of international law by allowing certain differences to be solved through a juridical process. However, courts have sided with current foreign policy concerns. Only the future will tell whether such an approach is adverse to the interests of foreign corporations abroad.

Many multinational corporations, not subject to traditional notions of international law, play stronger roles in today's world than most "nation-states." Today, more than ever, U.S. foreign policy is conducted not only through government appointed diplomats but through U.S. corporations, which frequently have strong influence over local governments, policies, and legislation.[40] Thus, multinational corporations are reshaping the notions of international law and the effectiveness of the rule of law globally. Such power decreases the capability and willingness of local courts to adjudicate disputes affecting the interests of key foreign investors, who are often critical to the interests of the local government.[41]

The contemporary interpretation of the ATCA has allowed foreign plaintiffs to seek justice before U.S. courts. Now the question arises as to whether federal courts should enforce international law, even if by doing

---

Halliburton); National Security Adviser (Condoleezza Rice: member of the Chevron board); White House Chief of Staff (Andrew Card: who used to be a lobbyist for the auto industry); Secretary of the Treasury (Paul O'Neil: Chair and CEO of Alcoa the world's largest producer of aluminum); Deputy Secretary of the Interior (J. Steven Griles: lobbyist for the coal, oil and gas industries); Secretary of Commerce (Don Evans: chair and CEO of Tom Brown, a Denver based oil and gas company); Assistant Attorney General (Debora Daniels: lobbyist for Cinergy). Sierra Club, http://wwwsierraclub.org (last visited Feb. 27, 2006).

40. Multinational corporations are an important source of revenues and direct foreign investment for many countries. Multinational corporations' payment of taxes, royalties, and other concession fees are crucial to many host governments.

41. In some cases host countries may lack functioning judiciaries. *See* Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997). In this class action against Unocal, Total, the Myanmar Oil & Gas Enterprise, and the State Law and Order Restoration Council for alleged international human rights violations, the plaintiffs, farmers of the Tenasserim region, argued that there is no functioning judiciary in Burma. *Id.* at 884. In *Doe v. Unocal Corp.*, 67 F. Supp. 2d 1140 (C.D. Cal. 1999), the United States District Court for the Central District of California found that the plaintiffs lacked standing for purposes of a class action. *Id.* at 1147. Standing requires that three elements be verified: an injury in fact (that plaintiffs suffered an invasion of a legally protected interest which is concrete and actual or imminent as opposed to hypothetical), causation (a causal connection between the injury and the conduct complained of), and redressability (it must be likely that the injury will be redressed by a favorable decision). *Id.* at 1142. The court found that the fist two elements had been satisfied but concluded that the alleged injuries were not redressable. *Id.* at 1144.

so they may affect the interests of U.S. corporations, and/or embarrass the U.S. government. May multinational corporations engaged in the oil and gas business abroad shield themselves from U.S.-based litigation under the ATCA? What are the foreign policy effects of a decision by the Supreme Court of the United States that limits the remedies available to foreign plaintiffs through the ATCA? Should the Supreme Court provide guidance to federal courts as to whether or not actions by nonstate actors qualify as violations to the law of nations, or should such guidance be provided by the Executive or Congress? These are just some of the issues that ATCA claims may raise.

During the first years after the formation of the Republic, the way aliens were treated, including their right to access federal courts, was considered essential, not only because the young nation introduced itself as the land of opportunity and equality, but also because this access was conceived as an instrument to ensure international support and avoid international disputes and crisis. Those same arguments remain valid and will determine not only the future of the Republic but the rules under which limited natural resources will be allocated in a world of scarcity.

I. THE ATCA: ITS BASIC ELEMENTS AND EARLY DEVELOPMENTS

The Alien Tort Claims Act states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[42] The ATCA is a 1789 provision by the First Congress that confers a forum in federal courts to foreign plaintiffs for torts committed abroad.[43]

In recent years federal court decisions applying the ATCA have grown exponentially.[44] The statute remained dormant for a long time following its enactment in 1789.[45] The intent of the 1789 legislature is a matter of conjecture, because its legislative history was not recorded.[46] Some suggest that the ATCA, now codified at 28 U.S.C. § 1350, "was

---

42. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

43. *Id.*

44. Between 1789 and 1980, U.S. courts reviewed only two cases in which jurisdiction under the ATCA was invoked. After 1980, ATCA cases number over 100.

45. *See* Judiciary Act of September 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified as 28 U.S.C. § 1350).

46. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984)("There is evidence . . . that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

part of the federalist effort to ensure that federal, rather than state courts, would handle cases involving foreigners and foreign affairs."[47]

The first formulation of what came to be known as the alien tort statute was the following:

> And be it further enacted, [t]hat the district courts shall 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.[48]

The act codified under 28 U.S.C. § 1350 requires the following three elements:[49]

(1) a claim by an alien,
(2) a claim based in tort, and
(3) a tort in violation of a treaty of the United States or the law of nations.[50]

Some recall that the statute's purpose "was to ensure the young state's full membership in the international community by guaranteeing that foreign ambassadors or ships protected by international law would have a cause of action in federal court for violations of their rights under international law."[51]

The history of ATCA claims may be divided into pre and post-1980 periods, when the *Filartiga* ruling was issued.[52] Filartiga transformed the interpretation of the old statute into an effective instrument for the protection of human rights. Most likely, the Supreme Court decision in *Sosa v. Alvarez Machain* will affect the history of the claims that may be brought under the act.[53]

Paradoxically, the first recorded ATCA decision, *Bolchos v. Darrell*, upheld the sale of slaves.[54] A second case, *Adra v. Clift*, decided in 1961,

---

47. Laura Wishik, *Recent Development: Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act*, 60 WASH. L. REV. 697, 699 (1985).

48. First Judiciary Act, § 9, 1 Stat. 73, 76-77 (1789).

49. These three elements are also mentioned by several court decisions. *See* Filartiga v. Pena Irala, 630 F.2d 876, 880 (2d Cir. 1980); *Tel-Oren*, 726 F.2d at 777; Doe v. Unocal, 395 F.3d 932, 944 (9th Cir. 2002).

50. Recent court decisions require that the tort violate "well established, universally recognized norms or international law." Presbyterian Church of Sudan v. Talisman, 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003).

51. Gregory Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 365 (1999).

52. *Compare* Filartiga v. Pena-Irala, 577 F. Supp. 860 (D.C.N.Y. 1984), *with* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

53. *See* Sosa v. Alvarez Machain, 542 U.S. 92 (2004).

54. Bolchos v. Darrell, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607). *Bolchos* involved a claim brought by captain Bolchos, who had captured a Spanish vessel transporting slaves, against

involved the custody of a Lebanese minor girl born to a Sunnite Muslim couple.[55] The United States Court for the District of Maryland found that the mother defendant's refusal to deliver her daughter to the father plaintiff's custody, concealing her daughter's name and nationality, amounted to the tort of unlawful taking or withholding of a minor child.[56]

Although factually distant from current alien tort claim act disputes, the *Adra* decision is particularly relevant for the following reasons:

(1) It confirmed that a private party is accountable under the law of nations,[57]
(2) It included both public and private international law under the notion of the "law of nations," and
(3) It suggested that declining jurisdiction, when clearly granted by the statute, would hinder foreign relations.[58]

For the district court:

> The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may either clothe a State with the privilege of punishing the offender, or impose upon it the obligation to endeavor to do so. The offender may be a private individual; and when he is subjected to the imposition of a penalty, he comes into close contact with the law of nations. Whenever he commits acts on account of which a country not his own may not unlawfully proceed to punish him even though they are consummated beyond the limits of its territory and have no connection

---

Edward Darrel, agent for Savage, invoked the application of a treaty with France. *Id.* The plaintiff claimed rights over the slaves who had been seized and sold by Darrel pursuant to the terms of a mortgage. *Id.* The South Carolina District Court confirmed its jurisdiction primarily on grounds of admiralty, although it also invoked the provisions of the ATCA. *Id.* The court ruled in favor of Captain Bolchos by applying a treaty with France, pursuant to which the property of friends found on board an enemy vessel shall be forfeited. *Id.* at 810-11.

55. Adra v. Clift, 195 F. Supp. 857, 859 (D.C. Md. 1961). Plaintiff did not seek damages but requested custody of his daughter. *Id.* at 862. Ultimately, the court denied such relief by giving great weight to the girl's desire to remain with her mother. *Id.* at 867. Thus, despite the court's conclusion that the conduct was tortious and in violation of the law of nations, the plaintiff was denied a remedy. *Id.*

56. *Id.* at 862.

57. This notion was particularly novel in 1961, at a time when international law was the exclusive domain of sovereign nation states. The court concluded that defendant's conduct was in violation of the law of nations, because, despite being a Lebanese citizen, she was admitted to the United States under an Iraqi passport. *Adra*, 195 F. Supp. at 865. The law of nations was triggered because the case involved passports, different nationalities and entry into the United States. *Id.*

58. *See id.* at 864-65. The court did not agree with the defendant's argument that private international law and the law of nations were two mutually exclusive branches, and citing *Hilton v. Guyot*, 159 U.S. 113 (1895), considered that there is some intertwining between the two. *Id.* at 864.

> therewith, or whenever he commits acts which the territorial sovereign of the place where they are committed is under an obligation to endeavor to prevent or penalize, he feels the direct consequence of what the law permits an offender sovereign to do, or enjoins a law-respecting sovereign to do. In both situations, it is not unscientific to declare that he is guilty of conduct which the law of nations itself brands as internationally illegal. For it is by virtue of that law that such sovereign acquires the right to punish and is also burdened with the duty to prevent and prosecute.[59]

In deciding this case, the court considered that the plaintiff was a Lebanese citizen, and that Lebanon was a nation friendly to the United States.[60] The court confirmed jurisdiction, fully aware of the importance and impact on foreign relations.[61]

Another early decision, *O'Reilly de Camara v. Brooke*, is particularly interesting when compared with the current U.S. occupation of Iraq.[62] *Brooke* referred to the deprivation of the rights of a Spanish citizen in Cuba during U.S. occupation.[63] The Supreme Court dismissed the complaint considering that "all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected."[64] The Court concluded that when the Executive, Congress, and the treaty making power have joined in adopting an act, a court may not declare that a tort exists.[65] According to the Court, the plaintiff's property did not survive when Spain lost its sovereignty.[66]

II. THE REVIVAL OF THE ATCA WITH *FILARTIGA*

It was not until 1980 that *Filartiga v. Pena-Irala* revived the 1789 ATCA statute.[67] *Filartiga* involved a claim filed by two aliens, Paraguayan citizens, against another Paraguayan for wrongful death.[68]

---

59. *Id.*

60. *Id.*

61. *Id.* The decision "cautions federal courts to give great weight to [foreign policy] such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations." *Id.* at 865.

62. *See* O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908).

63. *Id.* at 48-49.

64. *Id.* at 50.

68. *Id.* at 52.

66. *Id.* at 53.

67. *See* Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). *Filartiga* has been considered the paradigm case in which the victims of violations of international law sued foreign officials responsible for the violations for actions under color of governmental authority. *See* Tzeutschler, *supra* note 51, at 366.

68. *Filartiga*, 630 F.3d at 888. Joel Filartiga and his daughter Dolly Filartiga were Paraguayan immigrants in the United States and were allegedly political opponents of Alfredo

The claim alleged that Filartiga's son and brother were tortured and killed by the Paraguayan police.[69] Plaintiffs invoked the ATCA to sustain the court's jurisdiction.[70] The United States District Court for the Eastern District of New York dismissed the complaint for lack of jurisdiction, narrowly construing the law of nations and limiting its applicability regarding a state's treatment of its own citizens.[71] The United States Court of Appeals for the Second Circuit reversed the dismissal for lack of jurisdiction, ruling that torture is universally condemned in several international agreements and that an act of torture is against the law of nations which includes "established norms of international law of human rights."[72] In determining the concept of the law of nations and the sources of international law, the Second Circuit cited articles 38 and 59 of the Statute of the International Court of Justice and *The Paquete Habana*.[73] In determining "the law of nations" the *Filartiga* court reviewed the following:

(1) international conventions,
(2) international custom as evidence of a general practice accepted by law,
(3) general principles of law recognized by civilized nations, and
(4) judicial decisions and teachings of the most qualified publicists.[74]

The *Filartiga* court decided that international law must not be interpreted as understood in 1789, but "as it has evolved and exists among the nations of the world today."[75] The Second Circuit confirmed that international law is part of the federal common law and referred to the U.N. Charter, the OAS Charter, the Universal Declaration of Human Rights, the Declaration on the Protection of all persons from being subjected to torture, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and

---

Strossner's government. *Id.* The defendant was Americo Norberto Pena-Irala, the Inspector General of Police in Asunción, Paraguay. *Id.*

69. *Id.*
70. *Id.*
71. *Id.* at 880.
72. *Id.*
73. *Id.* (citing The Paquete Habana, 175 U.S. 677 (1900)).
74. *Id.*
75. *Id.* at 881.

Political Rights as binding principles of international law.[76] In condemning torture the court concluded that official torture is prohibited by the law of nations.[77]

The *Filartiga* court concluded that the ATCA provides a basis for federal jurisdiction, but does not grant new rights to aliens.[78] By accepting jurisdiction in a case involving a foreign plaintiff and a foreign defendant for a tort committed abroad, the court acted as a court of universal jurisdiction.[79]

Once the jurisdiction of the federal courts was confirmed, the district court on remand reviewed the issues of the act of state doctrine,[80] *forum non conveniens*,[81] and the nature of actions under the ATCA.[82] To

---

76. *Id.* at 885 (citing G.A. Res. 217 (III)(A) (Dec. 10, 1948); G.A. Res. 4352, 1975; G.A. Res. 2200 (XXI)(A), U.N. Doc A/6316 (Dec. 1966)). The following excerpt from the court's ruling in Filartiga is worth quoting in full:

> These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. . . . Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."

Id. at 883 (quoting 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat)).

77. The Abu Ghraib prison scandal for mistreatment of Iraqi inmates by U.S. soldiers justifies including another excerpt from the court's decision: "Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced." *Id.* at 884. The court reached this conclusion after reviewing the usage of nations, judicial opinions and the work of jurists as sources of customary international law. *Id.* at 883.

78. *Id.* at 887.

79. *See id.* at 890. In the court's own words: "[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in fulfillment of the ageless dream to free all people from brutal violence." *Id.* This view is opposed to Justice Brennan's reading of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964):

> All that *Sabbatino* says is that a domestic court is not an appropriate forum wherein to apply a rule of customary international law unless that rule is supported by a consensus at least wide enough to embrace the parties to the dispute. Such judicial self-restraint may not be appropriate if the forum is an international tribunal entrusted with the competence by both sides, but the situation is different for a domestic court.

First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 792 (1972).

80. In refusing to decline jurisdiction in deference to the act of state doctrine, the court noted that if the Paraguayan government had felt that a U.S. court judgment would be offensive, it could have advised the court but had not done so. *Filartiga*, 577 F. Supp. at 862. The court also noted that the condemnation of torture had reached a great degree of consensus in the international community giving no reason to suppose that Paraguay could be offended. *Id.* The court also found that Paraguay had not ratified Pena's acts and that they were not, therefore, acts of state. *Id.*

81. The court denied dismissal on *forum non conveniens* grounds, despite the fact that the plaintiffs and defendant were Paraguayan, the tort took place in Paraguay and evidence was found there, and Paraguayan law was applicable. *Id.* The plaintiffs filed evidence indicative that resort to the courts in Paraguay would be futile and Pena submitted no evidence to the contrary. *Id.*

vindicate the principle that torture is punishable as an international crime, the court imposed punitive damages, although it was questionable whether similar damages may have been recovered under the law of Paraguay.[83]

The jurisdiction of federal courts to adjudicate torts committed abroad by foreigners against foreigners was confirmed by the United States Court of Appeals for the Ninth Circuit in *In re Estate of Marcos Human Rights Litigation*.[84] The *Marcos* court specifically reviewed whether the adjudication of a tort committed by a foreigner against another foreigner abroad would exceed the territorial jurisdictional limits of U.S. courts and was therefore unsupported by Article III of the United States Constitution.[85] The court concluded that the alien tort statute imposes no limitations based on the citizenship of the defendant or the locus of the injury.[86] The court sustained jurisdiction, considering the *jus cogens* nature of torture as a violation of international law.[87] In so doing, the *Marcos* court concluded that § 1350 is a jurisdictional statute and provides a federal forum for "transitory torts."[88]

III. *TEL-OREN V. LIBYAN ARAB REPUBLIC*: THE EXCLUSION OF NONSTATE ACTORS

In *Tel-Oren v. Libyan Arab Republic*, the personal representatives of twenty-nine persons who died in an attack between Tel Aviv and Haifa by

---

82. *Id.* The court reviewed whether the requirement that the tort be in violation of international law was relevant only for obtaining jurisdiction, or whether in adjudicating the dispute the court would be required to apply international law. *Id.* The court concluded that international law would provide the substantive principles of law, as opposed to the law of the state where the wrong took place. *Id.* The court concluded that § 1350 gives the court the power to develop federal remedies. *Id.*

83. The district court entered a total judgment in favor of the Filartigas in the amount of $10,385,364, to be divided $5,175,000 for Dolly and $5,210,364 for Joel. *Id.* at 867.

84. *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992). This case involved a suit by Agapita Trajano, a Philippine citizen who filed a wrongful death claim against President Ferdinand Marcos and his daughter, Imee Marcos-Manotoc, for the kidnapping, torture and death of Trajano's son Archimedes. *Id.* at 495. The claim averred that Marcos controlled the police and military intelligence who tortured and murdered Trajano. *Id.* at 495-96.

85. *Id.* at 501-03 (concluding that Congress had power under the "Arising Under" Clause of Article III of the Constitution to enact the Alien Tort Statute, and that exercising jurisdiction over Trajano's claims against Marcos-Manotoc "comports with Article III").

86. *Id.* at 500.

87. *Id.*

88. *Id.* at 503. Transitory tort actions are defined as "tort actions which follow the tortfeasor wherever he goes." *Id.* The Ninth Circuit agreed with the district court's analysis that the alien tort statute provides a basis for jurisdiction, but not a substantive cause of action—which must be provided by a treaty or international law. *Id.* This case was decided before Congress passed the Torture Victim Protection Act (TVPA), and its applicability to this case was not reviewed by the Court. *See id.*

members of the Palestine Liberation Organization (PLO) filed tort-based claims against the PLO and the Republic of Libya among others.[89] The United States District Court for the District of Columbia dismissed the complaint for lack of subject-matter jurisdiction[90] under the ATCA, finding that the plaintiffs raised no valid cause of action, and accepted the defendant's argument that the statute of limitations had expired.[91] The district court also recognized that the plaintiffs had no private rights of action and therefore the judiciary should not become involved in foreign affairs and international relations, "traditionally an area where courts have chosen to stay their hands absent some fundamental constitutional violation."[92] The court characterized the ATCA as simply a door to federal jurisdiction, that does not necessarily provide a cause of action to plaintiffs.[93] In dismissing the complaint for lack of subject matter jurisdiction, the district court concluded that federal courts are not substitutes for international tribunals, and therefore should not adjudicate claims arising under international law when no private right of action has been provided.[94]

The D.C. Circuit affirmed the district court's ruling in a *per curiam* opinion, but recognized that this is an area of law that "cries out for

---

89. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981). According to the description by the United States Court of Appeals for the District of Columbia, passengers of a civilian bus, most of them Israeli citizens were taken hostage, tortured, and murdered. Tel-Oren v. Libyan Arab Republic, 767 F.2d 774, 776 (D.C. Cir. 1984) (per curiam). The bus was blown up with grenades by the terrorists who were trained and financed by the PLO. *Id.* at 799. The named defendants were the Libyan Arab Republic (Libya), the Palestine Liberation Organization (PLO), the Palestine Information Office (PIO), the National Association of Arab Americans (NAAA), the Palestine Congress of North America (PCNA). *Id.* The PLO and Libya never became parties to the proceedings. *See id.*

90. The plaintiffs argued for federal jurisdiction on four bases: federal question doctrine (28 U.S.C. § 1331 (2000)), alien tort statute (28 U.S.C. § 1350), diversity of citizenship (28 U.S. § 1332), and foreign sovereign immunities act of 1976 (28 U.S.C. § 1330). *Tel-Oren*, 517 F. Supp. at 545. The district court dismissed the complaint because the plaintiffs were unable to identify a valid cause of action arising under the Constitution, laws or treaties of the United States. *Id.* The district court followed *Foster v. Neilson*, 27 U.S. 253 (1829), which established that a treaty must establish a private right of action for an individual to base a claim thereon. *Id.* at 546.

91. *Id.* at 551. The National Association of Arab Americans raised the statute of limitations issue, which was granted by the court. *Id.* at 550. The complaint included counts for alleged assault, battery, false imprisonment, intentional infliction of emotional distress and/or intentional infliction of cruel, inhuman and degrading treatment. *Id.* The Association argued that under D.C. law the torts of assault, battery and false imprisonment are barred by a one year statute of limitations. *Id.* The district court accepted this argument and considered that the charges under other names were not different from the basic allegations, and were thus barred by the one year statute of limitations. *Id.*

92. *Id.* at 548.

93. *Id.* at 549.

94. *Id.* at 550.

clarification by the Supreme Court."[95] The D.C. Circuit concluded that the law of nations does not impose the same obligations on nonstate actors.[96] The concurring opinion by Judge Edwards noted that plaintiffs did not require a specific right to sue under the law of nations to establish jurisdiction under 28 U.S.C. § 1350, and that such rights are determined by each country's domestic laws.[97] Judge Edwards distinguished a claim brought as a tort in violation of a treaty from one brought as a violation of the law of nations.[98] He concluded that whenever international law confers a right to an alien, enforcement before federal courts may be sought.[99] In his view, torts in violation of the law of nations act as *hostis humani generis* could only be comparable to acts of piracy and slave trading, enemies of mankind which may be brought to justice anywhere.[100] Judge Edwards concluded that persons are subject to civil liability if they commit an offense warranting universal jurisdiction, and that current notions of international law should determine what is considered a violation of the law of nations instead of 1789 definitions.[101] Under Edwards' interpretation, Congress intended questions that could affect foreign relations to be cognizable by federal courts, the statute's intent was to avoid or mitigate international conflict, and a plaintiff is not required to identify and plead a right to sue granted under international law.[102] Judge Edwards, however, was not prepared to extend § 1350 and the application of the law of nations to private or nonstate actors.[103] He limited *Filartiga*, as a precedent, to torture committed under the color of state law and for this reason confirmed the dismissal of the complaint for lack of subject matter jurisdiction.[104]

---

95. *Tel-Oren*, 767 F.2d at 775. The D.C. Circuit concluded that jurisdiction over Libya was barred by the FSIA, which preserves immunity only if the injury or death occurs in the United States. *Id.* The United States Supreme Court clarified this gray area in 2004. *See* Sosa v. Alvarez Machain, 542 U.S. 92 (2004).

96. *Tel-Oren*, 767 F.2d at 776.

97. *Id.* at 777-78 (Edwards, J., concurring).

98. *Id.* at 778.

99. *Id.* at 780.

100. *Id.* at 781.

101. *Id.* at 777. Judge Edwards, citing the *Restatement (Third) of Foreign Relations Law (Revised)* section 702, stated that the following are included as violations of international law: state practiced, encouraged or condoned (1) genocide; (2) slavery or slave trade; (3) the murder or causing the disappearance of individuals; (4) torture or other cruel, inhuman or degrading treatment or punishment; (5) prolonged arbitrary detention; (6) systematic racial discrimination; and (7) consistent patterns of gross violations of internationally recognized human rights. *Id.*

102. *Id.* at 788-90.

103. *Id.* at 776.

104. *Id.*

In a concurring opinion, Judge Bork agreed that the plaintiffs had failed to state a claim or cause of action that would support jurisdiction, because neither the law of nations nor a treaty of the United States provide such cause of action.[105] Judge Bork raised separation of powers issues and noted that control of foreign affairs belongs exclusively to the political branches of government.[106] In his opinion, § 1350 does not grant a cause of action and is limited to affording federal jurisdiction.[107] Besides, he added, dismissal was justified on grounds of the political question doctrine.[108] Judge Bork's understanding of international law excludes nonstate actors and limits it to obligations involving states and state agents.[109] In his opinion, the case raised so many politically sensitive issues that it "is not the sort that is appropriate for federal court adjudication."[110] It is Judge Bork's understanding that courts should not construe the wording of the ATCA, because doing so would be legislating and therefore would raise constitutional issues.[111]

Judge Robb concurred with the court's decision to dismiss the plaintiffs' complaint but his justification for doing so was based entirely on political question grounds that rendered the dispute nonjusticiable because it involved foreign affairs, an area that is restricted to the executive and legislative branches.[112]

---

105. *Id.* at 799 (Bork, J., concurring).

106. *Id.*

107. *Id.* at 805. Bork's political question doctrine approach is also used as a justification for the lack of a private cause of action. *Id.* According to this interpretation, international law grants no private causes of action because doing so would interfere with foreign relations. *See id.* In Bork's opinion, Section 1350 is solely a jurisdiction-granting statute. *Id.*

108. *Id.* Bork's opinion is not conclusive as to whether a violation of international law is required solely to grant jurisdiction or also in determining whether the plaintiffs have a cause of action. *See id.* In a footnote he mentions the potential "applicable laws" to a § 1350 claim: international law, the federal common law of torts, or the tort law of the applicable jurisdiction under choice of law principles. *Id.*

109. *Id.* at 813. Judge Bork noted that in 1789 there was no notion of "international human rights" nor were any private party rights recognized under international law. *Id.*

110. *Id.* at 808. Judge Bork considered the risk of potentially flooding U.S. courts with so many claims by victims of violations of the nonaggression principle or of the Hague Conventions, if the court concluded that several human rights treaties to which the United States afforded a private cause of action. *Id.* at 810 (stating that such "lawsuits might be far beyond the capacity of any legal system to resolve").

111. *Id.* at 815.

112. *Id.* at 823 (Robb, J., concurring). An analysis of the *Tel-Oren* decision may be found in Wishik, *supra* note 47.

IV. CONGRESS ACTS: THE TORTURE VICTIM PROTECTION ACT

A direct consequence of *Filartiga* was Congress's approval in 1991 of the Torture Victim Protection Act (TVPA).[113] For a federal court to exercise jurisdiction, the TVPA requires that local remedies be exhausted wherever the tort was committed, and provides a ten year statute of limitations.[114] Thus, the TVPA specifically establishes a cause of action for wrongful death and torture.[115]

When the bill was proposed the legislative intent[116] was clear:

(1) To carry out U.S. obligations under the United Nations Charter and other international human rights agreements,[117]
(2) To establish a civil action that would entitle recovery of damages for extrajudicial killing and torture,
(3) To clarify and expand human rights law and make U.S. domestic law more effective in protecting basic human rights,
(4) To provide a cause of action to U.S. citizens victims of torture,[118]
(5) To deny torturers a safe haven in the United States, and[119]

---

113. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 106, 73 Stat. 1, 2 (1992):

> Section 1. Short title. This Act may be cited as the 'Torture Victim Protection Act of 1991.
>
> Sec. 2. Establishment of civil action
>
> (a) Liability. 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.
>
> (b) Exhaustion of remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.
>
> (c) Statute of limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

114. *Id.*

115. *Id.* According to the United States House of Representatives the purpose of the TVPA was to "codify *Filartiga*, to alleviate separation of powers concerns and to expend the remedy to include U.S. citizens." Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 105 (2d Cir. 2000).

116. *See* 102 Cong. Rec. H11244 (daily ed. Nov. 25, 1991).

117. *See* 102 Cong. Rec., H.R.2092 (1991).

118. 102 Cong. Rec. E1444 (daily ed. Apr. 14, 1991), *available at* http://thomas.loc.gov (last visited Feb. 27, 2006).

119. 102 Cong. Rec. S2667 (daily ed. Mar. 3, 1992), *available at* http://thomas.loc.gov (last visited Feb. 27, 2006). Several recent affairs, including Guantanamo Bay, Cuba, the Baghram Airbase and the Abu Ghraib prison, raise the issue of double standards when condemning torture and degrading treatment. Harold Hongju Koh, *Symposium on the United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next*, 35 COLUM.

(6) To establish a ten year statute of limitations.[120]

Congressional intent also described the requirements under the act as follows:

(1) The torturer must have acted under the actual or apparent authority of its government.[121]
(2) The torturer must be subject to the personal jurisdiction of U.S. courts.
(3) The victim must have exhausted all local remedies.[122]

In 1997, the United States District Court for the Eastern District of Louisiana held that the TVPA did not apply to corporations.[123] In 2003 the United States District Court for the Southern District of Florida did not follow this interpretation and held instead that the definition of "individual" under the TVPA is synonymous with the term "person," thus extending the TVPA to corporations.[124]

There was some discussion as to whether the TVPA had preempted the alien tort statute. Several courts interpreting the TVPA concluded that it does not preempt torture and summary judgment claims under the ATCA, and simply provides an additional basis to assert said claims.[125]

HUM. RTS. L. REV. 493, 501 (2003). These events are of grave concern, as they are examples in which torture may have been an approved state policy. *See id.*

120. Some courts have concluded that the ten-year TVPA statute of limitations applies to alien tort statute claims as well. *See In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1180 (N.D. Cal. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 462 (D.N.J. 1999); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996).

121. This is the "state action" requirement, where the violation must have been perpetrated under actual or apparent authority, or color of law of any foreign nation. Wiwa v. Royal Dutch Petroleum Co. 2002 U.S. Dist LEXIS 3293, *38-40 (S.D.N.Y. Feb. 28, 2002). A "joint action" test applies to determine whether private actors are considered state actors, more specifically whether a substantial degree of cooperative action between the corporate defendants and the government. *See id.*

122. *See* 102d Cong. Rec. E1444 (daily ed. Apr. 24, 1991) (remarks by Hon. Gus Yatron). In a TVPA claim the burden of proof that local remedies have been exhausted lies with the defendant. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *55-56. However, the exhaustion of local remedies should only take place if such remedies are "adequate and available." Sinaltrain v. Coca Cola Co., 256 F. Supp. 2d 1345, 1351 (S.D. Fla. 2003).

123. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 382 (E.D. La. 1997).

124. *Sinaltrain*, 256 F. Supp. 2d at 1358-59. In extending the interpretation of the TVPA to include violations by corporations the court noted that Congress did not excluded corporations from liability under the act, and courts have held corporations liable for violations of international law. *Id.* at 1358.

125. *See Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *11; *Beanal*, 969 F. Supp. at 380-81; Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 7 (D.D.C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995).

Following the 2004 Supreme Court *Sosa* decision, some courts have concluded that the TVPA preempts alien tort based claims.[126]

V. *KADIC V. KARADZIC*: NONSTATE ACTORS MAY VIOLATE THE LAW OF NATIONS

This case also involves litigation between foreign citizens for torts committed abroad.[127] Croat and Muslim citizens of Bosnia filed claims for genocide, rape, forced prostitution, torture and summary execution, and wrongful death by the Bosnian-Serb military forces.[128] Karadzic was sued in his capacity as President of the Bosnian-Serb Republic, however, he was not entitled to sovereign immunity since the Executive did not recognize him as a head of state.[129] The plaintiff's bases for jurisdiction were the ACTA, the Torture Victim Protection Act, and the federal question doctrine.[130]

The district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction.[131] Following the precedent in *Tel-Oren v. Libyan Arab Republic*, the court declined to extend jurisdiction under the alien tort statute to nonstate actors.[132] Under this interpretation, private parties could simply not breach the law of nations.[133]

---

126. Enahoro v. Abubakar, 408 F.3d 877, 884-85 (7th Cir. 2005). *But see* Aldana v. Del Monte Fresh Produce, N.A. Inc., 416 F.3d 1242 (11th Cir. 2005).

127. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

128. *Id.* at 236-37. Two actions were filed. Doe v. Karadzic, 866 F. Supp. 734, 735 (S.D.N.Y. 1994). One was a class action seeking redress on behalf of all women and men who had been victims of the Bosnian-Serb military through abuses known as "ethnic cleansing." *Id.* at 736. However, for immunity purposes the United States recognized neither the Bosnian Serb nation nor Karadzic as an official head of state. *Id.* at 737-38. Under U.S. law, the issue of whether an individual is a head of state, and therefore entitled to immunity, is not a question of fact, but an issue to be solved exclusively by the Executive branch pursuant to the wording of 28 U.S.C. § 517 (1994), which provides:

> Interests of United States in pending suits. The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

Id. (citing 28 U.S.C. § 517 (1994)).

129. *Kadic*, 70 F.3d at 236-37. Karadzic was served during one of his visits to the United Nations in New York. *Id.* at 246.

130. *Id.* at 237.

131. *Doe*, 866 F. Supp. at 743.

132. *Id.* at 740.

133. *Id.* The court also denied jurisdiction under the TVPA, since the Act only protects against "official torture," or torture committed under the color of state law. *Id.* at 741. Because Karadzic was not recognized as a foreign official, a claim under TVPA could not be sustained. *Id.* at 742.

The Second Circuit reversed the district court's decision by concluding that individuals could be held accountable for law of nations violations.[134] *Kadic v. Karadzic* expands the ATCA scope significantly by allowing claims against corporations, nonstate actors, for international law violations.[135]

VI. Corporations Are Accountable for International Law Violations

In *Doe v. Unocal Corp.*, fifteen Burmese villagers filed an action against Unocal Corporation, Union Oil Company of California and two Unocal executives alleging human rights violations committed by the Burmese military in assisting Unocal's operations to exploit gas in Burma (now known as Myanmar).[136] Unocal purchased a percentage of Total's interests, rights, and obligations under a production sharing contract with the Myanmar Oil and Gas Enterprise, in which Total was the operator.[137] The company found gas and required a pipeline.[138] The plaintiffs averred that they were forced by the military to relocate and work during the construction of the pipeline.[139] Plaintiffs filed claims under the alien tort statute, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the federal question statute.[140] The

134. *See Kadic*, 70 F.3d at 239. The Second Circuit cited the *Restatement (Third) of Foreign Relations Law* (1986), pursuant to which "[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes and genocide," as "offenses of universal concern." *Id.* at 240.

135. *See id.*

136. 110 F. Supp. 2d 1294, 1295 (C.D. Cal. 2000).

137. *Id.* at 1297. Unocal conducted exploratory work in Burma in the late 1980s, and in 1991 started negotiations with the government to obtain a production license. *Id.* at 1296-97. In 1992, Control Risk Group advised Unocal of the risks of doing business in Burma as follows: "Throughout Burma the government habitually makes use of forced labour to construct roads. . . . There are credible reports of military attacks on civilians. In such circumstances Unocal and its partners will have little freedom of manoeuvre." *Id.* at 1297. The Myanmar Oil and Gas Enterprise was obligated to provide security, protection and rights of way under the contract. *Id.*

138. *Id.* at 1296. The pipeline had to go through a region where people in opposition to the military government prevailed. *Id.* at 1297.

139. *Id.* at 1298. In 1995, a Unocal consultant wrote:

> My conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation . . . forced labor to work on infrastructure projects supporting the pipeline; and imprisonment and/or execution by the army of those opposing such actions. Unocal, by seeming to have accepted SLORC's version of events, appears at best naive and at worst a willing partner in the situation.

Id. at 1299-1300.

140. *See id.* at 1303. The RICO claims were dismissed because the district court did not find that substantial facts occurred in the United States and did not consider whether the statute applied extraterritorially. *Id.* at 1311. The court dismissed the federal question claim by applying

United States District Court for the Central District of California granted the defendants' motion for summary judgment.[141] The court found that the plaintiffs failed to satisfy the third element of all alien tort statute claims, i.e., a tort in violation of the law of nations.[142] In its analysis, the court concluded that the alien tort statute provides not only subject matter jurisdiction, but also a cause of action.[143]

The district court followed *Filartiga*'s precedent, requiring a current interpretation of the law of nations as opposed to a 1789 construction thereof.[144] Furthermore, the court indicated that a violation of international law required the violation of a "norm that is specific, universal and obligatory."[145] The court concluded that the plaintiffs did not present evidence that Unocal participated or influenced the military's unlawful conduct, controlled said conduct, or sought to employ forced labor.[146] Therefore, its claim that Unocal acted under color of law failed.[147] Although the district court concluded that Unocal knew that the government was using forced labor, and the joint venture benefited from it, this was not enough to establish liability under international law, which required active participation in the unlawful conduct.[148]

The Ninth Circuit reversed the district court's decision, holding that the alien tort statute not only confers jurisdiction before federal courts, but also grants a cause of action "as long as plaintiffs allege a violation of a 'specific, universal and obligatory international norm as part of [their] ATCA claim.'"[149] The Ninth Circuit also ruled that a ten-year statute of

---

the same rationale for its dismissal of the alien tort statute claim. *Id.* at 1311. Thus, according to the district court, whenever an A.T.C.A claim is dismissed, dismissal of political question based claims should also follow. *Id.*

141. *Id.* at 1312.

142. *Id.* at 1306-07.

143. *Id.* at 1303. In granting Unocal's summary judgment, the district court concluded that there was no evidence that Unocal compelled the Myanmar military to commit the alleged tortious acts, and that no facts suggested that Unocal sought to employ forced or slave labor. *Id.*

144. *Id.* at 1304. As opposed to a 1789 interpretation of the law of nations, a contemporary construction of the law of nations substantially increases the number and scope of torts covered under § 1350. The *Sosa* decision's references to the 1789 statute were made to limit the scope to certain actions that under strict standards are deemed universally condemned. *See* Sosa v. Alvarez Machain, 542 U.S. 92 (2004).

145. *Unocal*, 110 F. Supp 2d at 1304. The district court distinguished between a violation of a jus cogens provision (a binding provision due to its fundamental value) and a violation of a customary international law provision (which in order to be binding requires the specific consent of the State). *Id.* It accepted that torture, murder, genocide and slavery constitute *jus cogens* violations. *Id.*

146. *Id.* at 1306.

147. *Id.* at 1306-07, 1310.

148. *Id.* at 1310.

149. Doe I v. Unocal Corp., 395 F.3d 932, 944 (9th Cir. 2002).

limitations applies to alien tort statute claims.[150] According to the Ninth Circuit, the torts of torture, murder, slavery, and forced labor are *jus cogens* violations and, therefore, violations of the law of nations.[151] The court further concluded that although some torts, like torture, require color of law or state action, others like forced labor (as a modern variety of slavery) do not, and therefore, individual liability is possible.[152]

Several U.S. courts have recognized a federal forum in which common law remedies may be applied for violations of customary international law.[153] Further, federal courts have recognized that an association has standing as a plaintiff to file claims under the alien tort statute.[154] The United States District Court for the Northern District of Alabama recognized that the rights to associate and organize are part of customary international law and as such may support valid claims under the alien tort act statute.[155] These courts have noted that certain conducts amount to violations of international law, regardless of whether they are committed by states or private parties.[156]

---

150. *Id.*

151. *See id.* at 945. The notion of *jus cogens* was established by article 53 the 1969 Vienna Convention on the Law of Treaties:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community 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.

Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 344. Torture, murder, genocide, and slavery are *jus cogens* violations. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992); United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1996).

152. *John Doe I*, 395 F.3d at 946.

153. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Estate of Winston Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); Estate of Rodriguez v. Drummond, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); United States v. Smith, 18 U.S. 153, 160-61 (1820) (5 Wheat) (concluding that "the law of nations may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law"); Aquamar S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1295 (11th Cir. 1999) (describing the process of ascertaining customary international law as "look[ing] to a number of sources including international conventions, international customs, treatises and judicial decisions rendered in this and other countries").

154. Estate of Rodriguez v. Drummond, 256 F. Supp. 2d 1250, 1259 (N.D. Ala. 2003) (finding that in order to establish standing the association must demonstrate: an injury in fact, causation, and redressability) (citing Jane Doe I v. Islamic Salvation Front, 993 F. Supp 3, 10 (D.D.C. 1998)).

155. *Estate of Rodriguez*, 256 F. Supp. 2d at 1264.

156. *Id.* at 1260. Such conduct includes slave trade, piracy, slavery and forced labor, aircraft hijacking, genocide, and war crimes. *Id.*

VII. THE SUPREME COURT'S CHANCE: *ARGENTINE REPUBLIC V. AMERADA HESS SHIPPING CORP.*

In 1989, the Supreme Court reviewed the ATCA, deciding a case filed by two Liberian corporations against the Republic of Argentina for alleged damages to their vessel by the Argentine military during the Malvinas war in 1982.[157] However, at that time the Court did not address the merits of the ATCA claims and dismissed the complaint on foreign sovereign immunity grounds.[158] The Supreme Court confirmed that the Foreign Sovereign Immunities Act (FSIA) is the sole basis for jurisdiction against foreign sovereigns and must be applied in every action in which a foreign sovereign is a defendant.[159] The Court ultimately concluded that the Argentine Republic is immune under the Act.[160]

Thus, the FSIA preempts the ATCA and therefore limits suits in which foreign sovereigns or their agencies or dependents are entitled to immunity. When a multinational corporation and a national oil company are joined as defendants, the plaintiff must first establish that one of the exceptions to immunity under the FSIA applies.

VIII. THE ALIEN TORT STATUTE AS AN ENVIRONMENT PROTECTION TOOL

A third generation of alien tort statute cases consists of litigation for environmental degradation against multinational companies doing business overseas.

A. Jota v. Texaco

Two class actions were filed by members of indigenous tribes in Ecuador against Texaco for environmental damages and personal injuries allegedly caused by the company's operations.[161] Specifically, the two claims alleged that Texaco dumped large quantities of toxic products into local rivers during the drilling process.[162] Texaco moved to dismiss on

---

157. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 431-32 (1989).

158. *Id.* at 443.

159. *Id.* (citing 28 U.S.C. §§ 1602-1611 (1988)).

160. *Id.* at 434-35. The decision recalls the distinction between the initial "absolute immunity" doctrine under which foreign sovereigns were always granted immunity, and the most recent doctrine of restrictive sovereign immunity which excludes immunity for commercial acts. *See id.* at 434.

161. Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (involving plaintiffs from the Oriente region in Ecuador); Jota v. Texaco, Inc., 157 F.3d 53, 155-56 (2d Cir. 1998) (involving twenty-three indigenous residents of the region in Perú which adjoins Oriente).

162. *Jota*, 157 F.3d at 156. The complaint also alleged damages caused by crude oil leaking during Texaco's construction of the Trans-Ecuadoran pipeline. *Id.*

grounds of *forum non conveniens*, failure to join the Republic of Ecuador, and international comity.[163] The Republic of Ecuador filed an amicus brief arguing for the Ecuadorian courts to settle the dispute because the country's interest in formulating its own environmental policies was at stake.[164] The district court granted the defendant's motion to dismiss.[165] In *Jota*, Ecuador's attorney general filed a motion stating that adjudication by a U.S. court did not "damage the sovereignty of the Republic of Ecuador, instead it looks to protect the interests of the indigenous citizens of the Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company."[166] Ultimately, the district court dismissed this complaint as well.[167]

The Second Circuit reversed, finding that the district court abused its discretion by dismissing all portions of the plaintiffs' complaint because, vis-à-vis some claims, relief could be provided without participation by the Republic of Ecuador.[168]

On remand, the district court dismissed the complaint on *forum non conveniens* grounds by applying the *Gilbert* test for public-private interest factors.[169] In doing so, the court also dismissed the ATCA claim, concluding that a claim "that the consortium's oil extraction activities violated environmental norms of customary international law lacks any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss."[170] The Second Circuit found that no act taken by Texaco in the United States had material bearing on the pollution-creating activities.[171] The court pointed out that

---

163. *Id.* A Texaco subsidiary operated an oil and gas concession in Ecuador. *Id.* However, PetroEcuador, the national oil and gas company became the exclusive owner of all interests by 1992. *Id.*

164. *Id.* at 157.

165. *Id.* at 155. Remand was ordered since the district court had failed to obtain a Texaco commitment to submit to the jurisdiction of Ecuadoran courts when reviewing *forum non conveniens* arguments. *Id.*

166. *See id.* at 158. This intervention raised the issue of waiving sovereign immunity. *See id.* The Attorney General in a second communication was clear about not waiving sovereign immunity. *Id.* Thus, Ecuador presented two opposing positions in this case. *See id.* at 162. The Ambassador was opposed to U.S.-based litigation, but the Attorney General wanted to assist the plaintiffs in their claims against Texaco, and therefore favored U.S.-based adjudication. *See id.* at 162-63.

167. *Id.* at 158.

168. *Id.* at 162.

169. *Id.* at 159 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947)).

170. Aguinda v. Texaco, 142 F. Supp. 2d 534, 552 (S.D.N.Y. 2001).

171. *Id.* at 553.

> [T]he actions in question occurred overwhelmingly in Ecuador, where courts are fully capable of interpreting alleged violations of international law. The United States therefore has no special public interest, under the ATCA or otherwise, in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred.[172]

The court concluded that an ATCA claim does not alter the standard *forum non conveniens* analysis, which applies in an "undiminished fashion."[173]

B. Beanal v. Freeport-McMoran, Inc.

This complaint was filed by an Indonesian resident against Freeport McMoran Inc., the operator of an open-pit copper and coal mine in Indonesia, with claims for environmental degradation, human rights violations, and cultural genocide.[174] The district court dismissed plaintiff's complaint for failure to state a claim upon which relief can be granted.[175] The district court's opinion outlined existing ATCA precedents and reached the conclusion that § 1350 provides a private right of action so that a private party may be held liable for international law violations.[176] The court concluded that the plaintiff met the first two ATCA elements; he was an alien and pleaded tortious conduct.[177] The court focused its analysis on whether the conduct was in violation of the law of nations.[178] In the district court's view, for a tort to qualify under § 1350, "the alleged violation must be definable, obligatory (rather than hortatory), and universally condemned."[179] The court followed the

172. *Id.*

173. *Id.* at 553-54.

174. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999). Plaintiff Tom Beanal is a member of an indigenous tribe in Tamika, Iran Jaya, Indonesia, where the Grasberg gold and copper mine is located. *Id.* The environmental torts alleged by the plaintiff included allegations for "destruction, pollution, alteration, and contamination of natural waterways, . . . surface and ground water sources; deforestation; destruction and alteration of physical surroundings" and failure to protect one of the last great natural rain forests in the world. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 369 (E.D. La. 1997). Human rights violations alleged by plaintiff included: "arbitrary arrest and detention, . . . torture, . . . surveillance, . . . destruction of property, . . . and severe physical pain and suffering." *Id.*

175. *Beanal*, 969 F. Supp. at 365. Defendant's motion to dismiss for failure to state a claim was based on the following arguments: "the alien tort statute does not provide a private right of action; . . . Freeport is not a state actor; . . . the TVPA supersedes the ATCA for claims of torture and extrajudicial killings, . . . [and] the TVPA does not apply to corporations." *Id.* at 366-67.

176. *Id.* at 370.

177. *Id.* at 367.

178. *Id.* at 370.

179. *Id.*

Filartiga decision, accepting that international law must be interpreted not as it existed in 1789, but considering its dynamic nature and current evolution.[180] The district court established three elements which must be present to determine whether a tort is in violation of the law of nations:

(1) [That] no state condones the act in question and there is a recognizable "universal" consensus of prohibition against it;
(2) [That] there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; [and]
(3) [That] the prohibition against it is nonderogable and therefore binding at all times upon all actors.[181]

The district court also followed the *Kadic* decision concluding that "[c]ertain conduct violates the law of nations whether committed by a state or private actor . . . such as piracy, hijacking, genocide, war crimes, and certain acts of terrorism," and may be punished by any state under the notion of a universal jurisdiction.[182]

The court also noted that other types of conduct, nongenocide human rights abuses, are only actionable if committed by a state actor, such as slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; or a consistent pattern of gross violation of internationally recognized human rights.[183] In addition, the court determined that the ATCA was neither repealed nor limited by the TVPA.[184]

Then the district court analyzed whether § 1350 applies to international environmental torts, which the court answered affirmatively.[185] Notwithstanding the above, the district court concluded that the plaintiff failed to articulate an international law violation.[186] The

180. *See id.*

181. *Id.*

182. *Id.* The district court concluded that genocide is clearly an international tort. *Id.*

183. *Id.* The court also determined that official torture is an international tort as well. *Id.* It must be noted that state conduct is required, an element that is satisfied if the defendant acts in concert with the foreign state. *Id.*

184. *Id.* at 380. The court followed *Kadic*, stating that "[t]he scope of the Alien Tort Statute remains undiminished by enactment of the Torture Victim Protection Act." *Id.* This means that the TVPA is not the sole source for a cause of action for torture and extrajudicial killing. *See id.* Further, it also means that the scope of ATCA claims includes other international law torts. *See id.* The court concluded, however, that the term "individual" under the TVPA does not apply to corporations but only to individuals and that therefore Beanal failed to state a TVPA claim against Freeport. *Id.* at 382.

185. *Id.* at 383.

186. *Id.* Beanal based his allegations on three international environmental law principles: the "polluter pays" principle, the precautionary principle, and the proximity principle. *Id.* The

court considered that international environmental protection principles in the Stockholm and Rio Declarations apply to states and not to nonstate corporations.[187] According to the district court, a "nonstate corporation could be bound to such principles by treaty, but not as a matter of international customary law."[188]

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the Beanal complaint.[189] When reviewing the environmental tort based claim, the court noted that the plaintiff referred only to "a general sense of environmental responsibility" and to "abstract rights and liberties devoid of articulate or discernable standards" that failed to identify practices that amounted to international environmental torts.[190] The Fifth Circuit cautioned against federal court adjudication of environmental claims under international law "to insure that environmental policies [in] the United States do not displace environmental policies of other governments"[191]

C. Flores v. Southern Peru Copper Corp.

In *Flores v. Southern Peru Copper Corp.*, the Second Circuit reviewed whether environmental damages caused by a U.S. corporation doing business abroad were actionable under the ATCA.[192] The Second Circuit affirmed the district court's dismissal of the claim upon finding that the plaintiffs failed to state a violation of customary international law.[193]

The plaintiffs' claims for violations of their rights to life and health distinguished this case from previous ones in which strict international environmental tort violations were pleaded.[194] However, the district court dismissed the complaint and held that plaintiffs failed to state an ATCA claim because they did not plead a violation of a "cognizable principle of

---

court concluded that none rises to the level of an international tort due to a lack of universal consensus by the international community. *Id.*

187. *Id.* at 384.

188. *Id.*

189. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 169 (5th Cir. 1999).

190. *Id.* at 167.

191. *Id.* The Fifth Circuit noted that this case dealt with environmental abuses occurring within one state and not affecting neighboring countries to confirm its deference for the foreign nation's sovereignty. *Id.*

192. Flores v. S. Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003).

193. *Id.* at 171.

194. *See id.* at 143. The plaintiffs, residents of Ilo, Perú, alleged that the U.S.-based Southern Peru Copper Corporation polluted the air through its copper mining activities, which in turn caused severe lung diseases. *Id.* They claimed violations to their customary international law rights to life, health, and sustainable development. *Id.* A claim for a violation to their right to a sustainable development was subsequently dropped. *See id.* at 144.

customary international law."[195] The court reviewed the "works of jurists, writing professedly on public law . . . the general usage and practice of nations . . . [and] judicial decisions recognizing and enforcing [international] law [to determine] . . . whether [a customary international rule is] well established and universally recognized."[196] The court then rejected the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development as evidence of a customary international law.[197] The plaintiffs failed to show that the agreements have universal acceptance and the court rejected the notion that environmental torts can violate customary international law.[198] The district court stated that international agreements regarding the environment only state a "general sense of environmental responsibility" without identifying specific torts.[199] Notwithstanding the plaintiffs' claims for violations of their rights to life and health, the district court concluded that "plaintiffs have not demonstrated that high levels of environmental pollution . . . violate any well established rules of customary international law."[200] For the district court, it was critical that plaintiffs had failed to identify prohibited conduct.[201]

The Second Circuit concluded that the ATCA "creates a cause of action for violations of specific, universal and obligatory international human right standards."[202] The court ruled that courts must proceed with "extraordinary care and restraint" in determining what offenses violate the law of nations, and that a principle is only incorporated into customary international law if States abide by it out of a legal sense of obligation.[203] The court also concluded that customary international law was concerned only with wrongs of "mutual concern" (in which all nations are interested and not just one state) expressed through international agreements.[204]

To determine customary international law, the court reviewed primarily "formal lawmaking and official actions of States and only secondarily . . . the works of scholars as evidence of the established

---

195. *Id.* at 145.
196. *Id.*
197. *Id.* at 146-47.
198. *Id.* at 145-47.
199. *Id.* at 147.
200. Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 519 (S.D.N.Y. 2002).
201. *Id.* The court also stated that even if a proper ATCA had been stated the complaint would still be dismissed on *forum non conveniens* grounds. *Id.* at 544.
202. *See Flores*, 343 F.3d at 151.
203. *Id.* at 154.
204. *Id.* at 155. The fact that a nation's municipal law prohibits certain conduct is not sufficient to raise it to the level of a violation of customary international law. *Id.*

practice of States."[205] The court concluded that customary international law could not be established by citing abstract rights and liberties, stating that "where the customs and practices of States demonstrate that they do not universally follow a particular practice out of a sense of legal obligation and mutual concern, that practice cannot give rise to a rule of customary international law."[206] The court held that "the asserted 'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law."[207] The court considered multinational declarations of principle to be "mere general statements of policy . . . unlikely to give rise to . . . obligations in any strict sense."[208] The court noted the district court's reference to Principle 2 of the Rio Declaration as specific opposition to the notion of a violation of customary international law, since the sovereign controls the level of environmental exploitation within its own borders.[209] The court concluded that the plaintiffs failed to submit evidence sufficient to establish that intranational pollution violates customary international law.[210]

D. Presbyterian Church of Sudan v. Talisman

This class action was filed by residents of Sudan against Sudan and Talisman.[211] The plaintiffs claimed that Talisman, the operator of the

---

205. *Id.* at 156 (citing United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003)). In analyzing article 38 of the Statute of the International Court of Justice the court distinguished between "primary evidence" of customary international law sources, such as conventions, and international custom and the general principles of law recognized by the civilized nations; and "secondary sources" including judicial decisions and the works of publicists. *Id.* at 157.

206. *Id.* at 158. The court rejected the plaintiffs' "shockingly egregious standard" to distinguish torts in violation of international customary law. *Id.* It did so because, according to the court, "[it] would displace the agreement of nations as a source of customary international law and substitute for it the consciences and sensibilities of individual judges." *Id.*

207. *Id.* at 160.

208. *Id.* at 168. The court concluded that the multinational declarations cited by the plaintiffs were not reliable evidence of customary international law because the failed to create enforceable obligations. *Id.*

209. *Id.* at 169.

210. *Id.* at 172.

211. Presbyterian Church of Sudan v. Talisman, 244 F. Supp 2d. 289, 296 (S.D.N.Y. 2003). The members of the class, including members of the Presbyterian Church of Sudan, are the residents in an area within fifty miles of the oil concession operated by Talisman. *Id.* at 302. "Plaintiffs alleged that Talisman was complicit with Sudan in 'sanitizing' areas surrounding the oil concessions." *Id.* at 325. The plaintiffs amended complaint states:

> Defendants have collaborated in a joint strategy to deploy military forces in a brutal ethnic cleansing campaign against a civilian population based on their ethnicity and/or religion for the purpose of enhancing Defendant's ability to explore and extract oil from areas of southern Sudan by creating a *cordon sanitaire* surrounding the oil concessions located there.

Greater Nile Petroleum Operating Company, worked with the Sudanese government to insure security of its oil and gas operations, which committed gross human rights violations including genocide, war crimes, torture, and enslavement.[212] The complaint alleged Talisman's knowledge of the ethnical cleansing and military activities in its oil field areas, and accused Talisman of supplying equipment to the government for use against religious minorities.[213]

Talisman moved to dismiss on grounds of lack of jurisdiction, *forum non conveniens*, and the act of state doctrine, among others.[214] Talisman also argued that corporations are incapable of violating international law.[215] The district court rejected this argument, citing binding Second Circuit precedent to the contrary, including *Amerada Hess Shipping Corp. v. Argentine Republic*, *Kadic v. Karadzic*, *Jota v. Texaco*, *Wiwa v. Royal Dutch Petroleum Co.* and *Aguinda v. Texaco, Inc.*[216] In those cases, the courts concluded that an individual could be held liable for gross human right violations regardless of whether he was acting under color of law.[217] The district court noted that while the Second Circuit dismissed the complaints in some of the above-mentioned cases, it did so for reasons other than lack of subject matter jurisdiction.[218] The Second Circuit had accepted the idea that an individual or corporation may be held liable for international law violations, and concluded that it had jurisdiction under the alien tort statute because under international law, corporate liability follows allegations of *jus cogens* violations.[219]

Id. at 327. The amended complaint also alleged that "Talisman pays Sudan to 'protect' oil concession areas, knowing that 'such protection' includes ethnic cleansing or genocide." *Id.*

212. *Id.* at 300, 305. The Greater Nile Petroleum Operating Company is a joint venture between Talisman, China National Petroleum, Petronas Carigali Nile Ltd. of Malaysia, and Sudapet of Sudan. *Id.* at 300. The claims also included ethnic cleansing and displacement of the non-Muslim Sudanese population from areas in which Talisman operated. *Id.* at 300, 305.

213. *Id.* at 300-01.

214. *Id.* at 303.

215. *Id.* at 308.

216. *Id.* (citing Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Jota v. Texaco, 157 F.3d 153 (2d Cir. 1988); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002)).

217. *See id.* at 311.

218. *Id.*

219. *Id.* at 319. The district court did not review the issue of whether it had jurisdiction under 28 U.S.C. § 1331 or the federal question doctrine (whether international law is incorporated into U.S. law), since it concluded that it had jurisdiction under the ATCA. *Id.*

The court recalled that under U.S. law, corporations may be held criminally liable under the Racketeer Influenced and Corrupt Organizations Act (RICO), coercion of political activity, and witness tampering. *Id.* at 316-18 (citing 18 U.S.C. §§ 1512, 1610, 1961). In addition, the court

The court concluded that it must look to international law to determine whether the plaintiffs alleged a violation of the law of nations.[220] In addition, the court concluded that a private party may be held liable for war crimes and genocide under the ATCA, and that state action is unnecessary.[221]

Although Talisman is a Canadian company, arguably exempt from U.S. jurisdiction, the district court concluded that it had personal jurisdiction over Talisman.[222] Talisman sought to have the complaint dismissed to either Canada or Sudan on *forum non conveniens* grounds.[223] The court rejected those arguments and followed Second Circuit precedent, not requiring victims of human rights abuses to file suit in the country where such abuses occurred.[224] What is most significant about the court's decision is its recognition of a policy interest in providing a federal forum for the adjudication of claims which violate the law of nations.[225] In other words, the court accepted the notion of a universal jurisdiction to adjudicate *jus cogens* violations.[226] The extent of such universal jurisdiction, however, is limited, because (according to the

---

also referred to international treaties that established duties for corporations, such as the Convention Concerning the Application of the Principles of the Right To Organize and Bargain Collectively (dated July 1, 1949), which established the corporation's duty not to interfere in the ability of employees to form unions. *Id.*

220. *Id.* at 320.

221. *Id.* at 328. In its analysis of whether Talisman acted under color of law, the court applied the "joint test" under which a private actor is considered a state actor if it is a willful participant in a joint action with the State or a State agent. *Id.*

222. *Id.* The court found that Talisman was a Canadian company with stock traded at the New York Stock Exchange, and which had two U.S. subsidiaries, Fortuna and Rigel, that conducted business in New York and acted as Talisman agents. *Id.* at 331. The court reinforced its previous conclusion that "[o]nce a corporation is found to be doing business in the forum, jurisdiction lies with respect to any cause of action, related or unrelated to the New York contacts." *Id.* The court also reviewed the necessary elements to determine whether an ATCA plaintiff has standing: (1) that the plaintiff must allege a personal injury, (2) that such injury must be fairly traceable to the defendant's unlawful conduct, and (3) that the injury is likely to be redressed by the relief requested. *Id.*

223. *Id.* at 324-28. In addition to *forum non conveniens* arguments, Talisman raised international comity, act of state, and political question doctrine arguments which were denied by the court. *Id.*

224. *Id.* at 337. The court concluded that Sudan was not an adequate alternate forum. *Id.* In so doing, it recalled that Sudan was classified as a state sponsor of terrorism, and recognized the Second Circuit's precedent of denying *forum non conveniens* motions whenever the foreign forum conditions confirmed that the plaintiffs were "highly unlikely to obtain basic justice therein." *Id.* The court then confirmed "the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights." *Id.* at 338.

225. *Id.* at 340 ("Because of the nature of the alleged acts, the United States has a substantial interest in affording alleged victims of atrocities a method to vindicate their rights.").

226. *Id.*

court), "it is well established that environmental damage, without more, generally does not violate international law."[227]

The District Court for the Southern District of New York reviewed this matter on Talisman's motion for judgment on the pleadings, following the Supreme Court decision in *Sosa v. Alvarez Machain*.[228] Talisman argued that after *Sosa*, claims against corporations for violations of international law are unsupported under the alien tort statute.[229] Talisman also argued that secondary liability under international law is not sufficiently defined in international law to support an alien tort statute claim.[230] The court concluded that corporations may be held liable under international law for violations of *jus cogens* norms.[231] In this sense, *Talisman* confirms that alien tort statute claims may be brought against private actors.[232] Further, the court concluded that secondary liability is supported by customary international law.[233]

The Second Circuit cited *Bano v. Union Carbide Corp.* as support for confirming corporate liability.[234] The *Bano* court refused to dismiss claims for property damage which occurred due to exposure to contaminated water, allegedly contaminated by chemicals released from a Bhopal factory which was operated by a Union Carbide subsidiary.[235] In admitting these claims, the *Bano* court concluded that under certain circumstances a U.S. court may grant injunctive relief to correct environmental problems in foreign countries.[236] This decision once more

227. *Id.*

228. *Id.* at 323 (citing Sosa v. Alvarez Machain, 542 U.S. 92 (2004)).

229. *Id.*

230. *Id.* at 315. Secondary liability involves conspiracy and aiding and abetting. *Id.* at 321. The court understood aiding and abetting as "knowing practical assistance or encouragement which has substantial effect on the perpetration of the crime." *Id.* at 323.

231. *Id.* at 337.

232. *Id.*

233. *Id.* at 336-41. In reaching this conclusion the court noted that U.N. Security Council resolutions are binding on all U.N. members, that the international criminal tribunals of Yugoslavia and Rwanda confirm liability for violations of international humanitarian law obligations and, in so doing, confirm the status of customary international law provisions. *Id.* The court invoked the Yugoslavia and Rwanda International Tribunals, the Nuremberg Trials, and even the Rome Statute of the International Criminal Court, despite the U.S. lack of ratification thereof, to conclude that customary international law is formed, that there is no disagreement regarding its core principles and that such core principles may be determined by consulting international law sources. *Id.* at 340.

234. *Id.* at 335 (citing Bano v Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004)).

235. *Bano*, 361 F.3d at 716.

236. *Id.* (citing Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998)). Acknowledging that the court can refuse injunctive relief when it interferes with a foreign sovereign's interest, the *Bano* court concluded that site remediation would be viable if the Indian government intervened in the U.S. action. *See id.* at 716-17. The district court denied the injunctive relief, reasoning that

opens the door for U.S. courts to become courts of universal jurisdiction to correct environmental wrongs, as long as the actions do not raise sovereign immunity issues.

E. Wiwa v. Royal Dutch Petroleum Co.

This case involved a complaint by three Nigerian citizens against Royal Dutch Petroleum Company, Shell Transport and Trading Company, and Brian Anderson.[237] These two companies jointly own and operate the Royal Dutch/Shell group with a subsidiary in Nigeria for exploring and producing oil in that country.[238] The complaint alleged wrongful death, summary execution, crimes against humanity, false imprisonment, torture, and arbitrary detention performed by the Nigerian police and military, which Shell orchestrated, instigated, and planned.[239] The plaintiffs argued that Royal Dutch/Shell provided weapons, money and ammunition to the Nigerian military and bribed witnesses to provide false testimony against them.[240] The plaintiffs also argued that Shell Nigeria recruited the Nigerian police and military to suppress the Movement for the Survival of the Ogoni People.[241]

The district court granted the defendants' motion to dismiss on *forum non conveniens* grounds.[242] The Second Circuit remanded the decision because it found that after the passage of the Torture Victim Prevention Act, there is a "distinct U.S. policy interest in insuring that claims arising out of human rights abuses are adjudicated according to the standards of international law."[243] Thus, dismissal of alien tort statute

---

the court should not direct a foreign country in how to conduct its environmental policies, and that the court lacked enough control over a remediation process. *Id.* at 708.

237. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 U.S. Dist. LEXIS 3293 (Feb. 22, 2002). Ken Saro-Wiwa was a British citizen and leader of the Movement for the Survival of the Ogoni People formed to oppose the appropriation of the Ogoni land without compensation and the damages to their environment and economy. *Wiwa*, 226 F.3d at 92. Ken Saro-Wiwa was hanged after being convicted of murder by a special tribunal. *Id.* Plaintiffs argued that Shell bribed witnesses and conspired with Nigerian authorities to orchestrate the trial. *Id.* at 92-93. Mr. Anderson was Royal Dutch Shell's country chairman for Nigeria. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *4.

238. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *3-4.

239. *Id.*

240. *Id.* at *5.

241. *See id.*

242. *Wiwa*, 226 F.3d at 94. The district court found that the courts of England were an adequate alternative forum and, that the balance of *forum non conveniens* factors justified dismissal. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *98.

243. *Wiwa*, 226 F.3d at 104.

cases under the doctrine of *forum non conveniens* is disfavored, at least for the torts of torture and wrongful death.[244]

On remand, the district court denied the motion to dismiss and concluded that an alien tort statute claim requires a violation of an international norm that is "specific, universal and obligatory."[245] The district court then stated that "[i]t is well established that torture, summary execution. . . arbitrary detention [and cruel, inhuman and degrading treatment] 'constitute fully recognized violations of international law'."[246] The court denied the defendants' arguments for dismissal under the act of state doctrine as well as under *forum non conveniens*.[247] The court applied the "effects" test to sustain the RICO claims.[248] The court asserted subject matter jurisdiction because "much of the defendants' oil is shipped to the United States and [the] defendants had the 'intention to gain significant competitive advantage' in the United States through their racketeering activities."[249]

Thus, *Wiwa* confirms that oil and gas companies, operating abroad and selling to the U.S. market, are liable for claims under the alien tort statute.

IX. Some of the Defenses Against Alien Tort Statute Claims

There are multiple defenses in opposition to ATCA claims. They include, among others, *forum non conveniens*, the political question doctrine, sovereign immunity, and act of state doctrine issues.[250] Only some of these are addressed below.

---

244. *See id.* at 105. The Second Circuit added: "If in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss a case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations." *Id.* at 106.

245. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *15. "Actionable violations of international law 'are characterized by universal consensus in the international community as to their binding status and content.'" *Id.* (citing Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987)).

246. *Id.* at *17.

247. *Id.* at *91-100. In denying the act of state doctrine, the court found that a new government and democracy had replaced the Nigerian government responsible for the alleged torts and the new government was investigating the abuses. *Id.* The court did not interfere with Nigerian-American relations because the new government would most likely repudiate the acts in question. *Id.* at *93. The district court determined that the U.S. court's interests in adjudicating a claim by a foreign U.S. resident equaled the interest of an English court in adjudicating a dispute involving a British citizen. *Id.* at *97.

248. *Id.* at *72 ("To state a claim under [18 U.S.C.] § 1962(c) a plaintiff must demonstrate: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'").

249. *Id.* at *70.

250. *Marbury v. Madison* is often cited as the source of the "political question doctrine." In that landmark decision the Supreme Court stated:

A. *The Act of State Doctrine*

The Act of State doctrine has been known in England since 1674 and landmark decisions on this issue include *Underhill v. Hernandez*[251] and *Banco Nacional de Cuba v. Sabbatino*.[252] It is a judicially created doctrine which has been described as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[253]

In *Sabbatino*, the court summarized the "traditional formulation" of the doctrine as follows: it "precludes the courts of this country from

---

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . . The subjects are political . . . . [B]eing entrusted to the executive, the decision of the executive is conclusive . . . . Questions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court.

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The court narrowed the formulation of the political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962). Under the political question doctrine, certain issues are "nonjusticeable" because they impinge on the Executive and Legislative discretion in handling foreign affairs. *See Baker*, 369 U.S. at 212. *Alperin v. Vatican Bank* provides a recent analysis of the political question doctrine. 410 F.3d 532 (9th Cir. 2005).

251. 168 U.S. 250 (1897). *Underhill* involved the United States' recognition of the 1892 revolutionary government in Venezuela. *Id.* at 253. Underhill, a U.S. citizen, brought a claim for damages against Hernandez, a military Venezuelan revolutionary who refused to issue Underhill a passport and confined him to his own house. *Id.* at 251. The court declined to review military acts carried out by Hernandez under military operations in Venezuela in support of the revolutionary party in Venezuela. *Id.* at 253-54. The Supreme Court confirmed the Circuit court's decision that the acts of defendant Hernandez were the acts of the government of Venezuela, and could not be the subject of adjudication by the courts of another country. *Id.* at 254.

Underhill has been followed by *Oetjen v. Central Lether Co.*, 246 U.S. 297 (1918), and *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). In *Oetjen*, the Court based its decision on three basic principles of law: (1) That under the Constitution of the United States, the political branches of government, the Executive and the Legislative, conduct foreign relations, and that their political decisions are not subject to judicial scrutiny; (2) That determining who is the sovereign de jure or de facto of a territory is not a judicial question, but a political question to be decided by the Executive and Legislative branches of government; and (3) When a government that originates in a revolution is recognized as the de jure government, such recognition is retroactive in effect and validates all actions since the commencement of such government. *Oetjen*, 246 U.S. at 311. The Supreme Court confirmed the principle that the conduct of one independent government cannot be successfully questioned in the courts of another. *Id.* In doing so, the Court ratified the principles of comity and peaceful relations between nations. *See id.*

252. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (holding that the judicial branch will not examine the validity of a taking by a foreign sovereign within its own territory, notwithstanding that taking being against customary international law).

253. *Underhill*, 168 U.S. at 252.

inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[254]

The doctrine is rooted in the recognition of the sovereignty and independence of nation-states within their borders.[255] In reviewing the applicability of the doctrine, courts must balance the role of the judiciary with the executive and legislative branches. Thus, it is a doctrine of judicial restraint recognizing that the adjudication of a dispute may interfere with the conduct of foreign relations by the political branches.

The act of state doctrine applies only to valid acts of a sovereign nation, so the defense has been denied in human rights cases.[256]

B. The Bernstein *Exception*

One exception to judicial restraint imposed by the act of state doctrine is the "Bernstein exception," pursuant to which U.S. courts will exercise jurisdiction and pass judgment on an act of state, if so instructed by the Executive.[257] Thus, if the Executive branch so advises, the act of state doctrine does not apply.

In *Bernstein v. N.V. Nederlandsche-Amerikaansche, Etc.*, the Second Circuit considered a press release issued by the State Department, which addressed the issue of U.S. jurisdiction over suits regarding property involved in Nazi-forced transfers.[258] Jack B. Tate authored the State Department press release, which became known as the "Tate letter."[259] In the press release, the Department of State confirmed its opposition to the acts of confiscatory dispossession by Germany and relieved U.S. courts from any restraint upon the exercise of their jurisdiction, so that those courts could pass upon the validity of the acts of Nazi officials.[260]

---

254. *Sabbatino*, 376 U.S. at 401.

255. *See id.* at 415. The *Sabbatino* decision cited Chief Justice Marshall as follows: "one nation must recognize the act of the sovereign power of another, so long as it has jurisdiction under international law, even if it is improper according to the internal law of the latter state." *Id.*

256. *See* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 200 (2004).

257. *See* discussion *infra* notes 260-261 and accompanying text.

258. Bernstein v. N.V. Nederlandsche-Amerikaansche, Etc., 210 F.2d 375, 375-76 (2d Cir. 1954).

259. *Id.*

260. *Id.* at 376. The decision quoted the Tate letter as follows:

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

The Bernstein exception was confirmed by the Supreme Court in *First National City Bank v. Banco Nacional de Cuba* as follows: "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that [the] application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."[261]

C. The Hickenlooper Amendment

Congress further limited the Act of State doctrine in 1976 by enacting the so-called Hickenlooper Amendment:

> (2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.[262]

Id.

261. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972). Justice Brennan's dissent, joined by Justices Stewart, Marshall and Blackmun, opposed the Bernstein exception, arguing that a decision by the Executive which required the court to adjudicate a dispute otherwise dismissed under the act of state doctrine, would require the courts to reach a decision despite the possible absence of a consensus regarding the applicable international law rules and create the risk of upsetting foreign relations. *See id.* at 778 (Brennan, J., dissenting). According to the Brennan's dissent, the Executive's request should not be blindly followed by the courts, because of the risk that the courts could become politicized and supplant the job of the Executive branch. *Id.* at 790.

262. 22 U.S.C. § 2370(e)(2) (2000).

D. *Foreign Sovereign Immunity*

While federal courts ordinarily have jurisdiction over civil actions against foreign states, these states are immune from this jurisdiction unless their activity falls under any one of the exceptions provided by the statute.[263]

Whenever a State or a State agency or instrumentality is involved in alien tort statute related litigation, foreign sovereign immunity may be raised.[264] Under 28 U.S.C. § 1330, foreign sovereigns are immune from the jurisdiction of U.S. courts.[265] Thus, if a state or an agency or instrumentality thereof is involved, the exclusive basis to determine jurisdiction is the Foreign Sovereign Immunities Act.

As the court stated in *Argentine Republic v. Amerada Hess Shipping Corp.*:

> We think that the text and structure of the FSIA demonstrate Congress' intention *that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts*. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity.[266]

The statute establishes the basic premise that foreign states are immune from the jurisdiction of U.S. courts. Following the distinction between acts *iure imperium* and acts *iure gestonis*, Congress concluded that immunity is not absolute and states are not immune when they engage in commercial activities.[267]

---

263. 28 U.S.C. § 1330 (2000).

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id.

264. See id.

265. Id.

266. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (emphasis added).

267. 28 U.S.C. § 1602.

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to

Most circuit courts have extended immunity to individuals acting under the official capacity of the state.[268] Circuit courts agree that no immunity is granted for acts that violate *jus cogens*.[269]

X. ARE U.S. COURTS REQUIRED TO INTERPRET AND APPLY INTERNATIONAL LAW OR THE LAW OF NATIONS?

Since *The Paquete Habana*, U.S. courts have viewed international law as part of the law they must apply.[270] *Hilton v. Guyot* confirmed that international law is part of U.S. law.[271] Thus, understanding the notion of the law of nations and its contents is critical when litigating ATCA cases. Below we provide a basic definition of international law and its scope.

The law of nations has been traditionally defined as "the body of rules and principles of action which are binding upon civilized states and in their relations with one another."[272]

International law is defined in section 101 of the *Restatement (Third) of Foreign Relations Law* as follows: "International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."[273] This means that under the present notion international law is not limited to the relationships between nation-states and/or with international organizations, but also includes relationships with private parties.

The Fifth Circuit defined the law of nations as follows: "The standards by which nations regulate their dealings with one another *inter*

> immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Id.

268. *See* Velasco v. Indonesia, 370 F.3d 392, 398 (4th Cir. 2004); Park v. Shin, 313 F.3d 1138, 1144 (9th Cir. 2002); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporación Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).

269. *See* Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992).

270. *See* The Paquete Habana, 175 U.S. 677 (1900).

271. Hilton v. Guyot, 159 U.S. 113, 141 (1895).

272. *See* Tel-Oren v. Lybian Arab Republic, 726 F.2d 774, 792 (D.C. Cir. 1984) (citing J. BRIERLY, THE LAW OF NATIONS 287 (6th ed. 1963)).

273. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 101 (1987). The difference between this definition and the previous one must be noted. Previously the *Restatement* defined International Law as "those rules of law, applicable to a state or international organization that cannot be modified unilaterally by it." *Id.* § 1. General practice of states is established by diplomatic acts, diplomatic instructions, official statements of policy, government acts and omissions, as long as they are "general and consistent." *Id.*

se constitute the 'law of nations.' These standards include the rules of conduct which govern the affairs of this nation, acting in its national capacity, in relationships with . . . other nation[s]."[274] Section 102 of the *Restatement (Third) of Foreign Relations Law* defines a "rule of international law" as "one that has been accepted . . . by the international community of states."[275]

As early as 1963, the United States District Court for the Eastern District of Pennsylvania in *Lopes v. Reederei Richard Schroder* defined a violation of the law of nations *to include not only states but also individuals* as follows: "a violation by one or more individuals of those standards, rules or custom (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."[276]

The *Restatement (Third) of Foreign Relations Law* follows the provision under article 38 of the statutes of the International Court of Justice and names the sources of international law as follows:[277]

(1) the general practice of states or customary international law,
(2) international agreements,
(3) the general principles of law common to the major legal systems of the world.[278]

---

274. Cohen v. Hartman, 634 F.2d 318, 319 (5th Cir. 1981); Carmichael v. United Techs. Corp., 835 F.2d 109, 113 (5th Cir. 1988).

275. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102.

276. Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963). The court cited Kent's definition of Law of Nations as

> that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other, . . . founded on the principle that different nations ought to do each other as much good in peace and as little harm in war as possible without injury to their true interest.

Id. (citing 1 KENT, COMMENTARIES 1 (1st ed. 1826)). And in defining its contents included:

> [T]he rights and duties of countries, while at peace and while at war, the rights of belligerents, of neutrals, neutral trade, truces, passports, and, in the last lecture, entitled 'Of Offenses Against the Law of Nations,' listed four offenses under this heading: violation of passports, violation of ambassadors, piracy, and slave trade.

Id. (citing 1 KENT supra note 276). *Lopes* involved a civil claim by a foreign longshoreman plaintiff against an alien vessel owner under the alien tort statute. *Id.* at 293. The district court dismissed the claim and found that damages awarded under the doctrine of the unseaworthiness of a vessel do not arise from the law of nations but from U.S. law. *Id.* at 296-97. The court then dismissed the action after concluding that negligence and unseaworthiness are not torts in violation of the law of nations. *Id.* at 297.

277. It must be noted that judicial decisions and teachings of the most qualified publicists, a source of international law according to the Statute of the International Court of Justice, is not included as a source of international law under the *Restatement*. Instead, the *Restatement* refers to judgments, both by international judicial and arbitral tribunals and national courts and opinions of scholars as evidence of whether a rule has become international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103.

The Supreme Court addressed the issue of the notion of the "law of nations" in *The Paquete Habana* as follows:

> Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[279]

The *Restatement (Third) of Foreign Relations Law* indicates that a state has obligations under international law to respect human rights beyond those imposed by the State's consent.[280] Pursuant to section 701:

> A state is obligated to respect the human rights of persons subject to its jurisdiction (a) that it has undertaken to respect by international agreement;(b) that states generally are bound to respect as a matter of customary international law. . . and (c) that it is required to respect under general principles of law common to the major legal systems of the world.[281]

Section 702 provides a list of conducts considered violative of international law if encouraged or condoned by a state.[282] The list includes genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other inhumane, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent patter of gross violations of internationally recognized human rights.[283] Article 5 of the statute of the International Criminal Court provides that the Court's jurisdiction is limited to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[284]

---

278. *Id.* The *Restatement* refers to general principles common to the major legal systems as a supplementary rule of international law only to be applied "where appropriate." *Id.* Section 102 of the *Restatement* refers to customary international law as resulting from a general and consistent practice of states followed by the states from a sense of legal obligation. *Id.* § 102.

279. The Paquete Habana, 175 U.S. 677, 700 (1900).

280. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701.

281. *Id.*

282. *Id.* § 702.

283. *Id.*

284. *Id.* art. 5. Pursuant to article 7 of the Rome Statute, crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, ethnic, cultural, religious, gender or other grounds;

The *Restatement (Third) of Foreign Relations Law* also refers to the available remedies for a human rights violation.[285] Those remedies include remedies available to the state[286] and to an individual victim.[287]

The increasing number of disputes between corporations and nation states, evidenced by many arbitration proceedings, confirm that

---

enforced disappearance of persons, crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health. Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* http://www.un.org/law/icc/statute/romefra.htm.

285. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703.

286. *Id.* A state could protest against the violation of international law obligations through diplomatic channels by demanding that the offending state terminate the violation and make reparations. *Id.* § 902. Under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, make reparation, including in appropriate circumstances restitution or compensation for loss or injury. *Id.* § 901. A second alternative is to appeal to a means of dispute resolution such as conciliation, mediation, arbitration (any of which require the agreement of both parties to accept submission of their dispute to such means of dispute resolution) or adjudication (a dispute could be submitted to the International Court of Justice if the parties to the dispute have specifically consented to the jurisdiction of the court). *Id.* §§ 903, 904. Through these means a state could seek redress for violations of obligations provided under international agreements or under customary international law. *Id.* An additional alternative is self help, which has to be proportionate to the violation and may include cooling of communications or limitations of trade. *Id.* § 905 cmt. a.

287. *Id.* § 906. Pursuant to the *Restatement*, individual victim's remedies should be provided by the specific international agreement. *See id.* The *Restatement* refers to three options available to an individual: file an action before an international tribunal, bring a claim before the state at such state's own courts, or bring a claim in his own home state or a third state. *Id.*

> A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims; (b) in a court or other tribunal of that state pursuant to its law; or (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.

Id. Individuals may not submit a dispute for adjudication by the International Court of Justice, whose jurisdiction is limited to controversies between states. *Id.* Under the International Criminal Court Statute, a case may be submitted to the Court either by a State party, the Security Council or the Prosecutor, but the case is only admissible if an investigation is not being conducted by the State with jurisdiction over it. *See* Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* http://www.un.org/law/icc/statute/romefra.htm. Individuals are granted the right to file complaints against States before international investigative commissions under article 44 the American Convention on Human Rights and under article 25 the European Convention for the Protection of Human Rights and Freedoms. American Convention on Human Rights, art. 44 (Nov. 22, 1969), *available at* http://www.oas.org/juridico/english/Treaties/b-32.htm; European Convention for the Protection of Human Rights and Freedoms, art. 25 (Nov. 4, 1950), *available at* http://www.hri.org/docs/ECHR50.html.

corporations are a major player in contemporary international relations at the same level of many, if not all, nation states.[288]

Courts have concluded that not all international law principles automatically become part of federal common law, but "only those that achieve the status of customary international law . . . result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation [or are included in international treaties]."[289]

XI. INTERNATIONAL ENVIRONMENTAL LAW

Multinational corporations should be aware of the growing body of international environmental principles and law to determine whether they are exposing themselves to potential ATCA litigation in the United States when they are investing abroad. Below we outline the basic international environmental related instruments to analyze whether any provisions qualify as customary international law and assess whether a claim for an international environmental tort could be stated validly.

A. The Stockholm Declaration

Between June 5 and 16, 1972, the United Nations Conference on the Human Environment met at Stockholm.[290] The Conference concluded with the so called "Stockholm Declaration," which reached several conclusions.[291]

The Declaration stated that the protection of the environment is a major issue that affects the well being of people throughout the world and economic development.[292] The Declaration described the defense and protection of the environment as an "imperative goal for mankind" along with peace and economic and social development.[293] Environmental problems are viewed as a global problem that affects the "common international realm."[294]

288. *See, e.g.*, Topco v. Libya, 17 I.L.M. 1 (1977); Libyan-Am. Oil Co. (Liamco) v. Gov't of the Libyan Arab Republic, 20 I.L.M. 1 (1981); Saudi Arabia v. Aramco, 27 I.L.R. 117 (1958); British Petroleum, Inc. v. Libya, 53 I.L.R. 297 (1979); Kuwait v. Aminoil, 21 I.L.M. 976 (1982); Mobil Oil, Inc. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3 (1987); Agip v. Congo, 21 I.L.M. 726 (1982).

289. John Doe I v. Unocal Corp., 345 F.3d 932, 969 (9th Cir. 2002).

290. The United Nations General Assembly called the Conference pursuant to Resolution 2850 (XXVI) dated December 20, 1971, during its 2026th Session.

291. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/conf.48/14/Rev.1 (June 16, 1972), *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503 (last visited Feb. 28, 2006).

292. *Id.* ¶ 2.

293. *Id.* ¶ 6.

294. *Id.* ¶ 7.

Environmental protection may be viewed as a Governmental duty. Protection of the human environment is conceived as a "duty of all governments," requiring the "actions of all nations and international organizations."[295]

Underdevelopment is a cause of environmental problems. The Declaration proposed to close the gap between developed and underdeveloped countries and to use international cooperation as an instrument to raise resources for developing countries.[296]

Corporate accountability is taken into account. The Declaration acknowledges that individuals, "enterprises, institutions, communities, and governments" are responsible for the environment.[297]

The Declaration concluded with twenty-six principles on the importance of environmental protection. Principle 21[298] confirmed the State's sovereign right to exploit its national resources, while Principle 22 encouraged State cooperation regarding liability for environmental damage.[299]

Several important developments followed including the creation of the United Nations Environment Program.[300] In December of 1972 the U.N. General Assembly designated June 5 as "World Environment Day" and established the governing council of the United Nations Environment Program.[301] In so doing, the U.N. General Assembly confirmed that the

---

295. *Id.* ¶¶ 2, 7.

296. *Id.* ¶¶ 4, 7.

297. *Id.* ¶ 7.

298. Principle 21:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id. princ. 21.

299. Principle 22: "States shall cooperate to develop further the international law regarding the ability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." *Id.* princ. 22.

300. *See* G.A. Res. 2997 (XXVII) (Dec. 15, 1972) (referring to the "urgent need for a permanent institutional arrangement within the U.N. system for the protection and improvement of the environment").

301. *Id.* § I(1). The General Assembly called Governments and U.N. organizations to undertake activities reaffirming their concern for the environment. *Id.* There is no reference at all to corporations. *See id.* This resolution confirmed the international nature of environmental problems and the three pillars under which cooperation in this field should develop: (1) Each state's sovereign rights, (2) The U.N. Charter, and (3) Principles of international law. *Id.* § I(2). The UNEP governing counsel is composed of fifty-eight members elected by the General Assembly. *Id.* § II. The UNEP also has an Environment Secretariat headed by the Executive

primary responsibility for environmental protection rested with Governments, and that environmental protection was to be dealt with at national and regional levels.[302] The United Nations Environment Program, the principal U.N. body that deals with environmental protection, pursuant to its own mandate, may not involve itself in "conflict identification, prevention or resolution."[303]

B. U.N. Framework Convention on Climate Change (UNFCCC)

The Convention acknowledges concerns about climate change resulting from human activities.[304] Its objective is to stabilize greenhouse gas concentrations in the atmosphere, at nondangerous levels, in order to facilitate a sustainable economic development.[305] The Convention refers to sustainable development as a right.[306] It may be seen as a further development of two other international agreements: the Vienna Convention for the Protection of the Ozone Layer[307] and the 1987 Montreal Protocol.[308]

The parties to the UNFCCC agreed to the following commitments:

(1) To develop national inventories of anthropogenic emissions,
(2) To implement national and regional programs to mitigate climate change,
(3) To promote greenhouse gas emission control and reduction,
(4) To use impact assessments to minimize adverse effects of projects,
(5) To promote scientific research on climate change, and

Director, also elected by the General Assembly and an Environment Fund to finance environmental activities. *Id.*

302. *Id.*

303. G.A. Res. 53/242, ¶ 10 (Aug. 10, 1999).

304. United Nations Framework Convention on Climate Change (UNFCCC), New York, N.Y., May 9, 1992, ¶ 1, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf (last visited Feb. 12, 2006). The Convention was adopted at the United Nations headquarters in New York on May 9, 1992, and opened for signature at the Rio Conference on Environment and Development. *Id.* The Convention entered into force on March 21, 1994. *Id.* It has been ratified by 189 countries, including the United States (which was a signatory in June 1992, and ratified the Convention on March 21, 1994), Japan, Russia, and the European countries. *Id.* It was also approved by the European Economic Community as an international organization. *Id.*

305. *Id.* art. 2.

306. *Id.* art. 3.

307. The Convention for the Protection of the Ozone Layer was signed in Vienna on March 22, 1985. *See* United Nations Environment Programme, http://ozone.unep.org/Treaties_and_Ratification/index.asp (last visited Feb. 28, 2006). It called for State parties thereto to adopt the necessary legislation to control human activities under their jurisdiction that have adverse effects over the ozone layer. *Id.*

308. United Nations Environment Programme, 1987 MONTREAL PROTOCOL, *available at* http://ozone.unep.org/Treaties_and_Ratification/2B_montreal_protocol.asp (last visited Feb. 28, 2006).

(6) To provide information about its emissions.[309]

The Convention establishes two groups of countries: those under Annex I, which include the developed and industrialized countries; and those under Annex X, which include developing countries.[310] Developed countries agreed to limit the anthropogenic emissions of greenhouse gases with the objective of returning to 1990 emission levels.[311]

C. The Rio Declaration

The United Nations Conference on Environment and Development, also known as the Earth Summit, met at Rio de Janeiro from June 3 to 14, 1992, following the Stockholm Declaration and the 1987 report by the World Commission on Environment and Development.[312] The Conference concluded with the so called "Rio Declaration" affirming twenty-seven Principles on sustainable development and environmental protection.[313]

The Rio Declaration confirmed the sovereign right to exploit natural resources.[314] Like the Stockholm Declaration, the Rio Declaration is considered "soft-law," or nonbinding provisions. The enforcement of the sustainable development principles was left to national legislation.[315] The Declaration calls for States to "enact effective legislation," and "national law" to provide compensation for environmental damages."[316]

Three basic premises were also laid down in Rio.[317] First, the convention recognized the necessity of environmental impact assessments and Principle 17 recommends that environmental impact studies be performed whenever an activity may cause a "significant

---

309. UNFCCC arts. 4.1(a)-(g), 12.1(a).

310. *Id.* at 32-33.

311. *Id.* art. 4.1(a).

312. REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, U.N. G.A. A/CONF.151/26/Rev.1 (Vol. I) (May 1993). This was known as the Brundlandt Commission. *Id.* The Brundlandt Commission established in its report "Our Common Future" the notion of "sustainable development" as a central principle of the United Nations, governments and private institutions, as follows: "meeting the needs of the present without compromising the ability of future generations to meet their own needs." *See* G.A. Res. 42/187 (Dec. 11, 1987).

313. REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, U.N. G.A. A/CONF.151/26/Rev.1 (Vol. I) (May 1993).

314. *Id.* princ. 2. Principle 2 copied verbatim the contents of Principle 2 under the Stockholm Declaration. *See id.*

315. *Id.* princ. 11.

316. *Id.* princs. 11, 13. Principle 13 also directs States to "cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." *Id.* princ. 13.

317. *Id.*

adverse impact on the environment."[318] Also important is the "polluter pays" principle which dictates that the polluter should bear the cost of pollution.[319] Finally, Rio recognized that "peace, development and environmental protection are interdependent and indivisible."[320]

D. Agenda 21

One of the conference's accomplishments was the proclamation of Agenda 21, which was adopted by more than 178 governments.[321] Agenda 21 identified several basic world problems: "perpetuation of disparities between and within nations, worsening poverty, hunger, ill health, illiteracy and continuing deterioration of the ecosystems" and called for a "global partnership for sustainable development."[322] The document portrays itself as the outcome of "global consensus and political commitment at the highest level on development and environment cooperation."[323] Although the Agenda identifies nine major groups as having key roles in sustainable development, the Agenda is still primarily addressed to governments.[324] Involvement of business and industries is provided on an aspirational basis, and their contribution to a healthier environment is proposed as "voluntary" and based on "promoting and implementing self-regulations and greater responsibilities in ensuring their activities have minimal impacts on human health and the environment."[325] "Business and industry, including transnational corporations, and their representative organizations should be full participants in the implementation and evaluation of activities related to Agenda 21."[326]

The corporate role is contemplated in two main programs: cleaner production and responsible entrepreneurship.[327] Both programs are based

---

318. *Id.* princ. 17.
319. *Id.* princ. 16.
320. *Id.* princ. 25.
321. *See* Agenda 21, *available at* http://www.un.org/esa/sustdev/documents/agenda21 (last visited Feb. 28, 2006).
322. *Id.* pmbl. ¶ 1.1.
323. *Id.* ¶ 1.3.
324. *Id.* § III, arts. 23-32, pmbl., ¶ 1.3. The nine major groups identified by Agenda 21 are: women, children and youth, indigenous peoples, nongovernmental organizations (NGOs), local authorities, workers and trade unions, business and industry, scientific and technological community, and farmers. *Id.* § III, arts. 23-32.
325. *Id.* art. 30.3.
326. *Id.* art. 30.1.
327. Agenda 21 falls short of establishing any binding obligations and transnational corporations are encouraged to increase resource use efficiency, reduce waste discharges, internalize environmental costs into accounting and pricing mechanisms, report on their environmental records, implement codes of conduct and best environmental practices and include

on cooperation and good citizenship instead of obligation. Ultimately, enforcement is expected from individual countries through local legislation to be drafted "in consultation with business and industry."[328] Agenda 21 realizes that international law is not up to speed with the proposed goals and objectives and promotes "the gradual development of universally and multilaterally negotiated agreements or instruments, international standards for the protection of the environment that take into account the different situations and capabilities of countries."[329] The lack of binding provisions of international law was acknowledged several years later at the Nairobi conference in 1997.[330]

Five years after the U.N. Conference on Environment and Development, the U.N. General Assembly held a special session to review the progress accomplished, confirm the commitment to sustainable development, and accelerate the implementation of Agenda 21.[331] The General Assembly noted that "[h]undreds of small and large businesses have made 'green business' a new operating mode,"[332] although the General Assembly concluded that five years after Rio "the state of the global environment has continued to deteriorate."[333] Addressing the issue of legal implementation of the Rio Declaration, the General Assembly acknowledged that "much remains to be done to embody the Rio principles more firmly in law and practice."[334] Again the G.A. confirmed that achieving the economic, social, and environmental objectives under Agenda 21 is primarily the responsibility of national

---

cleaner production policies in their operations and investments. Agenda 21, art. 30.5-30.12, *available at* http://www.un.org/esa/sustdev/documents/agenda21.

Companies are invited to encourage the concept of stewardship in the management and use of natural resources, adopt worldwide policies on sustainable development, increase research in environmentally sound technologies, increase self regulation. *Id.* art. 30.17-30-29.

328. *Id.* art. 30.8.

329. *Id.* art. 39.3(d).

330. Nairobi Declaration of the United Nations Environment Programme, Governing Council, UN GAOR, 52d Sess., U.N. Doc. A/52/25 (1997). The Nairobi Declaration emphasized the need to develop international environmental law with agreed international norms and policies. *Id.*

331. *See* G.A. Res S-19/2 (Sept. 19, 1997).

332. *Id.* ¶ 12.

333. *Id.* ¶ 9.

334. *Id.* ¶ 14. The Resolution mentioned the entry into force of the following conventions as an achievement since Rio: the U.N. Framework Convention on Climate Change, the Convention on Biological diversity, the U.N. Convention to combat desertification, and the U.N. Law of the Sea Convention. *Id.*

governments.[335] Once more, no international binding obligation was provided for business compliance with environmental regulations.[336]

E. The Kyoto Protocol

The Kyoto Protocol was signed on December 11, 1997 but only entered into effect on February 16, 2005.[337] On July 28, 2005, Eritrea deposited its instrument of accession, raising the number of ratifications to 153.[338] The parties to the Protocol agree to reduce their greenhouse gas emissions through individually binding targets.[339] Five years after the Rio Conference, the President of the United States stated before the U.N. General Assembly that greenhouse gases were at their highest levels in 200,000 years.[340] The United States was a signatory to the Protocol, and

---

335. *Id.* ¶ 22.

336. *Id.* ¶ 28(1) ("*Encouraging* business and industry to develop and apply environmentally sound technology that should aim not only at increasing competitiveness but also at reducing negative environmental impacts." (emphasis added)).

337. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, Japan, Dec. 11, 1997, art 25, *available at* http://www.unfccc.int. Pursuant to article 25, the Protocol entered into effect when at least parties representing 55% of the total carbon dioxide emissions for 1990 have ratified it. *Id.* Some believed that the Protocol may never enter into effect. *See* John Browne, *Beyond Kyoto*, 38 FOREIGN AFF. 4, 20 n.4 (July/Aug. 2004). "Despite nearly a decade of effort, it may not even enter into force as a binding instrument. Canada, Japan and the European Union—the most enthusiastic advocates of the Kyoto process are not on track to meet their commitments." *Id.* The protocol entered into effect ninety days after Russia's ratification on November 5, 2004. UNFCCC Homepage, *available at* http://www.unfccc.int/2860.php. As of July 27, 2005, 152 states and regional economic integration organizations, representing a total of 61.6% of carbon dioxide emissions had ratified the convention. *Id.*

338. *See* UNFCCC, Press, *available at*: http://www.unfccc.int/press/items/2794.php (last visited Feb. 28, 2006).

339. Article 3 of the Protocol provides that the parties agree to reduce their greenhouse gases emissions by at least 5% below their 1990 levels during the "commitment period," i.e., between 2008 and 2012. Kyoto Protocol, art. 3.

> There are two main reasons why it has been hard for societies to tackle climate change. First, carbon dioxide has a very long life span: it exists for hundreds of years in the atmosphere, making this a multigenerational issue. Second, reducing carbon dioxide in the atmosphere can be done only on a truly global basis, since emissions mix throughout the atmosphere much quicker than individual processes can limit their impact.

Browne, *supra* note 337, at 21.

Annex A to the Protocol includes the following as greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride. Kyoto Protocol, annex A.

340. President Bill Clinton at the U.N. General Assembly Special Session (June 26, 1997), U.N. Press Release GA 9271 ENV/DEV/437, June 26, 1997.

> The science is clear and compelling. We humans are changing the global climate. Concentrations of greenhouse gases in the atmosphere are at their highest level in more than 200,000 years and climbing sharply. If the trend is not changed, scientists expect the seas to rise two feet or more in the next century. In America, that means 9,000

President Clinton was committed to the goals of sustainable development:

> "We must unleash more of the creative power of our people to meet the challenge of climate change." Already, we are working with our auto industry to produce cars by early in the next century that are three times as fuel-efficient as today's models. The sun's energy can reduce our reliance on fossil fuels. We will work with businesses and communities to install solar panels on 1 million roofs around our nation by 2010. We must strengthen our stewardship of the environment so that when this generation passes, it will be a rich and abundant earth that abides, and the coming generation will inherit a world as full and as good as the one we have known.[341]

By March 2001, after the election of President George W. Bush, the U.S. presidential support changed dramatically.[342] On July 28, 2005, United States Deputy Secretary of State Robert Zoellick announced the "Asia-Pacific Partnership on Clean Development," which "represent[ed] over half of the world's economy, population, energy use [and] green house emissions."[343]

> square miles of Florida, Louisiana and other coastal areas will be flooded. In Asia, 17 per cent of Bangladesh, where 6 million people live, will be lost, while island chains such as the Maldives will disappear from the map. Climate changes will also disrupt agriculture, cause droughts and floods, and the spread of infectious diseases. No nation can escape this danger or evade its responsibility to confront it. We must all do our part—industrial nations that emit the largest quantities of greenhouse gases, and developing nations whose emissions are growing rapidly. Here in the United States, we must do better. With 4 per cent of the world's population, we produce 20 per cent of its greenhouse gases. We must create new technologies and develop new strategies. In order to do our part, we must first convince the American people and the Congress that the climate change problem is real and imminent.

Id.

341. Id.

342. See Letter from President Bush to Senators Hagel, Helms, Craig & Roberts, dated March 13, 2001, available at http://www.whitehouse.gov/news/releases/2001/03/22040314.html.

> As you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate's vote, 95-0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.

Id.

343. U.S. DEP'T OF STATE, ANNOUNCING THE ASIA-PACIFIC PARTNERSHIP ON CLEAN DEVELOPMENT, http://www.state.gov/s/d/rem/50326.htm (last visited Feb. 28, 2006). The members of the partnership are Australia, China, India, Japan and the Republic of Korea. *Id.* The agreement focuses on energy security, on flexible mechanism to address climate change, and on the participation of developing countries that under Kyoto have no emission control obligations. *Id.* Although Zoellick conceives the partnership as a complement and not an alternative to Kyoto, many view it as another U.S. attempt to undermine it. *See* Fiona Harvey & Caroline Daniel, *U.S. Unveils Asia Allies in Accord on Climate*, FIN. TIMES, July 28, 2005, at 1.

F. *World Summit on Sustainable Development*

Between August 26 and September 4, 2002, Johannesburg hosted the World Summit on Sustainable development.[344] In addition to governments, the key players identified in Agenda 21 were present, including business and industry, indigenous peoples, NGOs, farmers, children, women, workers and trade unions.[345] The summit concluded with a declaration, whereby delegates of the nations in attendance committed to sustainable development once more.[346]

Principle 27 specifically refers to a corporate duty as follows: "We agree that in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies."[347]

G. *Growing Global Concern for Corporate Accountability*

The global consensus on sustainable development and some of the problems caused by globalization contribute to the pressure for international corporate accountability mechanisms. Until now, the approach has been primarily voluntary and through the adoption of the so-called codes of corporate conduct.

On January 31, 1999, United Nations Secretary General Kofi Annan invited corporations to join the "Global Compact," an international initiative to bring governments, corporations, civil society, labor and U.N. agencies together in support of nine basic principles.[348] The nine principles emerge from three basic international declarations: The Universal Declaration of Human Rights, the International Labor Organization Declaration on Fundamental Principles and Rights at work, and the Rio Declaration on Environment and Development.[349]

The nine principles are classified under Human Rights (two), Labor (four) and Environmental Standards (three), as follows:

1. Human Rights
   Principle 1. Businesses should support and respect the protection of internationally proclaimed human rights; and

---

344. World Summit on Sustainable Development Homepage, *available at* http://www.johannesburgsummit.org (last visited Feb. 28, 2006).

345. *Id.*

346. REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, Johannesburg, South Africa, Aug. 26–Sept. 4, 2002, U.N. Doc. A/CONF.199/20.

347. *Id.* princ. 27.

348. Secretary General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos (Feb. 1, 1999), U.N. Press Release SG/SM/6881, available at http://www.un.org/News/Press/docs/1999/1990201.sgsm6881.html.

349. *Id.*

Principle 2. make sure that they are not complicit in human rights abuses.

2. Labor

Principle 3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining

Principle 4. the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

3. Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.[350]

These core principles have been accepted by many companies.[351] Many principles are "soft law," which is not binding upon corporate actors. However, the trend is to establish self-regulation through codes of conduct, guidelines and voluntary standards.[352]

The Universal Declaration of Human Rights Preamble provides:

> Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, *shall strive by teaching and education to promote respect for these rights and freedoms* and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[353]

---

350. *Id.*

351. *See* United Nations Global Compact Homepage, *available at* http://www.unglobalcompact.org (last visited Feb. 28, 2006). Companies interested in the Responsible Corporate Citizenship initiative may submit a letter to the U.N. Secretary General. *Id.* The companies that have done so are listed as participants to the Global Compact. *Id.* As of June 15, 2004, 1658 companies were listed as participants. *Id.*

352. *See* INT'L COUNCIL ON HUMAN RIGHTS POL'Y, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), *available at* http://www.ichrp.org/paper_files/107_p_01.pdf.

353. Universal Declaration of Human Rights, Pmbl., G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg, U.N. Doc A/810 (Dec. 12, 1948), *available at* www.un.org/Overview/rights.html (emphasis added).

International law scholars have interpreted the words "every individual and every organ" to include corporations and companies.[354] This preamble has been referred to as the "principal statement of a company's internationally-recogni[z]ed responsibility to promote and protect human rights."[355]

Article 30 of the Universal Declaration of Human Rights provides: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[356]

Corporations doing business on a global scale frequently try to internationalize or denationalize their agreements. By doing so, they seek to be bound by international law or general principles of law, as opposed to the law of the country where they are doing business. Stabilization, arbitration and applicable law provisions are some of the tools used by multinational corporations to internationalize their agreements.[357] It is inconsistent for corporations, requesting the internationalization of their agreements, to deny the applicability of international law when it governs their conduct.

The body of law that has developed from the international arbitral awards involving multinational corporations and nation states has been compared to the law merchant or "lex mercatoria"[358] under the name of "lex petrolea."[359] The notion of a lex petrolea was advanced by Kuwait in the *Kuwait v. Aminoil* arbitral award as follows:

---

354. See INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *supra* note 352, at 58.

355. *Id.* at 59-60. Some will argue that in addition to the Declaration not being a binding treaty, the preamble is not legally binding either.

356. Universal Declaration, *supra* note 353, art. 30.

357. An example of a stabilization clause is cited in the arbitral award between the Government of the State of Kuwait v. The American Independent Oil Company (Aminoil) dated May 24, 1982, as follows:

> Article 17 of the 1948 concession agreement provided as follows: "The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement."

See INT'L COUNCIL FOR COMMERCIAL ARBITRATION, YEARBOOK COMMERCIAL ARBITRATION Vol. IX 81 (Pieter Sanders ed., 1984).

358. Lex mercatoria or ancient law merchant. *See* GERARD MALYNES, CONSUETUDO VEL LEX MERCATORIA (1981).

359. *See generally International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 YB COM. ARB. 1131 (1998).

> On behalf of the Government, it was maintained that the only compensation Aminoil was entitled to claim must be determined by precedents resulting from a series of transnational negotiations and agreements about compensation. These precedents, so it was said, had instituted a particular rule, of an international and customary character, specific to the oil industry. Attention was called to the fact that a number of nationalizations of oil concessions had occurred in the Middle East, and elsewhere in the world, in the years 1971-77. However, the solutions adopted in the case of these precedents were not identical but had certain common features: the compensation granted was very incomplete and had reference only to the "net book value" of the redeemable assets. These precedents, it was claimed, had generated a customary rule valid for the oil industry—a *lex petrolea* that was in some sort a particular branch of a general universal lex mercatoria. That was why Kuwait, in the course of the 1977 discussions, had offered no more than the net book value of the redeemable assets as compensation for the expropriation.[360]

H. Sosa v. Alvarez-Machain

The Supreme Court once more reviewed the alien tort statute in a case involving the wrongful arrest of a Mexican physician, Humberto Alvarez-Machain, who was captured, at the request of DEA agents, in Mexico and by Mexican nationals, including José Francisco Sosa.[361] In a previous decision, the Supreme Court held that Alvarez's forcible seizure in Mexico did not affect the jurisdiction of a federal court, and Alvarez-Machain was ultimately acquitted.[362] Then, Alvaez-Machain filed a civil action against Sosa under the ATCA, and against the United States and four DEA agents under the Federal Tort Claim Act.[363] The district court dismissed the action against the Government and awarded damages to Alvarez on his ATCA claim.[364] The Ninth Circuit affirmed the judgment holding that the ATCA confers federal jurisdiction and provides a cause of action for a violation of the law of nations.[365] The Ninth Circuit enforced the international prohibition against arbitrary arrest and detention, and considered that the tort committed against Alvarez was

---

360. *See* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 357, at 87 (emphasis added). The arbitration panel denied the existence of a *lex petrolea* arguing that the precedents do not constitute an expression of the *opinio juris* and that the companies negotiated at this time during great pressure such dealings being apposite for generating general rules of law. *Id.* at 87-88.

361. Sosa v. Alvarez Machain, 542 U.S. 692, 697 (2004).

362. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

363. *Sosa*, 542 U.S. at 692 (citing 28 U.S.C. § 1346(b)(1) (2000)).

364. *Id.* at 699.

365. *Id.*

one in violation of the law of nations.[366] The Supreme Court reversed the Ninth Circuit, limiting the scope of the alien tort statute by holding that it does not confer a cause of action, but only provides jurisdiction.[367]

Under this decision, the future of claims under the alien tort statute is unclear. The Court tried to infer from history Congress's intent in enacting the ATCA, and concluded that the intent was to grant jurisdiction for a "relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors . . . ; violations of safe conduct . . . ; and individual actions arising out of prize captures and piracy . . . ."[368] Further, the Court's decision likely substantially limits actions against nonstate actors.[369]

The Court's decision concluded that

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[370]

In determining what causes of action are to be brought before a federal court, the following passage from the Court's decision is instructive: "we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[371] The Court called for judicial caution when considering individual claims under the ATCA and concluded that establishing a cause of action was a matter best suited for Congress instead of the courts.[372]

---

366. *Id.*

367. *Id.* at 724.

368. *Id.* at 720 (internal citations omitted).

369. *See id.* A passage of the decision states: "offenses against this law of nations are principally incident to whole states or nations," and not individuals seeking relief in court." *Id.* at 714 (internal citations omitted).

370. *Id.* at 724.

371. *Id.* at 725.

372. *Id.* at 725-27. This decision raises interesting questions about the judiciary's role and whether courts are limited to interpreting the law or may create law. This has been one of the essential differences between common law and civil law systems. In *Sosa*, the Supreme Court behaved as a civil law court. What would be the purpose of granting jurisdiction if the Court would lack the power to adjudicate the dispute from a substantive point of view as well? Under

According to the Court the test for actionable claims under the ATCA is a "high bar" to be dealt by the courts with "great caution" due to the potential foreign relations implications.[373] In support of the Court's argument for restraint, the Court noted that there is no legislative mandate to define "new and debatable violations of the laws of nations."[374]

Sosa did not eliminate completely the possibility of filing claims under the alien tort statute. In the Court's own words, "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[375]

The Supreme Court confirmed that international law is part of U.S. law.[376] However, with this decision the Court may have acknowledged the weak nature of the law of nations and its poor chances of being enforced. From a jurisdictional and international law perspective, the Court confirmed the Executive's disregard for international law.[377]

U.S. federal courts were the judicial forum where the rule of law could have been upheld. However, as the Supreme Court acknowledged, the effects over foreign relations were considerable. In deciding this case, the Supreme Court has adopted President Bush's perception of international law as an instrument of foreign policy. Thus, international law may come in handy whenever the specific interests of the United States may require, but only then. At such time, the current interpretation of the alien tort statute would allow the courts to adjudicate a case that may not be politically sensible.

I. The Alien Tort Statute After Sosa

Several courts have applied the alien tort statute after the Supreme Court's *Sosa* decision.[378] In doing so, the outcome has not been

---

Sosa, the Court promotes actions without meaningful content that would be dismissed on formal technicalities by courts with jurisdiction.

373. *Id.* at 727-28.

374. *Id.* at 728. The Court added that the Senate has expressly declined to give the federal courts the task to interpret and apply international human rights law when it ratified the International Covenant on Civil and Political Rights and declared that its provisions were not self executing. *Id.*

375. *Id.* at 729.

376. *See id.*

377. *See id.* In the Executive's case, such disregard was evident through the doctrine of pre-emption, the "war" against Iraq and the Abu Graib prison events.

378. The First Circuit cited *Sosa* in the dissenting opinion of a case filed by a U.S. citizen resident in Puerto Rico claiming its right to vote in the U.S. presidential election. Igartua-De la Rosa v. United States, 386 F.3d 313, 317 (1st Cir. 2004) (Torruella, J., dissenting). The majority confirmed precedents and denied the right to vote to a U.S. citizen residing in Puerto Rico. *Id.* at 313-14. The dissent cited *Sosa* when recalling that the Universal Declaration on Human Rights

consistent and the circuit court's call for clarification by the Supreme Court still remains valid. *Sosa*'s message of substantially restricting the available causes of action under the statute seems to be the prevailing trend.[379] Most courts view the statute as a mere jurisdictional instrument, disfavoring the creation of new causes of action and the expansion of federal court jurisdiction.[380] Several decisions restricting clear causes of action for *jus cogens* violations are of concern.[381] One decision limits alien tort statute based claims even further by requiring the exhaustion of local remedies, which is not found in the statute's actual language.[382]

In *Mohammad v. Bin Tarraf*, the Second Circuit, citing *Sosa*, confirmed jurisdiction to review alien tort statute claims in a case for alleged torture regardless of any close connection with the United States.[383] This case involved a Canadian plaintiff and several defendants, none of whom were U.S. residents, and was based on acts which occurred entirely in the United Arab Emirates.[384] The case reaffirmed the doctrine of U.S. courts acting as courts of universal jurisdiction, in some cases.[385]

In *Lacey v. Calabrese*, a case involving a burglary conviction, the plaintiff invoked the Universal Declaration of Human Rights and alleged violations of his civil rights, including, among others, the right to a speedy trial.[386] The United States District Court for the Eastern District of New York cited *Sosa* to conclude that the Universal Declaration of Human Rights is not binding.[387]

In *Vietnam Ass'n for Victims of Agent Orange/Dioxin v Dow Chemical*, Vietnamese citizens and a Vietnamese organization sued U.S.-based corporations for manufacturing and supplying herbicides such as agent orange to the governments of the United States and South Vietnam, and thus committing violations of U.S. law and international law.[388] Claims were brought under the alien tort statute, the TVPA, and the war

---

does not of its own force impose obligations of international law. *Id.* at 317. The court noted that provisions of the International Covenant on Civil and Political Rights can be implemented via the alien tort statute. *Id.* at 319.

379. *See* discussion *supra* notes 144, 372.

380. *See* discussion notes 144, 372.

381. *See* discussion *supra* notes 143, 372.

382. *See* Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).

383. Mohammad v. Bin Tarraf, 114 Fed. Appx. 417, 419 (2d Cir. 2004).

384. *Id.* at 418.

385. *Id.*

386. Lacey v. Calabrese, 2005 U.S. Dist. LEXIS 10006, at *1-2 (E.D.N.Y. May 17, 2005).

387. *Id.* at *9-10.

388. Vietnam Ass'n for Victims of Agent Orange/Dioxin v Dow Chem.,373 F. Supp. 2d 7, 15-16 (E.D.N.Y. 2005).

crime act.[389] The Executive branch requested that the court dismiss the complaint on political question grounds because the case would require the court to pass judgment on the Executive's decisions regarding war tactics, and for failure to state a claim under the alien tort statute, because at that time the use of herbicides in war was not unlawful.[390] In addition, the Executive argued that its decision preempted any customary international law provision, that the Executive's interpretation of international law should be controlling, and that the government contractor defense applied.[391] The district court concluded that in adjudicating international human rights claims against domestic corporations, U.S. courts act as "quasi international tribunals."[392]

Several important conclusions may be derived from the Agent Orange Product Liability litigation:

(1) After *Sosa*, courts are required to proceed with caution regarding alien tort statute based claims, and therefore such claims must be viewed skeptically.[393]

(2) In reviewing alien tort statute based claims courts must assess the practical consequences of making the cause of action available in federal courts.[394]

(3) In recognizing causes of action under the alien tort statute, courts should be cautious not to intrude on foreign affairs issues, which are generally the province of Executive and Legislative discretion.[395]

---

389. *Id.* at 35 (citing 18 U.S.C. § 2441 (2000)).

390. *Id.* at 43-44.

391. *Id.*

392. *Id.* at 17.

> International law allows states to exercise universal jurisdiction over certain acts which threaten the international community as a whole and which are criminal in all countries, such as war crimes . . . . International law is internalized by our courts as law of the United States. In deciding the scope and nature of . . . international law, this court applies Rule 44.1 of the Federal Rules of Civil Procedure which governs the determination of foreign law.

Id. at 17-18 (internal citations omitted).

393. *Id.* at 47.

394. *Id.* In this Agent Orange Product Litigation, the federal court considered the practical consequences of recognizing a cause of action that challenged the President's war powers as Commander in Chief, and the fact that they would undermine the Executive's conduct of foreign relations with Vietnam pursuant to which the United States never agreed to provide reparations to the Vietnamese for the use of chemical herbicides during the war. *Id.* at 46-49. The court considered that war reparations were a matter of government to government negotiations, of diplomacy, as opposed to a result to be achieved through a civil action before a court of law. *Id.* at 48-49. Claims for war reparations belong to states, not to individuals. *Id.* at 49.

395. *Id.* at 46.

(4) The alien tort statute provides a cause of action against corporations for international law violations. Potential corporate liability includes liability for "aiding and abetting."[396]

(5) In alien tort statute claims for war crimes and crimes against humanity, the general rule under customary international law is that no statute of limitation applies.[397]

(6) In deciding alien tort claims cases U.S. courts apply international law which is part of U.S. law.[398]

(7) The fact that an alien tort claims is related with foreign relations does not per se render the issue nonjusticiable.[399] According to the court, interpretation of treaties and customary international law may allow the court to conclude that the executive acted in violation of international law.[400]

The court considered the practical consequences of potentially opening the federal courthouse to "all of the Nation's past and future enemies."[401] The court confirmed corporate liability for violation of international law provisions.[402] The court dismissed the complaints on the merits, since the use of herbicides was not proscribed by international law in 1975.[403]

---

396. *Id.* at 52-59. The court concluded that the aiding and abetting liability for violations of international law could be traced back to the origins of the statute. *Id.* at 52-54 (citing Breach of Neutrality 1, Op. Att'y Gen. 57, 59, (1795); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 156 (1795)). In reaching this conclusion, the court followed the jurisprudence of the Yugoslavia and Rwanda International Criminal Tribunals. *Id.* at 137. The court specifically reviewed the argument that corporations cannot be liable under international law, based on the traditional principle pursuant to which international law imposes obligations on states, its principal subjects, and not on private actors. *Id.* at 54-59. The court recalled how international tribunals when finding criminal liability of private actors have only convicted individuals, not corporations. *Id.* It noted also however, that no corporation was a named defendant in such criminal proceedings, that no international provision establishes immunity for corporations for international law violations and that in today's world civil liability of corporations for these violations makes sense. *Id.* In citing *Sosa* and all the alien tort statute precedents, the court concluded that corporations could be held liable for international law violations. *Id.*

397. *Id.* at 59-64.

398. *Id.* at 64-68. "'Treaties are the law of the land. Cases arising under treaties are justiciable.' What international law is and how it applies present questions of the meaning of substantive law, and the interpretation of these questions is a task entrusted to the courts." *Id.* at 75 (quoting Louis Henkin, *Lexical Priority or "Political Question:" A Response*, 101 HARV. L. REV. 524, 531 (1987)).

The court read *Sosa* as adopting a federal choice of law rule for causes of action applying international law. *Id.* at 83. The court also refers to article 38 of the Statute of the International Court of Justice as a guide to identify the sources of international law. *Id.* at 131-32.

399. *Id.*

400. *Id.* at 79.

401. *Id.* at 48.

402. *Id.* at 54-59.

403. *Id.* at 81-82.

In several decisions courts have been mindful of their "duty of vigilant doorkeeping"[404] as mandated by the Supreme Court in *Sosa* and have construed customary international law narrowly.

In *Arndt v. UBS AG*,[405] a German citizen filed an action against a Swiss bank for seizure of assets under the Trade with the Enemy Act.[406] The plaintiff sought jurisdiction under the alien tort statute.[407] The court concluded that it lacked jurisdiction, interpreted the statute consistently with *Sosa* pursuant to which courts in applying the ATCA could not create causes of action, and that required a reference to a specifically violated international law provision.[408] Plaintiff's complaint for fraud and conversion failed to identify any violation of international law.[409] The court, interpreting the TVPA, concluded that a corporation cannot be sued under the TVPA.[410]

In *In re South African Apartheid Litigation*, claims were filed with seven federal courts by several groups of South African individuals against multinational companies doing business in South Africa during the Apartheid regime.[411] The court interpreted the alien tort statute narrowly by determining that the defendant corporations did not act under color of law, and that the plaintiffs failed to claim any joint action by defendants.[412] The district court followed *Sosa*'s language about preventing innovative interpretations, and did not follow *Presbyterian Church*, considering it inapplicable to the civil context.[413] Addressing the issue of whether there was a claim against corporations for doing business during the Apartheid regime in South Africa, the court concluded that "there is no private liability under the treaties of the United States."[414] The court also noted that the Apartheid regime and not

---

404. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

405. Arndt v. UBS AG, 342 F. Supp. 2d 132, 134-36 (E.D.N.Y. 2004).

406. *See id.*

407. *Id.* at 137.

408. *See id.* at 138-41.

409. *Id.* at 141.

410. *Id.* The court also noted that since the U.S. government approved a settlement of the same claims involved, the political question precluded judicial review and warranted dismissal. *Id.*

411. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 542 (S.D.N.Y. 2004). The claim, with estimated damages exceeding $400,000,000,000 was filed on behalf of "all persons who lived in South Africa between 1948 and 2002 and suffered damages as a result of apartheid." *Id.* at 545.

412. *Id.* at 548.

413. *Id.* at 550.

414. *Id.* at 552.

the defendants engaged in the wrongful conduct.[415] The court concluded that the most important international instruments are merely goals that create no legal obligations.[416] In denying the claim the court also considered the South African government's position that allowing the action to proceed would preempt its ability to handle its domestic matters and discourage investment in the country.[417] The court also deferred to the U.S. government's position which opposed the litigation as undermining its policy to encourage change in developing countries via economic investment.[418] The court's conclusion opposed to expanding the ATCA is worth citing in full:

> In a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce. Moreover, to infer such causes of action under the ATCA would expand precipitously the jurisdiction of the federal courts and would not be consistent with the "extraordinary care and restraint" that this Court must exercise in recognizing new violations of customary international law.[419]

In *Weiss v. American Jewish Committee*, the court dismissed a claim filed in Poland, by two descendants of Jews murdered during the Holocaust, against the American Jewish Committee for funding the construction of a trench through the Belzec death camp.[420] The claim, based on the Protocol of the 1949 Geneva Conventions[421] and the International Covenant on Civil and Political Rights,[422] alleged emotional

---

415. *Id.* In reaching this conclusion the Court concluded that the neither the Apartheid Convention, the U.N. Charter, Universal Declaration of Human Rights, nor General Assembly Resolutions create binding international law. *Id.* at 551-52. According to the court, "The UN Charter and the Declaration speak in broad aspirational language that does not meet the specificity required under the ATCA." *Id.* at 552.

416. *Id.* at 553.

417. *Id.*

418. *Id.*

419. *Id.* at 554.

420. Weiss v. Am. Jewish Comm., 335 F. Supp. 2d 469, 470 (S.D.N.Y. 2004).

421. Article 34 of the Protocol provides that "the remains of those who died as a result of hostilities shall be respected, and the grave sites respected, maintained, and marked." *Id.* at 476.

422. *Id.* The court also reviewed ICCPR the provisions of article 17 against arbitrary or unlawful interference with a person's privacy or family; article 23 pursuant to which "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State," and article 27 under which persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language, and concluded that none is sufficiently definite to give rise to a rule of customary international law." *Id.* at 476-77.

distress and a tort in violation of international law, for the displacement of plaintiff brother's remains by the digging of the trench.[423] The court considered that although both instruments constitute evidence of customary international law the plaintiffs had failed to show that an "overwhelming majority of States have ratified the Protocol and the ICCPR."[424] The court concluded that it could not "find in the pronouncements of Protocol I and the ICCPR any specific, binding legal obligations with definite content and acceptance among civilized nations that would prohibit the digging of the Trench."[425]

In *Jama v. United States INS*, a claim was filed by several undocumented aliens detained at an Immigration and Naturalization Service facility in New Jersey (while the decision of their asylum status was pending) against the corporation that managed the facility, its officers, individual guards and the INS.[426] Plaintiffs alleged that they were tortured, beaten, harassed, and mistreated by the facility's guards.[427] The court sustained jurisdiction against the corporation and its officers.[428] In 1998, while reviewing a motion to dismiss for lack of subject matter jurisdiction, the court concluded that "it is evident that the totality of the treatment to which plaintiffs were subjected violated customary international law."[429] The court recalled that U.S. courts have recognized that customary international law provides the right to be free from cruel, inhuman or degrading treatment.[430] In 2004, after reviewing the claims against the individual facility guards the court concluded that the rigorous *Sosa* requirements were not met and granted summary judgment in their favor.[431] The court sustained claims against the corporation and its officers and stated that it is a violation of customary

---

423. *Id.* at 476.

424. *Id.*

425. *Id.*

426. Jama v. United States INS, 343 F. Supp. 2d 338 (D.C.N.J. 2004). Claims against the INS were dismissed applying the basic doctrine pursuant to which absent specific waiver, the United States and its agencies are immune from suit and courts lack jurisdiction over them. *Id.* at 373. The U.S. sovereign immunity is removed when the government is sued in tort under the Federal Tort Claims Act. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Smith v. United States, 507 U.S. 197 (1993). The statutory waiver of immunity is provided under 28 U.S.C. § 1346(b) (2000).

427. *Jama*, 343 F. Supp. 2d at 346. Plaintiffs' alien tort statute claim was supported on the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. *Id.* at 360.

428. *Id.* at 348.

429. Jama v. United States INS, 22 F. Supp. 2d 353, 363 (1998).

430. *Id.* at 363.

431. *Jama*, 343 F. Supp. 2d at 360-61.

international law to mistreat individuals who have committed no crime and are waiting for a decision on their asylum status.[432] In addition, the court concluded that the ten-year TVPA statute of limitations was applicable to the alien tort statute based claims after *Sosa*.[433]

In *Enahoro v. Abubakar*, seven Nigerian citizens sued a Nigerian general, who acted as head of state, for acts committed in Nigeria.[434] The complaint included claims for torture, arbitrary detention, cruel, inhuman and degrading treatment, false imprisonment, assault and battery, intentional infliction of emotional distress, and wrongful death.[435] The court, citing *Sosa*, considered that the alien tort statute is a mere jurisdictional provision which established no new causes of action.[436] Interpreting *Sosa*, the United States Court of Appeals for the Seventh Circuit concluded that the TVPA preempts alien tort statute claims based on torture and extrajudicial killing.[437] In addition, the court concluded that exhausting local remedies is required for alien tort statute-based claims.[438] The most noteworthy aspect of the decision is the court's ruling that the foreign sovereign immunities act does not apply to individuals, which distanced the Seventh Circuit from most other circuit courts.[439]

In *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, the United States Court of Appeals for the Eleventh Circuit dismissed a complaint filed by seven Guatemalan citizens, U.S. residents, against Del Monte, a Delaware corporation, for claims related to the hiring of a private security

---

432. *Id.* at 361.

433. *Id.* at 363-66.

> Public policy suggests that "borrowing" the TVPA's 10 year statute of limitations period is still the correct way to go. Consequently, while *Sosa* does serve to limit the breadth of the claims eligible under the ATCA, that narrow reading does not influence the application of the TVPA 10 year statute of limitations.

Id. at 366.

434. Enahoro v. Abubakar, 408 F.3d 877, 878-79 (7th Cir. 2005).

435. *Id.* at 879.

436. *Id.* at 883.

437. *Id.* at 884-85. According to the Seventh Circuit the TVPA occupies the field of alien tort statute claims for torture and extrajudicial killings and both may not coexist. *Id.* Judge Cudahy notes in his dissent that there is nothing in *Sosa* to suggest that. *Id.* at 889 (Cudahy, J., dissenting).

438. *Id.* The dissent agrees with the majority conclusion considering that exhausting local remedies, although not mandated by *Sosa*, is required by both international law for all international law based claims, and by the TVPA, so that American plaintiffs suing under the TVPA, required to exhaust local remedies, would not be treated differently than foreigners suing under the alien tort statute, who were not subject to that requirement. *Id.* at 879 (Cudahy, J., dissenting).

439. *Id.* at 892-93 (citing Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004)).

force in Guatemala that detained them.[440] Plaintiffs filed claims for cruel and inhuman treatment, arbitrary detention and crimes against humanity under the alien tort statute.[441] Reading *Sosa*, the court dismissed the claims for arbitrary detention and cruel and inhuman treatment by concluding that the International Covenant on Civil and Political Rights does not create obligations enforceable in federal courts.[442] The court sustained the plaintiffs' torture based claims.[443]

XII. CONCLUSION

There was a time when the world looked at the United States in search of guidance. At that time, the possibility of the American Dream was a reality. The United States portrayed itself as the defender of the rule of law. The world looked toward U.S. courts with hope. For many, if justice before their own courts was not possible, the fact that U.S. courts would act as courts of universal jurisdiction was encouraging. In recent times, the Executive's decisions have questioned its compliance with international law. The Supreme Court was conceived by the founding fathers as a power that would check the conduct of the political branches. Introducing arguments of convenience to decisions that should be based on legal principle is troublesome.

The alien tort statute has been regarded as a door to federal jurisdiction. In *Sosa*, the Court established a "duty of vigilant door keeping."[444] The Court's narrow understanding of the role of the judiciary, and its motivations based on power considerations, provide the true contemporary meaning of "equal justice under law." Such a notion moves away from the nation's ideals, the concept of the American Dream, and the very notion of the rule of law.

If corporations sleep, they may sleep more comfortably after the *Sosa* decision. The chances for being held accountable before U.S. courts have been substantially reduced, unless corporations step over politically sensitive issues. Unfortunately, this standard may be held against their interests abroad in contexts not yet explored. "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."[445]

---

440. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1244-46 (11th Cir. 2005).

441. *Id.* at 1246.

442. *Id.* at 1246-47.

443. *Id.* at 1250-53. In doing so, the court concluded that claims based on torture could be brought both under the alien tort statute and the TVPA. *Id.*

444. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

445. *See* Wilner, *supra* note 1.