Corporate Responsibility under the Alien Tort Statute

Enforcement of International Law through US Torts Law

Michael Koebele

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Part I
Introduction

Introduction

I

The Alien Tort Statute ("ATS")[1] was first enacted as part of the Judiciary Act of 1789. The Judiciary Act was the first statute of the newly-founded United States of America and provided for the establishment of the judiciary on the federal level.[2] The direct reasons for the inclusion of the ATS are uncertain since the legislative record on ATS is completely silent.[3] However, it is likely that its enactment was connected to the mistreatment of foreign ambassadors and the occurrence of piracy.[4] At the time, the United States was still a weak and largely unproven nation – with the notable exception of the war of independence – which was dependent on the goodwill of the European powers and which wanted to take its adequate place in the family of civilized nations.[5] After its inclusion into the Judiciary Act, ATS largely fell into disuse for almost two centuries.[6]

Today, ATS, as codified in 28 U.S.C. § 1350, provides:

> The district courts shall have 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.[7]

Thus, there are two alternatives under ATS: (a) a violation of the law of nations or (b) a violation of a treaty of the United States.[8] Under the first alternative, three requirements must be met: (a) an alien, (b) a tort, (c) and a breach of

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[1] *See generally* Alexander Abel, *Das Alien Tort Statute nach der Entscheidung des US Supreme Court in der Sache Sosa v. Alvarez-Machain – ein US-amerikanischer Weg zum Schutz der Menschenrechte* (2007). The ATS is sometimes also referred to as "Alien Tort Claims Act".

[2] *See infra* Chapter One: Actionability Standards.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Alien's Action for Tort, 28 U.S.C. § 1350 (2004). *See* U.S. Const. art. I, § 8, cl. 10, which grants Congress the power to "define and punish … offenses against the law of nations."

[8] The second alternative has remained redundant ever since. *See* Sarah Joseph, *Corporations and Transnational Human Rights Litigation* 53–54 (2004).

customary international law.[9] The first element is obvious while the second one is typically fulfilled if the third – a breach of international law – is present. For example, a rape amounting to torture under international law is legally categorized as battery under torts law[10] or the pollution of a river on which indigenous people depend for their subsistence is a destruction of property.[11] Accordingly, while the first two elements are usually met, the last one poses significant difficulties in the practical concrete application of ATS.

The modern era history of the ATS begins in 1980 with *Filártiga v. Peña-Irala*.[12] Plaintiffs were Paraguayan citizens, Dolly Filártiga and her father, Dr Joel Filártiga, a well-known critic of the dictator Alfred Stroessner who was at the time in power in Paraguay.[13] They, with the support of human rights activists, brought a complaint in New York alleging that defendant Americo Noberto Peña-Irala, a former Paraguayan police officer, tortured the plaintiffs' brother and son to death in order to stop public criticism of the Stroessner Regime by Joel Filártiga.[14]

On the merits, after the case was dismissed on first instance, the Court of Appeals for the Second Circuit declared that international law prohibits the use of torture and accordingly, the Filártigas' claims were properly brought under ATS.[15] It explained that claims brought under ATS is not restricted to violations of 18th century law of nations but expand to present-day customary international law.[16] Finding that the modern-day torturer as "an enemy of all mankind" was analogous to the recognized historic ATS paradigms, the Second Circuit concluded that ATS provided jurisdiction for the Filártigas' claims.

The decision was largely followed by other federal courts throughout the country. As a consequence, any alien could sue for a violation of present international law which is comparable to the historic paradigms.[17] Over the years, courts assumed jurisdiction over numerous claims, including genocide; war crimes; summary execution; forced disappearance; slavery; and prolonged and cruel, inhuman, and degrading treatment.[18]

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[9] On the treaty alternative, *see* Beth Stephens *et al., International Human Rights Litigation in US Courts* 215–227 (2008).

[10] *See infra* Chapter Three: Civil and Political Rights.

[11] *See infra* Chapter Five: Environmental Destruction.

[12] 630 F.2d 876 (2d Cir. 1980). *See infra* Chapter Three: Civil and Political Rights.

[13] 630 F.2d at 878.

[14] *Id*.

[15] *Id*. at 882.

[16] *Id*. at 890.

[17] A Westlaw case search in March 2006 produced almost 300 references to *Filártiga v. Peña-Irala* or ATS.

[18] For a concise summary of the development of litigation under the ATS, *see* Daniel Diskin, "The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute", 47 *Ariz. L. Rev*. 805, 815–18 (2005).

In the first wave of litigation, more than 100 cases were filed, mainly against former dictators and military officials who fled to the U.S. after the respective governments in their home countries had been removed.[19] However, although damages were awarded in many instances, plaintiffs were often unable to collect money judgments, and the litigation was more of a symbolic nature.[20]

As a consequence of the case law developed in the aftermath of *Filártiga*, Congress passed the Torture Victim Protection Act ("TVPA") in 1991 which was signed into law by President Bush in 1992.[21] It entails a 10-year statute of limitation and requires the exhaustion of local remedies.[22] As to liability, the TVPA provides as follows:

> Any individual who, under actual or apparent authority, or under the color of law, of any foreign nation
> subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> 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.[23]

The legislative history of the TVPA is replete with expressions of support for the *Filártiga* decision and the case law based on it. It highlights the role of U.S. courts in providing a legal forum for outrageous violations of human rights regardless of where they are committed. The legislative reporter declares:

> Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law.… The Torture Victim Protection Act would respon[d] to this situation.[24]

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[19] On the first wave of litigation, *see generally* Alfried Heidbrink: *Der Alien Tort Claims Act* (28 USC § 1350): *Schadenersatzklagen vor US-amerikanischen Gerichten wegen Verletzungen des Völkerrechts* (1989).

[20] *See* David Weissbrodt *et al., International Human Rights: Law, Policy, and Process* 816–17 (2001); Beth Stephens, "Taking Pride in International Human Rights Litigation", 2 *Chi. J. Int'l L.* 485 (2001). The *Marcos* case is an exception. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d. 493 (9th Cir. 1992).

[21] Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). *See* Stephens *et al., supra* note 9, at 75–88.
See Beth Stephens & Michael Ratner, *International Human Rights Litigation in US Courts* 25–29 (1996).

[22] *Id.*

[23] *Id.*

[24] *H.R. Rep. No.* 102–367, at 3 (1992).

The Supreme Court addressed claims under ATS once in 2004 in *Sosa v. Alvarez-Machain*[25] in which the court gave limited guidance on the interpretation of ATS to lower courts.

II

In 1995, the Court of Appeals for the Second Circuit held in another landmark decision, *Kadic v. Karadzic*[26] which involved atrocities committed during the disintegration process of the former Yugoslavia, that ATS's scope of application is not limited to State actors but also applies to private actors. This decision triggered a second wave of litigation under ATS in which (foreign) victims of human rights abuses, with the support of human rights activists, filed cases against transnational corporations ("TNCs"), which, in one way or another, are connected to human rights abuses in the countries where they are doing business.[27] Defendants in these lawsuits include the oil companies Chevron Texaco, Occidental, Royal Dutch Shell, and Talisman and the mining companies Freeport-McMoran, Newmont, Rio Tinto, and the Southern Peru Copper Corporation; other prominent defendants are Coca-Cola, Fresh Del Monte Produce, The Gap, Daimler-Chrysler, Ford, DynCorp, and Pfizer.[28]

Approximately half of the post-*Sosa* ATS cases involve TNC defendants. Many of the cases against TNCs which have not been dismissed are still at a relatively preliminary stage of the litigation. Some of those which are pending survived early motions to dismiss.[29] These decisions form the major basis of the research undertaken in this book. Thus, many decisions (with TNCs as defendants) presented throughout this book reflect only the respective preliminary stage of a given case and are not ultimately binding or strictly determinative for the final ruling. Interestingly, the first two post-*Sosa* appellate court decisions reversed the dismissal of ATS cases against TNC defendants.[30]

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[25] 124 S. Ct. 2739 (2004).

[26] 70 F.3d 232, 239 (2d Cir. 1995), *cert. den.*, 116 U.S. 2524 (1996).

[27] *See* Anja Seibert-Fohr & Rüdiger Wolfrum, "Die einzelstaatliche Durchsetzung völkerrechtlicher Mindeststandards gegenüber transnationalen Unternehmen", 43 *ArchVR* 153 (2005); Luis Enrique Cuervo, "The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea", 19 *Tul. Envtl. L.J.* 151 (2006).

[28] For details, *see infra* Chapter Three; Civil and Political Rights; Chapter Four: Labor Standards; Chapter Five: Environmental Destruction; Chapter Six: Application to TNCs.

[29] *See* Federal Rules of Procedure § 12(6)(b).

[30] *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007).

In one prominent case involving a TNC, *Doe v. Unocal Corp*., which involved claims of forced labor in the construction of a natural gas pipeline in Myanmar pursued under a joint venture by Unocal with the military government of Myanmar, litigation resulted in a partial success for plaintiffs. In December 2004, the parties settled out of court. The specific terms of the agreement are being held confidential. However, the amount of around $30 million as monetary compensation has been suggested.[31]

The background of the second wave of litigation is that on the international plane, the regulatory response to TNC activity has been largely ineffective or even absent. TNCs do not belong to the subjects of international law.[32] Neither international treaties nor customary international law directly impose legal obligations on TNCs. Accordingly, human rights obligations are not binding on TNCs. By virtue of institutions in the field of economics and trade, such as the International Bank for Reconstruction and Development, the International Monetary Fund, and the World Trade Organization, and a network of bilateral investment treaties protecting the rights of investors, international law enables TNCs to operate on a worldwide scale without, however, providing a regulatory framework for such business activities.

Instead, the last decades have witnessed the emergence of soft initiatives of business codes of conduct, i.e., non-binding sets of rules to guide behavior and decisions of TNCs in respect of social and environmental issues, such as the International Labor Organization ("ILO") Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[33] the United Nations ("UN") Global Compact,[34] the Organization for Economic Cooperation and Development ("OECD") Guidelines of Principles concerning Multinational Enterprises,[35] the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights adopted by the

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[31] Diskin, *supra* note 18, at 808. *See* Marc Lifsher, "Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline", L.A. Times, *available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm (accessed 11 September 2006).

[32] *See infra* Chapter Six: Application to TNCs.

[33] *See* ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 279th Session, Geneva, adopted in November 1977 and amended in November 2000, *available at* http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=2&chapter=28&query=%28Tripartite+Declaration+of+Principles+concerning+Multinational+Enterprises%29+%40title+&highlight=&querytype=bool&context=0 (accessed 17 July 2006).

[34] *See* UN Global Compact, Ten Principles, *available at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (accessed 17 July 2006).

[35] *See* OECD, Policy Brief: The OECD Guidelines for Multinational Enterprises (2001), first issued in 1976 and revised in 2000, *available at* http://www.oecd.org/dataoecd/12/21/1903291.pdf (accessed 17 July 2006).

UN Sub-Commission on the Promotion and Protection of Human Rights,[36] and the Global Sullivan Principles on Corporate Social Responsibility.[37] While these informal nonbinding enforcement mechanisms have shown some effects on corporate governance and leadership and may offer a real way forward in addressing community concerns, they do not constitute a legal substitute against TNCs which persist in pursuing business profits regardless of the impacts upon local populations, environment, and workers. While useful in many respects, their inherent deficiency – the fact that they are not mandatory[38] – impedes making any real dent on giant, mass scale employer-TNCs, the mere size, power, and reach of which cry out for binding checks and balances in the absence of constant media coverage. From this perspective, TNC liability under the ATS merely fills a gap which is not adequately filled by international law.

At the same time, the indirect regulation of TNC activity outside U.S. territory under ATS is not a unique and isolated specialty of ATS.[39] The issue of extraterritorial regulation of TNCs faces two distinct approaches which prominent American 20th century corporate law scholar Phillip Blumberg referred to as entity and enterprise approaches.[40] Under the entity approach, each country regulates only those corporate entities which are doing business within its territory. Accordingly, the parent company's country of registration applies its law to the parent company and all other countries apply their respective laws to the subsidiaries incorporated in their respective jurisdictions. Under the enterprise approach, however, the TNC is, in accordance with economic realities beyond corporate law fragmentation, treated as one single integrated business operating on a worldwide scale. The enterprise approach

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[36] UN Doc. E/CN.4/Sub.2/2003/12Rev.2 (2003). However, see Res. 2004/116 of 20 April 2004 and Res. 2005/69 of 20 April 2005 of the UN Commission on Human Rights which still call for more action in the field and thereby limit the impact of the previous work of the commission.

[37] *Available at* http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp (accessed 17 July 2006). *See* Christopher McCrudden, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?", 19 *Oxford J. Legal Stud*. 167 (1999).

[38] Transparency and consumer pressure, sufficiently raised, can have a real impact without hard law enforcement mechanism though.

[39] As to the application of American law to TNCs (other than ATS), this part draws heavily on research undertaken by University of Michigan Law Professor Reuven S. Avi-Yonah, "National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization", 42 *Colum. J. Transnat'l L*. 5 (2003).

[40] *Cf.* Phillip I. Blumberg, *The Multinational Challenge to Corporation Law* 63 (1993); Phillip I. Blumberg, "The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities", 28 *Conn. L. Rev*. 295, 295–96 (1996).

can be implemented either by harmonization or by extraterritorial application. While corporate law in many, if not all, developed countries favor the entity approach as a general rule, the enterprise approach has been adopted in some fields of law where the legalistic entity approach led to suboptimal results under the policies pursued by a legislation or other body of law. One famous example is taxation. In tax law, it is hornbook wisdom in American tax law that separate accounting and taxation is not feasible in respect of TNCs and the only viable approach is the enterprise approach taxing TNCs on a worldwide basis with a formulary apportionment.[41] One other example is corruption. The U.S. adopted the Foreign Corrupt Practices Act ("FCPA") in 1977,[42] which applies to corporations, citizens, and residents and extends in particular to corrupt practices abroad.[43] Antitrust is another body of law in which extraterritoriality is practiced in order to satisfy the purpose of the underlying statute. In the well-known decision *United States v. Aluminum Company of America*, the Supreme Court held that a cartel formed in Canada could be subject to American antitrust law if it had "effects" on U.S. markets.[44]

As to ATS, the point can be made that just like in 1789 when there was a need to regulate U.S. citizens for mistreatments of foreign ambassadors or other violations of international law,[45] today, a similar demand exists for the regulation of (U.S. – and others with strong ties to the U.S. markets) TNCs operating on a worldwide scale, the business activities of which result in the mistreatment of people within the sphere of influence of such TNCs, in particular, but by no means limited to, indigenous peoples in other countries.

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[41] *See* Reuven S. Avi-Yonah, "The Rise and Fall of Arm's Length: A Study in the Evolution of US International Taxation", 15 *Va. Tax Rev*. 89 (1995).

[42] 15 U.S.C. § 78dd-1, 2 (1977).

[43] For a history of the FCPA, *see generally* Alejandro Posadas, "Combating Corruption under International Law", 10 *Duke J. Comp. & Int'l L*. 345 (2000). On the adverse economic effects of corruption, *see generally* Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (1999).

[44] 302 U.S. 230 (1937). For more recent cases, *cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Timberlane Lumber Co. v. Bank of America, N.T.*, 549 F.2d 597 (9th Cir. 1976). Thereafter, the constant expansion of American antitrust law to extraterritorial behavior has caused serious frictions with U.S. trading partners. *See, e.g.*, United Kingdom: Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes concerning the Act, 21 I.L.M. 834 (1982). Today, European antitrust law follows the example of its American counterpart, *see, e.g.*, Case T-36/91, *Imperial Chem. Indus. (ICI) v. Comm'n*, 1995 E.C.R. II-1847; Case 89/85, *Ahlstrom v. Comm'n*, 1988 E.C.R. 5193; Case T-102/96, *Gencor Ltd. v. Comm'n*, 1999 E.C.R. II-753. *See generally* Alison Jones & Brenda Sufrin, *EC Competition Law* (2004).

[45] For an example of an 18th century extra-territorial application of ATS, *see infra* Chapter One: Actionability, text accompanying n. 100 (U.S. citizens taking part in military operations overseas in support of the French revolutionary cause).

Not surprisingly, since the start of the second wave of ATS litigation against TNCs, it has come under severe criticism from the business community. However, even under an economic theory of law, the liability of TNCs under ATS is a desirable result. Torts law, of which ATS forms part of, strives at the imposition of the financial burden on the natural or legal person who was in the best suitable position to prevent the harm and injuries sustained. In this manner, torts law provides an incentive to reduce the risk of the occurrence of harm and damage in the future and aims at maximizing the overall societal wealth.[46] The imposition of liability will increase the sensibility of TNCs to human rights violations and deter them from entering into joint ventures, making general investment, or doing business in countries which have low or non-existent implementation of the rule of law. One may argue that the award of damages may discourage investment by TNCs in the Third World and consequently, may do more harm than good to the cause of human rights and sustainable development. While this raises a valid point, it does not overturn the result. Given the degree and pace of globalization and the necessity for global players to be present in all continents, it seems unlikely that foreign direct investment will decrease as a result of TNC accountability under ATS. Rather, TNCs will focus and invest in countries which, while not frontrunners of the human rights development, refrain at least from a widespread and constant use of human rights violations as a means of internal policy.[47] This side effect is particularly desirable. It favors countries which maintain a higher level of human rights implementation and provides compliance incentives for countries to further improve the treatment of their own citizens.

III

This book determines whether and to what extent TNCs are regulated by ATS.[48]

It consists of four parts:

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[46] For the notion of shaping the law of torts in order to increase economic efficiency and overall wealth, *see generally* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987).

[47] Moreover, human rights by definition focus exactly on the individual and his or her protection from the will of the majority or government. In simple words, if one takes human rights seriously, one cannot close his or her eyes to rapes, forced labor, extrajudicial killings, and brutal torture. It is the very purpose of human rights to prevent the sacrifice of individuals in favor of the collective.

[48] Accordingly, throughout this book international law is only analyzed and presented to the extent it is relevant for the interpretation of ATS.

Part I on "Introduction" provides a general overview of ATS, its human rights litigation, and the research undertaken in this work.

Part II on "International Law Covered" consists of five chapters. Part II deals with the issue of what kind of international law norms fall within the scope of ATS's reference to international law, i.e., which international norms are actionable and how they can be determined.

Chapter One on "Actionability Standards" starts with the analysis of the proper standard to determine the international law norms which are actionable under ATS. Over the years, a bundle of tests to determine what kind of norms of international law can be implemented through ATS have been advanced. The recent decision of the Supreme Court in *Sosa v. Alvarez-Machain*[49] has also offered some guidance in this respect.

Chapter Two on "International Criminal Law" examines the actionability of international criminal law under ATS. Various TNCs are accused of infringements of international criminal law, in particular, in respect of oil operations in Nigeria and Southern Sudan. The case against Royal Dutch/Shell is the most prominent of these cases.

Chapter Three on "Civil and Political Rights" looks at the actionability of civil and political (human) rights under ATS. This is the field in which ATS started with the groundbreaking *Filartiga* decision of the Court of Appeals for the Second Circuit and where human rights litigation celebrated one of its biggest successes. In most cases against TNCs, various human rights claims are raised.

Chapter Four on "Labor Standards" evaluates the actionability of labor standards under ATS. In many ATS cases relating to South America, plaintiffs contend that the TNC concerned took advantage of the unstable political and legal situation in the respective countries to suppress workers' rights. For example, the media coverage of Coca-Cola's bottling companies' practices has been extensive.

Chapter Five on "Environmental Destruction" analyzes the possibility of constructing ATS as an enforcement tool for establishing a minimum standard of ecological behavior for TNCs doing business abroad. While the frequently used term "race to the bottom" may overstate the problem, it seems clear that TNCs in countries where environmental law is not actually applied in practice are able to externalize costs on local populations.

Part III on "Corporate Participation Covered" consists of three chapters. It analyses whether and what kind of corporate contribution to a given violation of international law suffices to incur corporate liability.

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[49] *Supra* note 25.

Chapter Six on "Application to TNCs" deals with the first issue of whether corporate misconduct is actually covered by ATS in the first place. The background of such suggestion is the prevailing view in international law that TNCs are not subjects of international law, cannot infringe it, and therefore, cannot be held responsible under ATS which explicitly refers to international law.

Chapter Seven on "Norms that Can Be Violated Only by State Actors" acknowledges that international law still largely applies exclusively to States. Therefore, for most norms of international law, TNCs can only be held liable under ATS if they cooperate with State officials to whom such norms apply directly. Accordingly, the issue is the necessary connection between the government officials and TNCs' business activities in respect of a given violation of international law to hold TNCs responsible. In ATS litigation, courts have dealt with this issue under the heading of "required state action".

Chapter Eight on "Norms that Can Be Violated by Everyone" focuses on international law norms which apply to any actor whether it is a State or a private actor, i.e., mostly international criminal law. Here, the issue posed is as to modes of participation of a corporation in an international wrongdoing resulting in individual liability for a corporation. Since ATS's wording is silent on the issue, a methodology to develop such rules must also be developed.

Part IV on "Defenses and Limitations" consists of five chapters. It addresses possible defenses and limitations available to TNCs in ATS litigation.

Chapter Nine on "Corporate Shield" presents the defense of corporate veil and limited liability. The background of the defense is that, although economically a TNC is conducting one business operating on a worldwide scale and strategy, legally however, a TNC consists of a group of separate corporations headed by one or more parent company(ies). This legal fragmentation may render it difficult for plaintiffs in ATS cases to hold the parent company liable which has the deeper pockets as opposed to the subsidiary in the country where the infringements of international law typically occurred.

Chapter Ten on "Lack of Personal Jurisdiction" addresses the parallel problem (of corporate shield) on a civil procedural level. It is often difficult to establish personal jurisdiction over a foreign subsidiary or a foreign parent company.

Chapter Eleven on "Forum Non Conveniens" explores the impact and scope of the doctrine of *forum non conveniens* in ATS cases against TNCs. One main issue here is whether ATS's purpose of providing a forum for victims of human rights violations is a factor to be taken into account by courts in the process of balancing private and public considerations under ordinary *forum non conveniens* jurisprudence.

Chapter Twelve on "Nonjusticiability Issues" evaluates the availability of nonjusticiability doctrines, such as political question doctrine or act of state doctrine, in ATS actions against TNCs. In this respect, ATS critics argue that

extensive litigation under ATS has the potential to undermine the foreign relations of the United States which has been assigned to other branches of the government.

Chapter Thirteen on "Duress" discusses the possible resort by TNCs to the defense of duress in ATS claims. In very limited instances in which the pressure on TNCs from oppressive governments becomes excessive, the defense may be available to TNCs in ATS cases.

IV

Finally, even if business lobbyists further amplify their campaign against ATS as applied to TNCs[50] and succeed in a total repeal of ATS by Congress[51] without any substitute, and all litigation thereunder is barred from that time on, or a bench of newly appointed Supreme Court Justices adopts a narrow reading of ATS which renders corporate human rights litigation difficult or impossible under ATS, litigation in U.S. forum will not stop as long as its plaintiff-amicability is protracted and the U.S. legal, economic, political, and military hegemony sustain. The availability of juries and the possibility of extensive discovery combined with the option of punitive damages make the U.S. a preferable legal forum for any plaintiff.[52] The human rights community will attempt and find other paths to compensate for the lack of a functioning legal order elsewhere in the world, e.g., through reliance on ordinary torts law,

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[50] Compared to the first wave of litigation, the second wave has provoked heavy opposition from the business community within and outside the United States. On the lobbying efforts by various influential business associations against ATS, *see* Paul R. Dubinsky, "Justice for the Collective: The Limits of the Human Rights Class Action", 102 *Mich. L. Rev*. 1152, 1186 (2004) involving the International Chamber of Commerce and the U.S. Council for International Business; Marjorie Cohn, "Human Rights: Casualty of the War on Terror", 25 *T. Jefferson L. Rev*. 317, 330 (2004) on the National Foreign Trade Council; Terry Collingsworth, "Separating Fact from Fiction in the Debate over the Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations", 37 *U.S.F. L. Rev*. 563, 564 (2003) on USA Engage and the National Foreign Trade Council. *See also* Brief for the Nat'l Foreign Trade Council *et al.* as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004) (No. 03–339).

[51] On 18 October 2005, Senator Diane Feinstein introduced the Alien Statute Reform Act. After fierce criticism from the human rights community, she withdrew her draft within less than one week. Her proposal restricted liability to direct participants and required a specific intent to commit the alleged tort. For details on the proposal, *see* Anthony Sebok, "Senator Feinstein's Now-Withdrawn Statute Limiting Non-Citizens' Tort Claims", 31 October 2005, *available at* http://writ.lp.findlaw.com/sebok/20051031.html (accessed 16 September 2006).

[52] On the advantages of the U.S. legal forum, *see* Chapter Eleven: Forum Non Conveniens.

etc. It is clear that as long as great injustices blossom with impunity in this world, the pressure will not disappear.[53] Moreover, so far, corporate human rights litigation under ATS as such (without ultimate award for plaintiffs) combined with protests and consumer campaigns has shown positive effects on TNCs veering away from a "business as usual" attitude in areas with a potential for severe human rights violations due to extensive media coverage and its impact on consumers' behavior.[54]

[53] On new possible strategies for the human rights movement, *see* Joseph, *supra* note 8, 151–52.

[54] As an example of the move away from the "business as usual" attitude, see the case study on Royal Dutch/Shell in Lothar Rieth & Melanie Zimmer, *Transnational Corporations and Conflict Prevention: The Impact of Norms on Private Actors* 19–29 (2004).

Part II
International Law Covered

Chapter One

Actionability Standards

I. *Introduction*

ATS as codified in 28 U.S.C. § 1350 provides that district courts shall have "jurisdiction of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States."[1] Therefore, the first issue that a federal court deciding ATS claims needs to address is what standard should be employed to determine which torts are actionable under ATS. Over the years, various standards with different legal and practical implications for litigation against TNCs emerged and spread.

This chapter examines the various proffered standards in determining the torts which are implementable under ATS.[2] Part II presents standards developed and shaped to carve out those norms of customary international which are actionable under ATS in the aftermath of the *Filártiga v. Peña-Irala*[3] decision of the Court of Appeals for the Second Circuit.[4] Part III determines

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[1] Oliver Ellsworth, the principal drafter of the Judiciary Act establishing a judicial federal system in the United States, formulated ATS in its draft with the following words: "[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where a foreigner sues for a tort only in violation of the law of nations or a treaty of the United States." This clause was adopted by the First Congress as part of the Judiciary Act, with one exception: the term "foreigner" was substituted by the term "alien". In ATS's history, its wording was amended three times, merely for aesthetic reasons. *Cf.* William R. Casto, "The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations", 18 *Conn. L. Rev*. 467, 468 (1986). The current version of ATS emerged when the clause was integrated in 28 U.S.C. § 1350. *Cf. id.*

[2] E.g., in the *Unocal Case* involving the construction of a gas pipeline in Myanmar by the California-based Unocal Corporation, the company's lawyers argued that ATS applies exclusively to *jus cogens*. *See Doe v. Unocal*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) and II.C. below. On the further development of the case law from *Filártiga* to *Sosa*, *see* Beth Stephens *et al., International Human Rights Litigation in US Courts* 48–54 (2008).

[3] 630 F.2d 876, 887 (2d Cir. 1980).

[4] Most scholars and judges agree that ATS should be interpreted narrowly to exclude certain categories of international law. William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'", 19 *Hastings Int'l & Comp. L. Rev*. 221 (1996)

the guidance given to lower courts by the majority of the Supreme Court in the case of *Sosa v. Alvarez-Machain*.[5]

II. *Possible Standards to Determine Actionable Norms*

The uncertainty over the exact meaning of ATS is fuelled by two facts. First, the lack of legislative record over its passage: ATS was enacted in section 9 of the Judiciary Act of 1789 by the First Congress, and there is no reported discussion over it.[6] Second, after its original enactment, ATS afterwards lapsed largely into disuse for almost two centuries.[7]

A. *Customary International Law-Standard*

In the case *Abebe-Jira v. Negewo* involving the complaint of a victim of the so-called "red terror" of the "Dergue" military dictatorship ruling Ethiopia in the mid-1970s against one of her torturers, the Court of Appeals for the Eleventh Circuit went on to explain that it "read the statute as requiring no more than an allegation of a violation of the law of nations in order to invoke § 1350."[8] Similarly, in its judgment in *Xuncax v. Gramajo* involving an action by citizens of Guatemala against their former Minister of Defense in relation to injuries imposed by the military forces, the U.S. district court for the District of Massachusetts stressed that "[a]ll the statute requires is that an alien plaintiff allege a 'tort' was committed 'in violation' of international law or a treaty of the United States."[9] Indeed, at first sight, one may be intuitively inclined to interpret ATS literally since the wording of ATS requires nothing more and nothing less than a violation of (a treaty or) the law of nations. Under this view, every violation of customary international

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constitutes a remarkable exception. Disagreement exists, however, on which standard should be employed to determine the torts actionable under ATS from those which are not. See the discussion under II. Until the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), a myriad of diverging and complementary views on the appropriate criteria for the determination of which wrongs are open to litigation under ATS flourished.

[5] 124 S. Ct. 2739.

[6] Peter Schuyler Black, "Kadic v. Karadzic: Misinterpreting the Alien Tort Claims Act", 31 *Ga. L. Rev*. 281, 281–82 (1996). Its wording is indeterminate and provides only very little guidance. Black speaks of the "cryptic wording" of ATS. Judge Friendly even remarked that ATS is "a legal Lohengrin;…no one seems to know whence it came." *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

[7] *See* Casto, *supra* note 1, at 467–68.

[8] 72 F.3d. 844, 847 (11th Cir. 1996).

[9] 886 F. Supp. 162, 180 (D. Mass. 1995).

law, which is based on two constituent elements, state practice combined with the conviction that the practice flows out of binding legal obligations (*opinio juris vel necessitatis*), both of them being considered necessary to amount to a binding rule,[10] should be sufficient.[11] One may even argue that any other reading would amount to a refusal by the court to exercise jurisdiction and a rejection of the purpose set by Congress in enacting the law.[12] Yet, while this stance may be promising at first sight, a second look gives rise to doubts. One may ask, why would the First Congress have authorized suits in federal courts financed by U.S. taxpayers to allow, for example, the enforcement of regional customary international law in other parts of the world with no connection to the U.S. and in respect of rules which were, in a comparable situation, not equally applicable to the U.S. and its counterparts? The answer to this question shows that a literal reading of the wording of ATS runs afoul. And in practice, no single court, despite some rhetorical assertions such as in *Abebe* or *Xuncax*, ever seriously considered the actionability of every single norm of international law.[13]

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[10] *See* Rudolf Bernhardt, "Customary International Law", in I (2) *Encyclopedia of Public International Law* 898, 899 (Rudolf Bernhardt ed., 1992). *The Restatement (Third) of the Foreign Relations Law of the United States ("Restatement")* defines customary international law as "a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement*, § 102(2). According to the comments, the objective element – state practice – embraces "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example, in organizations such as the Organization for Economic Cooperation and Development". *Id.*, § 102, comment (b). Even inaction can amount to practice of State if it constitutes acquiescence. *Id.* The activity must be "general and consistent" although not universal. *Id.* As for the subjective element – *opinio iuris sive necessitas* – the comment declares that "explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; opinio juris may be inferred from acts or omissions." *Id.*

[11] This intuitive approach to the interpretation of ATS is also discernable in Judge Reinhardt's Concurring Opinion in *Doe v. Unocal Corp.*, 395 F.3d. 932, 964 (9th Cir. 2002) where he refuses to discuss the possible *jus cogens* status of forced labor under international law.

[12] The duty to exercise jurisdiction is stressed in the opinion of Justice Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789–91 (D.C. Cir. 1984) saying that

> to the extent that Judge Bork rejects the *Filártiga* construction of section 1350 because it is contrary to his perception of the appropriate role of courts, I believe he is making a determination better left to Congress. It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute. If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions "exacerbate tensions" and should not be heard.

[13] In *Abebe-Jira*, 72 F.3d 844, as well as in *Xuncax*, 886 F. Supp. 162, plaintiffs alleged the most severe human rights violations.

B. *Definable, Universal, and Obligatory-Standard*

In the celebrated *Filártiga v. Peña-Irala* decision, the Court of Appeals for the Second Circuit neither took the position that every norm of customary international law should suffice to vest jurisdiction under ATS nor held that federal courts enjoy a broad discretion in fashioning new claims under ATS based on current-day international law norms. Instead, it required:

> It is only where the nations of the world have demonstrated that the wrong is mutual, and not merely of several concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.[14]

Writing for the court, Judge Kaufman further stressed the need for "universal renunciation in the modern usage and practice of nations"[15] that the international wrong must "command the general assent of nations",[16] that "no government has asserted a right to torture its own nationals",[17] and that the prohibition was "clear and unambiguous".[18] Moreover, it explained the historical fact of ATS's neglect in litigation and jurisprudence on the grounds that plaintiffs in previous cases were unable to rely on "well-established, universally recognized norms of international law".[19] In doing so, while the Second Circuit did not explicitly rule on which specific torts fall within ATS, it laid down a general framework as guidance for future ATS cases.[20]

In a frequently cited article published in the Harvard International Law Journal, Jeffrey M. Blum and Ralph G. Steinhardt reviewed the *Filártiga v. Peña-Irala* decision.[21] Blum and Steinhardt developed a three-part test to determine other rights actionable under ATS wherein the prohibited conduct must be (a) "definable and identifiable as a tort committed by individuals"; (b) "core norms must be textually obligatory"; and (c) "universal, so that derogations are not defended as 'exercises of legitimate political diversity'."[22] The

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[14] 630 F.2d 876, 888 (2d Cir. 1980).

[15] *Id.* at 883.

[16] *Id.* at 881.

[17] *Id.* at 883–84.

[18] *Id.* at 888.

[19] *Id.*

[20] It held: "[i]nternational law confers fundamental rights upon all people vis-à-vis their governments. While the ultimate scope of those rights will be subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them." *Id.* at 885.

[21] Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala", 22 *Harv. Int'l L.J.* 53, 88 (1981).

[22] *Id.* at 88–89.

Blum/Steinhardt test found its path into jurisprudence in the case *Tel-Oren v. Libyan Arab Republic*, a dispute decided by the Court of Appeals for the District of Columbia in 1984 involving a massacre perpetrated by Palestine Liberation Organization members on bus passengers and passers-by on a highway to Tel Aviv in Israel.[23] After citing the article and *Filártiga v. Peña-Irala*, Judge Edwards declared that "commentators have begun to identify a handful of heinous actions – each of which violates definable, universal and obligatory norms."[24] Three years later, in *Forti v. Suarez-Mason* involving claims against a former Argentine military general, Judge Jensen used this formulation of the test pointing to *Tel-Oren and Filártiga*.[25] Thus, a new test to restrict the application of ATS was born.

Since then, this standard became the most popular one followed by the great majority of the courts, inter alia, the Ninth Circuit.[26] In effect, the standard

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[23] 726 F.2d 774. The facts giving rise to the dispute are: In March 1978, 13 heavily armed members of the Palestine Liberation Organization ("PLO") landed by boat in Israel and set up a scenario of destruction along the highway connecting Haifa to Tel Aviv. Their mission was to exercise pressure on the Israeli government to release PLO members incarcerated in Israel. In the pursuit of such goal, they seized two civilian buses, a taxi, and a passing car, took hostages, tortured, shot, and murdered passengers as well as passers-by. When finally stopped by a police barricade after a shoot-out with the police, the gunmen blew up themselves and the bus with grenades. Thirty-six people, mainly Israelis, but also including Americans and a Dutch were killed, 12 of whom were children, and 87 people were wounded. The plaintiffs, the survivors and the representatives of those murdered, filed a suit for compensatory and punitive damages in a federal district court. *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981). Plaintiffs named as defendants the Libyan Arab Republic, the PLO, the National Association of Arab Americans, and the Palestine Congress of North America. The district court dismissed the ATS claims against the PLO for lack of subject matter jurisdiction and for being barred by the statute of limitations. *Id.* at 550–51. The court further held that the pleadings in regard of the Palestine Information Office and the National Association of Arab Americans are too insubstantial and that jurisdiction over Libya is barred by the Foreign Sovereign Immunities Act. *Id.* Accordingly, the case was dismissed in toto.

[24] 726 F.2d at 781.

[25] *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539–40 (N.D. Cal. 1987). In *Forti*, an action based on ATS was brought by two Argentinean citizens residing in the United States alleging torture, murder, and arbitrary detention.

[26] *See In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). However, the difference with those who proclaim that violations of international law in general should fall within the reach of ATS should not be overstated, particularly in terms of practical differing results. Quite often, courts which rely on the stricter "definable, universal and obligatory test" simultaneously refer to *Restatement* § 702, with the heading "Customary International Law of Human Rights". *See Tel-Oren*, 726 F.2d at 781. This shows that the difference between the two standards is one of degree rather than of exclusivity.

The District Court for the District of Massachusetts in the above-mentioned *Xuncax* case, held that the "qualifications essentially require that 1) no state condone the act in question

restricted ATS claims to serious and outrageous violations of international law.[27]

C. Jus Cogens-*Standard*

Before the U.S. Supreme Court rendered its decision in *Sosa*, the development of ATS interpretation has not stopped at this point. Some courts were willing to go further in erecting barriers to the application of ATS declaring that only *jus cogens* norms are actionable.

Jus cogens norms take the first, highest, and most prominent rank over all rules of international law. The Vienna Convention on the Law of Treaties refers to them as "a peremptory norm of general international law" defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[28] Accordingly, by definition, States are bound by *jus cogens*

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and there is a recognizable 'universal' consensus of prohibition against it; 2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; 3) the prohibition against it is non-derogable and therefore binding at all times upon all actors." 886 F. Supp. at 184. The last criterion shows that this court was already willing to require *jus cogens* as a standard to determine torts under ATS.

For a more recent application of the *Filartiga* approach, *cf. Doe v. Qi*, 349 F. Supp. 2d 1258, 1277 (N.D. Cal. 2004); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1144–45 (E.D. Cal. 2004); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1294 (S.D. Fla. 2003); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1131 (C.D. Cal. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at 4 (S.D.N.Y. 2002); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1251 (S.D. Fla. 1997).

[27] *See infra* the evaluation of ATS jurisprudence presented in Chapter Two: International Criminal Law; Chapter Three: Civil and Political Rights; Chapter Four: Labor Standards; Chapter Five: Environmental Destruction.

[28] Vienna Convention on the Law of Treaties, art. 53, 23 May 1969, 1155 U.N.T.S. 332, which provides:

> 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 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.

The wording suggests a positivist, as opposed to a natural law-based, understanding of the concept of *jus cogens* since it requires recognition. *Restatement* comment k to § 102 states that "[s]ome rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them."

even if they have not consented.[29] In ATS litigation, the topos emerged from a reading of the *Siderman de Blake* case by later courts.[30] In this case involving an action against Argentina filed by victims of the military junta that ruled the country after the overthrow of President Maria Estela Peron, the Ninth Circuit classified the proscription on torture as *jus cogens* norms.[31] In *Trajano v. Marcos*, involving allegations of wrongful death against the daughter of the former Philippine president, the Ninth Circuit approved the finding of the district court that a violation of a *jus cogens* norm vests jurisdiction on the courts under ATS.[32] Although a mere dicta in the judgment's last sentence,[33] the judgment is open to an interpretation that only peremptory norms are actionable under ATS.[34]

D. *Wrongs Related to a Lawful Prize-Standard*

In addition, legal literature has also added to the discussion on possible standards. In his article *A Tort Only in Violation of the Law of Nations*, prominent law professor Joseph Modeste Sweeney developed an equally narrow standard like the one of *jus cogens*.[35] The cornerstone of his conception is ATS's stress

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[29] *See* Vienna Convention on the Law of Treaties, *id.*

[30] *Siderman de Blake v. Republic of Argentina*, 965 F.2d. 699 (9th Cir. 1992).

[31] *Id.* at 714. The circuit court reversed the district court's judgment and remanded the case for further proceedings because it found the plaintiffs to have presented sufficient evidence of a waiver of Argentina's immunity.

[32] *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d. 493, 503 (9th Cir. 1992).

[33] The reason for this is that the real issue answered was whether ATS was a mere jurisdictional statute not providing a cause of action, not even for *jus cogens* violations.

[34] See also the above-mentioned *Xuncax* case where the court required a norm "binding at all times upon all actors". 886 F. Supp. at 184. More current pronouncements, however, do not support this approach. In *Papa v. United States,* 281 F.3d 1004 (9th Cir. 2002), the Ninth Circuit held that a plaintiff must demonstrate a specific, universal, and obligatory norm of international law as part of an ATS claim. *Id.* at 1013. Moreover, in *Doe v. Unocal Corp.*, the Ninth Circuit further clarified that a specific, universal, and obligatory norm is actionable under ATS whether it amounts to *jus cogens* or not. 395 F.3d at 945, n. 15. *See also Xuncax*, 886 F. Supp. at 184 ("binding at all times upon all actors"); *National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D. Cal. 1997). This interpretation would not bar ATS litigation against TNCs totally. However, it would definitely restrict it substantially.

[35] 18 *Hastings Int'l & Comp. L. Rev.* 445 (1991). Professor Sweeney himself admits the provocative nature of his reading and explains that he would not have pursued such a stony course at an earlier stage of his academic career.

on the restriction on "all suits brought . . . for a tort only"[36] which he interprets against the background of the 18th century practice of prize law. In his view, only wrongs related to a lawful prize are actionable under ATS.[37]

Historically, prize law is the branch of international law which is concerned with the capture of (enemy) property at sea, and sovereign States were permitted to capture enemy ships and cargoes.[38] With regard to neutral nations, the right to capture implied the right to visit and search on the high seas all neutral merchant ships in order to verify the neutrality of the cargo and capture any cargo in case it could be assigned to enemy nations or nationals.[39] However, in the exercise of the right to visit under the law of prize, it was outlawed to do injury to person or property aboard neutral ships.[40] Such right to capture played a significant role in the War of Revolution because after the Continental Congress granted authority to private merchants to operate armed ships to control the high seas and exercise the right to capture, American merchants willingly filled their pockets at the enemy's expense as they were assigned the lion's share of the profits.[41]

After an impressively extensive and compound research of cases on prize law, Professor Sweeney concludes that ATS merely applies to prize cases in which the legality of the prize as such is not an issue but wrongs committed in the course of such prize. He puts ATS in a power-struggle between admiralty courts and state courts.[42]

Before the entry into force of the U.S. Constitution in 1789, if the legality of the capture was not an issue but the suit was only for damages based on wrongs related to the capture, Pennsylvanian courts asserted jurisdiction as common law courts based on the argument that in such an instance, there was no prize dispute and thus, no admiralty court competent over the dispute.[43]

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[36] See the full wording of 28 U.S.C. § 1350: "The district courts shall have 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."

[37] Sweeney, *supra* note 35, *passim*.

[38] D.H.N. Johnson, "Prize Law", in III (2) *Encyclopedia of Public International Law* 1122 (Rudolf Bernhardt ed., 2000). Naturally, prize law is irrelevant to the current business activities of TNCs.

[39] *Id.* at 1126. *See generally* Ondolf Rojahn, "Ships, Visit and Search", in IV (1) *Encyclopedia of Public International Law* 409 (Rudolf Bernhardt ed., 2000).

[40] Sweeney, *supra* note 35, at 447.

[41] In 1776, according to the United States Naval Academy, 2980 British vessels were captured during the War Faculty of the United States Naval Academy. *American Sea Power since* 1775 8 (Allan Westcott ed., 1947) cited in Sweeney, *supra* note 35, at 451.

[42] Sweeney, *supra* note 35, at 482.

[43] *Id*. at 478–81.

According to Professor Sweeney, Oliver Ellsworth, the principal drafter of the Judiciary Act of 1789 of which ATS historically formed part of, was well aware of this power struggle and did not want to challenge the holding of the state courts in principle.[44] However, in section 9 of the Judiciary Act, he had assigned exclusive jurisdiction to federal courts in admiralty cases.[45] Given the inherited law of England from which the mentioned state courts had deviated and which accorded all disputes incidental to a prize or capture to admiralty courts, section 9 would have undermined the understanding of the Pennsylvanian courts.[46]

In Professor Sweeney's view, Ellsworth did not want to contest the competence of common law courts of states when the suit was only for reparation in damages of a wrong related to a capture.[47] Consequently, while he maintained exclusive federal jurisdiction over the legality of a capture as prize and over any claim for reparation in damages of a wrong related to the capture in the case, when the suit was "only" for the reparation in damages of a wrong related to a capture without questioning the legality of the capture as such, he planned to allow the continuation of the jurisdiction of the (state) common law courts over such a suit with the only exception in respect of suits brought by foreigners, in which case, federal courts should have concurrent jurisdiction under ATS.[48]

The immediate question that arises is why Ellsworth did not specifically formulate "tort in violation of the law of prize or a treaty of the United States dealing with prize". In response to this question, Professor Sweeney claims that at the time, no reason existed for Ellsworth to be so specific since the struggle between the courts on prize disputes must have been well-known to the members of the new Congress and only the law of prize as part of the law of nations provided for private causes of action at the time.[49] In support of his understanding, particularly with respect to ATS's treaty alternative, Professor Sweeney points to four treaties of Amity and Commerce dealing with prize issues which were in effect in 1789 and which granted to aliens a private cause of action for the reparation of wrongs committed by Americans in violation of the treaties.[50]

While Professor Sweeney's approach is deeply embedded in the law of prize and well founded in the genesis of the American nation, it cannot be accepted

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[44] *Id.* at 482.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 476.
[50] *Id.*

without a substantial disregard of the other parts of the wording of ATS. One has to read "tort" as a "tort under the law of prize" to agree with his final interpretation. Under this view, mesmerizing as his understanding is, the text of ATS is distorted by overemphasizing the word "only" and underestimating the remaining wording of ATS.

A more realistic explanation for the inclusion of the word "only" in ATS can be seen in the light of the still tense relations between the United States and Great Britain in the post-revolutionary war period. A provision in the Definitive Treaty of Peace between the United States and Great Britain concluding the Revolutionary War stipulated that "[c]reditors on either Side shall meet with no lawful Impediment to the Recovery of the full value in Sterling Money of all bona fide Debts heretofore contracted".[51] Given the strong and persistent rejection of anything British in the post-war period, British merchants had a difficult time in recovering debts from U.S. debtors in state courts.[52] In this situation, the federal Judiciary Act of 1789 – of which ATS also formed part of – stipulated a $500 limit on federal diversity jurisdiction. This constituted a blatant attempt to further deny British subjects access to impartial federal courts in the overwhelming majority of cases since the amount of $500 was significantly high at that time.[53] Without ATS's restriction to actions in tort only, this attempt would have been consigned to failure because at the time, the "law of merchants" in the meaning of private international business transactions was seen as the third pillar of the law of nations, together with the regulation of state relations (first pillar) and admiralty law (second pillar).[54] Therefore, in court practice, Professor Sweeney's approach was, by and large, not even taken into consideration.[55]

E. *Cause of Action under International Law-Standard*

The narrowest of all interpretations of ATS reads the statute as requiring a cause of action under international law. Judge Bork of the Court of Appeals for the District of Columbia took this position in 1984 in the aftermath of

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[51] 3 September 1783, 8 Stat. 80, T.S. No. 104.

[52] Casto, *supra* note 1, at 507–08.

[53] *Id.*; Dodge, *supra* note 4, at 254–55.

[54] Kenneth C. Randall, "Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute", 18 *N.Y.U. J. Int'l L. & Pol.* 1, 28–31 (1985); Casto, *supra* note 1, at 507–08; Dodge, *supra* note 4, at 254. Compare the lectures of James Wilson, *Lectures on Law, reprinted in The Works of James Wilson* 69, 279 (Robert G. McCloskey ed., 1967) *cited in* Casto, *supra* note 1, at 505 n. 210.

[55] Although in *Sosa*, the Supreme Court briefly referred to Sweeney's article (without any discussion) and other legal history researches undertaken in respect of ATS. *See* 542 U.S. 718.

Filártiga v. Peña-Irala in the ATS case *Tel-Oren v. Libyan Arab Republic*, where he was unable to find subject matter jurisdiction under ATS.[56] His reasoning centers on two arguments. First, Judge Bork argued that in order to successfully bring a claim under ATS, the showing of a violation of international law is not sufficient.[57] Instead, plaintiffs need to rely on an express cause of action under the law of nations, i.e., their right under international law to enforce their claims under municipal law.[58] In his view, ATS, as part of the Judiciary Act of 1789 establishing the federal judicial system, is a mere jurisdictional statute neither providing explicitly or impliedly for a cause of action nor carrying a congressional recognition of possible causes of actions to be created by courts.[59]

Since customary international law typically does not address the enforcement of individual rights in the domestic sphere,[60] the consequence of such interpretation is the practical nullity of ATS from the moment it was enacted. Considering the inappropriateness of such result given the fact that international law under the prevailing view is still under-developed and rarely assigns an enforceable and well-shaped secondary right to compensation to an individual against a State for a breach of a primary human right,[61] Judge Bork pressed forward his second argument that ATS was intended to apply only to torts that violated the law of nations in 1789.[62] In other words, Judge Bork averred that in the absence of international law providing for an express cause of action, ATS solely incorporated the law of nations as it stood in 1789. In determining the relevant historic torts, Judge Bork relied on the classic writer William Blackstone.[63] In 1789, the year ATS was enacted, Blackstone listed in his Commentaries of the Laws of England "as the principal offences [committed by individuals] against the law of nations, animadverted on as such by the municipal laws of England… 1. [v]iolations of safe-conduct; 2. [i]nfringements of the rights of ambassadors; and 3. [p]iracy".[64]

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[56] 726 F.2d at 808.

[57] *See* Judge Bork's Concurring Opinion in *Tel-Oren*, 726 F.2d at 808–11.

[58] *Id.*

[59] *Id.* at 811.

[60] *See* Rudolf Dolzer, "The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945", 20 *Berkeley J. Int'l L.* 296 (2002).

[61] *See generally* Martin Seegers, *Das Recht auf Wiedergutmachung* (2005).

[62] 726 F.2d at 813.

[63] *Id.* at 813–14.

[64] 4 *William Blackstone, Commentaries of the Laws of England* 67 (1854), *cited in Tel-Oren, id.* Since the concept of human rights did not exist yet at that time, Judge Bork's reading excludes the possibility of ATS being a human rights enforcement mechanism.

Due to the fact that Judge Bork's colleagues on the bench equally denied subject matter jurisdiction although for other reasons, the decision of the district court, which had dismissed the action in toto, was affirmed.[65]

The major flaw of Judge Bork's approach is the total disregard of the fact that historically, the line of separation between international law on one side and domestic law on the other was not as distinctively and positivistically drawn in English and U.S. 18th century legal thinking as it is true today.[66] For example, a leading legal historian depicts the then prevailing view that domestic law incorporates international law and that the former provides remedies for violations of the latter.[67]

In practice, Judge Bork's approach remained singular and was not followed by courts.[68]

III. *The Supreme Court's Decision in* Sosa

Against this background of a great variety of proposed standards, both sides, human rights activists and the multinational business community, eagerly awaited the first ruling of the highest court of the United States on the interpretation of ATS. Less than four years after *Filártiga v. Peña-Irala*, Judge Edward of the Second Circuit had already urged in vain the Supreme Court to provide guidance in *Tel-Oren v. Libyan Arab Republic*.[69] Yet, so far, despite

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[65] While all judges of the Court of Appeals agreed that the case should be dismissed, the court was deeply fractured on how to justify the dismissal. Judge Edwards was willing to follow *Filártiga v. Peña-Irala*, the decision of the Second Circuit which had revived ATS in 1980, but categorized torture perpetrated by a national liberation movement as private in nature and found a lack of consensus on the liability of non-state actors under the law of nations. 726 F.2d at 791–92. On torture, *see infra* Chapter Three: Civil and Political Rights. In respect of terrorism as a tort under ATS, Judge Edwards held that considering the split among nations on the legitimacy of such action, terrorist attacks do not amount to an infringement of the law of nations. *Id.* at 795–96. Judge Robb argued that the dispute constituted a nonjusticiable political question. *Id.* at 823–27.

[66] Casto, *supra* note 1, at 480.

[67] *See, e.g.*, *id*.

[68] See the general and representative critic by Anthony D'Amato, "What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations Is Seriously Mistaken", 79 *Am. J. Int'l L.* 92 (1985).

[69] 726 F.2d at 775. Judge Edwards declared in the introductory part of the decision:

> This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the "law of nations". As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

Id.

more than 100 court decisions on ATS, the Supreme Court always denied the writ of certiorari with regard to the few ATS cases that had reached the Circuit level.[70] It was only in 1989 in *Argentine Republic v. Amerada Hess Shipping Corp.* did the Supreme Court consider an ATS claim but dismissed the case on sovereign immunity grounds holding that the Foreign Sovereign Immunities Act bars almost all suits against foreign sovereigns regardless of cause of action.[71]

Finally, on 29 June 2004, just a day less of 24 years after *Filártiga v. Peña-Irala*, the United States Supreme Court handed down its judgment in *Sosa v. Alvarez-Machain* where the court considered for the first time the question of which standard should be employed in determining (new) torts actionable under ATS.[72] The underlying facts of this dispute had already faced the Supreme Court in 1992.[73]

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[70] *See Tel-Oren v. Libyan Arab Republic, cert. denied*, 470 U.S. 1003 (1985); *Kadic v. Karadzic, cert. denied*, 116 U.S. 2524 (1996); *Abebe-Jira v. Negowo, cert. denied*, 519 U.S. 830 (1996).

On two occasions, the Supreme Court cited ATS as a statutory example of congressional intent to provide federal jurisdiction on questions with likely effect on foreign relations. *See Ex Parte Quirin*, 317 U.S. 1, 27–30 n. 6 (1942); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964).

[71] 488 U.S. 428, 434–35 (1989).

[72] 124 S. Ct. at 2754. As a prominent corporate human rights lawyer stated, factually it was not the kind of case a human rights lawyer would wish to be brought to the Supreme Court to finally determine ATS's potential to enforce international law. It was not a corporate case involving breathtakingly outrageous and ruthless business conduct in a foreign far-flung developing country. *Cf.* Beth Stephens, "Corporate Liability Before and After Sosa v. Alvarez-Machain", 56 *Rutgers L. Rev.* 995, 996 (2004).

The court approached the issue by asking first whether ATS was a jurisdictional statute only or whether it created or authorized the courts to recognize any particular right of action. For a discussion of *Sosa*, *see* Ehren J. Brav, "Opening the Courtrooms' Doors to Non-Citizens: Cautiously Affirming Filártiga v. Peña-Irala for the Alien Tort Statute", 46 *Harv. Int'l L.J.* 265 (2005); Mark K. Koller, "Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain", 2004 *Cato Sup. Ct. Rev.* 209 (2004); Eugene Kontorovich, "Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111 (2004); Julian Ku & John Yoo, "Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute", Hofstra University Legal Studies Research Paper No. 04–26, UC Berkeley Public Law Research Paper No. 652141, *Sup. Ct. Rev.* 153 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=652141 (accessed 18 September 2006); Edward T. Swaine, "The Constitutionality of International Delegations", 104 *Colum. L. Rev.* 1492 (2004); J. Harvie Wilkinson III, "Our Structural Constitution", 104 *Colum. L. Rev.* 1687 (2004); George N. Barrie, "The Alien Tort Statute – The US Supreme Court Finally Speaks", 30 *S. Afr. Y.B. Int'l L.* 221 (2005).

[73] *See United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

A. *Factual Background*

The plaintiff Alvarez, a Mexican physician, allegedly prolonged the life of a Mexican agent of the United States Drug Enforcement Agency ("DEA") in 1985 in order to facilitate torture and interrogation by Mexican druglords.[74] Despite the issuance of a warrant for his arrest by the U.S. District Court for the Central District of California, the request and negotiations by the DEA with the Mexican Government for support in bringing the plaintiff to justice in the United States failed, and the plaintiff was then abducted by Mexican nationals, including defendant Sosa, hired by officials of the DEA and brought to the United States where he was arrested.[75] In custody, he moved to dismiss the indictment arguing that his kidnapping was "outrageous governmental conduct" and in violation of the extradition treaty between the United States and Mexico.[76] The district court followed these arguments, as did the Ninth Circuit, but the Supreme Court reversed holding that the fact of a "forcible abduction" did not affect the jurisdiction of the court once the plaintiff was in the United States.[77] Accordingly, the case went to trial which was terminated with Alvarez's acquittal in 1992.[78]

After his return to Mexico, Alvarez started a civil proceeding seeking damages. He sued, inter alia, Sosa, one of the Mexican non-government officials who kidnapped him.[79] In this respect, the district court found that there is no credible evidence of any kind of torture and that he could not collect

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[74] 124 S. Ct. at 2746.

[75] *Id*.

[76] *Id*.

[77] *Cf*. 504 U.S. at 670. The decision received a tremendous and predominantly critical review. *See generally* William J. Aceves, "The Legality of Transborder Abductions: A Study of United States v. Alvarez-Machain", *Sw. J. L. & Trade Am*. 3 (1996) 101–78; Paul Michell, "English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain", 29 *Cornell Int'l L. J*. 383 (1996); Myint Zan, "US v. Alvarez-Machain 'Kidnap' Case Revisited: Case Note concerning the Decision of the US Supreme Court, 15 June 1992, 112 S. Ct. 2188 (1992)", 70 *Austl. L.J*. 239 (1996); Carlos D. Espósito, "Male captus, bene detentus: A Proposito de la Sentencia del Tribunal Supremo de Estados Unidos en el Caso Alvarez-Machain", 62 *Universidad Buenos Aires Facultad de Derecho y Ciencias Sociales: Lecciones y ensayos* 17 (1995); *United States vs. Álvarez Machain* (Alonso Gómez-Robledo Verduzco *et al.*, eds., 1993).

[78] 504 U.S. 655.

[79] 124 S. Ct. at 2747. He also sued the United States and some federal employees. The parties fought the case in different venues involving complex issues such as the ATS and the related Federal Tort Claims Act which, other than ATS, waives U.S. sovereign immunity thereby allowing suits against the U.S. government. He also sued some federal employees involved but the U.S. exercised its right to substitute itself for its employees. *See* Stephens, *supra* note 72, at 997.

damages for his detention after he was brought to the territory of the United States. Thus, the only remaining claim concerned the 24 hours of detention on Mexican territory prior to his forced transportation to the United States. The district court awarded $25,000 against Sosa for arbitrary arrest and detention based on ATS.[80] Sosa appealed the judgment against him.[81] A panel of the Ninth Circuit affirmed the case against Sosa.[82] The full circuit, reviewing the case en banc, affirmed the decision in this respect.[83] As the United States was also a party to the dispute (on other grounds), the chances of getting a ruling on ATS from the Supreme Court were higher than usual, and indeed, the Supreme Court did not deny certiorari.[84]

Given the variety of standards offered before the Supreme Court, the views equally diverged as to the correct standard to determine those norms of international law which are actionable under ATS. With the support of the United States, Sosa argued a variation of Judge Bork's approach in *Tel-Oren* (which deemed a separate cause of action necessary under international law)[85] that ATS is a mere jurisdictional statute which requires an additional express cause of action enacted by Congress.[86]

B. *Interpretation Given by the Majority*

Within the Supreme Court, all nine justices, including those belonging to the minority, agreed that ATS, enacted as part of the Judiciary Act establishing the judicial system of the United States, is merely a jurisdictional statute which neither explicitly nor implicitly provides for a cause of action.[87]

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[80] The court dismissed the claims against the United States for false arrest under the Federal Tort Claims Act. The federal government is immune from suit for claims arising in a foreign country. *See* 28 U.S.C. § 2680(k). The question was whether an exception under the "headquarters" doctrine was applicable. The Ninth Circuit panel held so and was reversed by the Supreme Court in this respect.

[81] Alvarez appealed the decision to dismiss the claims against the U.S. government. For the complex procedural history of the case, *see* Stephens, *supra* note 72, at 997.

[82] However, it reversed the dismissal against the U.S. government. *Id.*

[83] As to claims against the U.S., the full circuit reaffirmed the decision of the district court. *Id.*

[84] For details of the complex case involving significant issues, *see supra* note 79.

[85] *See infra* Chapter One: Actionability Standards, II.E.

[86] 124 S. Ct. at 2754.

[87] *Id.* at 2755. The court argues with the original wording of ATS ("cognizance"), the nature of the Judiciary Act dealing (exclusively) with jurisdiction and at the time of the enactment, the generally known distinction between jurisdiction and cause of action. *Id.*

1. *Historic Authorization by Common Law*

The Supreme Court explained that at the time the First Congress enacted the ATS as part of the Judiciary Act of 1789, it assumed the power of district courts as common law courts to recognize private causes of action for certain torts in violation of the law of nations which was deemed a natural branch of common law at the time, just like in the case of the historic ATS paradigms of violations of safe conduct, infringements of the rights of ambassadors, and piracy.[88] Noting the difficulty of the task given the empty legislative record and the lack of consensus in the legal community on the original understanding of the First Congress in 1789, the Supreme Court was nonetheless able to point to an array of historic evidence to support its view:[89]

Firstly, in what may be labeled as ATS's "direct antecessor",[90] the Continental Congress in 1781, at the time the organ of the confederation of the former 13 American colonies (and later, founding states of the United States) which were at the time still politically unwilling to cede their freshly gained autonomy and independence from Great Britain to a true federal government, in addressing the need to redress infringements of the law of nations as a matter of foreign policy and lacking the power to institute legal proceedings itself, passed a resolution calling upon the states to provide "expeditious, exemplary and adequate punishment" for violations of the law of nations or a treaty of the United States by individuals.[91] While the resolution explicitly names four major categories of infringements, i.e., violation of safe conducts, acts of hostility in related cases, infractions of immunities of ambassadors and

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[88] All nine justices declared that "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". *Id*. at 2761. For the majority/minority divide, see below.

[89] A group of professors of federal jurisdiction and legal history filed an amici brief which argued that the First Congress intended to provide a federal forum for tort suits by aliens, understood such torts to be cognizable at common law with no further congressional action required, and meant for the district courts to have jurisdiction over all torts in violation of international law not being restricted to the law of nations of 1789 or those torts restricted to the territory of the United States. *See* "Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, Sosa v. Alvarez-Machain", reprinted in 28 *Hastings Int'l & Comp. L. Rev*. 99 (2005). The list of amici included Vikram Amar, William R. Casto, Sarah H. Cleveland, Drew S. Days III, David M. Golove, Robert W. Gordon, Steward Jaw, John V. Orth, Judith Resnik, and Anne-Marie Slaughter. In this respect, all nine Supreme Court justices agreed with the opinion stated in the Amici Curiae Brief. *See* William Casto, "Introduction: Brief of Amici Curiae", 28 *Hastings Int'l & Comp. L. Rev*. 95, 96 (2005).

[90] *Cf.* Casto, *supra* note 1, at 476.

[91] Continental Congress' Resolution of Nov. 23, 1781, 21 *J. Continental Congress* 1136–37 (1912) *reprinted in* Dodge, *supra* note 4, at 257–58.

other public ministers, and infractions of treaties to which the United States is a party, the list was in no way meant to be exclusive and referred to the specifically mentioned ones only as those violations of the law of nations which are most obvious.[92] Indeed, the resolution concludes with the recommendation to establish a tribunal in each state or, if already existing, to vest it with "the power to decide on offenses against the law of nations, not contained in the foregoing enumeration".[93] In addition to these criminal proceedings, the resolution further urged the states to institute civil proceedings in which damages could be awarded to any injured party against the tortfeasor and to the United States against the tortfeasor to refund the government for the victim's compensation.[94] In respect of the former, the resolution envisaged full-fledged tort liability covering the complete spectrum of infringements of international law not restricted to certain categories.[95]

Secondly, as the Supreme Court correctly pointed out,[96] in what became known as the Marbois Affair due to Continental Congress's lack of competence to react,[97] Chevalier de Longchamps, a French nobleman who, in 1784, threatened his countryman Consul General Marbois in the ambassador's home in Philadelphia and assaulted him two days later on the street. This assault received high public attention and is believed by many to have contributed to ATS's enactment.[98] Longchamps was ultimately indicted and convicted of the common law offense against the law of nations.[99]

Thirdly, violations of the neutrality rule contained in the Treaty of Amity with Great Britain by American citizens who supported the French

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id. Cf.* Dodge, *supra* note 4, at 227.

[96] 124 S. Ct. at 2757.

[97] In the Longchamps affair, Continental Congress had to explain that it had no power whatsoever to bring Marbois to justice as this power was not delegated to the federal power. *Cf.* Dodge, *supra* note 4, at 229. While the aristocrat was eventually convicted of a crime by the Pennsylvanian courts, many Federalists criticized the denial of efficient justice by Continental Congress as a matter of foreign policy. The event was subjected to such a degree of public scrutiny that Continental Congress felt the need to recommend the legislation for the punishment of persons who attack or insult the personnel of foreign powers to the states. Continental Congress' Resolution of Nov. 23, 1781, *supra* note 91, at 1137. Furthermore, in a similar event in 1788, a New York officer arrested one of the servants of Ambassador Van Berckel of the Netherlands. *Cf.* Dodge, supra note 4, at 229. He was sentenced by a state court to three months imprisonment for a violation of the law of nations. *See* Casto, *supra* note 1, at 494.

[98] *E.g.*, Dodge, *supra* note 4, at 229; Casto, *supra* note 1, at 494.

[99] *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784).

revolutionary cause by taking part in military operations overseas were similarly tried and indicted at common law.[100]

Fourthly, as the Supreme Court correctly remarked,[101] early interpretations of ATS further support the view that no further legislation was required to authorize suit and that no a priori restriction to certain classic paradigm torts existed.[102] A 1795 memorandum of U.S. Attorney General William Bradford unambiguously confirms a dynamic and flexible concept.[103] The opinion addressed legal issues related to the French plunder of a British slave colony in Sierra Leone in which United States citizens participated in contravention of the Treaty of Amity with Great Britain.[104] While the Attorney General was doubtful as to whether criminal proceedings could be successfully instigated against the perpetrators in respect of this extraterritorial misconduct, he was absolutely certain that any company or individual that incurred injuries in the plunder would have a remedy through a civil suit in United States federal courts based on ATS.[105] While his particular statement related to the violation of a treaty to which the United States was a party, Bradford's opinion assumed that ATS empowered courts with jurisdiction over any conduct punishable as common-law crimes.[106] Likewise, as pointed out by the Supreme Court, two early court proceedings in the 1790s in which the injured party raised ATS as a source of civil liability reveal the same understanding of the First Congress. In *Bolchos v. Darrel*, the court's reservations as to whether it possesses admiralty jurisdiction over a suit for damages initiated by a French privateer against the mortgagee of slaves on board a ship under British flag were dispelled with ATS providing jurisdiction.[107] In *Moxon v. The Fanny*, the court denied jurisdiction under ATS in cases in which damages and restitution of property of a vessel and its cargo is sought for since in the court's opinion, the suit "cannot be called one for a tort only".[108] Although less than one decade since its enactment had passed and the legal minds should have

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[100] *Cf.* Stewart Jay, "The Status of the Law of Nations in Early American Law", 42 *Vand. L. Rev*. 819, 825 (1989).

[101] 124 S. Ct. at 2759.

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] No proceedings were actually instigated.

[106] Casto, *supra* note 1, at 504.

[107] 3 F. Cas. 810, 810 (No. 1607) (D.C.S.C. 1795). District Judge Bee stressed that "as the 9th section of the judiciary act of congress…gives this court concurrent jurisdiction with state courts and circuit courts of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point". *Id.*

[108] 17 F. Cas. 942, 948 (No. 9895) (D. Pa. 1793).

been still fresh on the accurate scope of the provisions of the Judiciary Act, both judges maintained a stony silence on the necessity for supplementary legislation by Congress or the constraint on jurisdiction under ATS to a predetermined array of encroachments of international law. It is correct to assume with the Supreme Court that a need for a specific additional cause of action should have become visible in the judgments.[109] Based on this evidence, the Supreme Court concluded that the First Congress in 1789 "did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."[110]

As a consequence, in 1789, neither crimes nor their civil counterpart – torts under the law of nations – required a statutory basis, support, or even indication. Instead, both were deemed naturally cognizable by the courts at common law.[111] Accordingly, there was no need for the First Congress of the United States to stipulate an explicit cause of action, and more importantly, the First Congress did not restrict ATS to these torts which were already acknowledged at the time of its enactment even if the inability of state courts to protect and remedy attacks on foreign ambassadors may have led to its enactment as the newly born nation was dependent on the sympathies and friendship of European governments.[112]

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[109] 124 S. Ct. at 2759. Lastly, this assumed flexible comprehension of the First Congress would be in line with contemporary flexible concepts of the late 18th century. The wording of ATS in its original version can even be read to reverberate such understanding. It provided that "the district courts shall have…cognizance…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". Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76–77 (1789), *cited in* Dodge, *supra* note 4, at 224.

[110] 124 S. Ct. at 2758.

[111] Dodge, *supra* note 4, at 232.

[112] *See* Casto, *supra* note 1, at 491–93. Alexander Hamilton's statement in The Federalist (No. 80) is frequently cited in support of the First Congress's endeavour to please foreign nations by judicial means by providing for criminal and civil remedies in the event of mistreatments of aliens by American citizens:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

Id. at 500–01. *See also* Anthony D'Amato, "Comment, The Alien Tort Statute and the Founding of the Constitution", 82 *Am. J. Int'l L.* 62, 64–65 (1988), who explains that ATS was an important national security interest in 1789.

2. *Standard of Elevated Level of Specificity and Acceptance*

As to the exact standard to be employed to determine actionable torts resting on a present-day international norm under ATS, the majority in *Sosa* explicitly refused to promulgate a final test.[113] Yet, as indicated, the Supreme Court had explained the enactment of ATS with the "anxieties of the preconstitutional period"[114] of a young and relatively weak and unproven nation (with the notable exception of the Independence War), whose future survival still largely depended on a strict observance of international law as a precondition to friendly relations with the Great Powers in Europe.[115] Therefore, it took only a little step to draw from the historic evidence presented not only in respect of the pure jurisdictional nature of ATS but also with regard to the breadth of claims actionable thereunder. For the case at hand, the majority deemed it sufficient for the resolution of the case to enunciate that for the international norm to be actionable under ATS, it "must be accepted by the civilized world and defined with a specificity comparable to the features of 18th century paradigms".[116] Explaining the formulation further, the Supreme Court stated that courts should not accept claims for violations of any international law norm "with less definite content and acceptance among civilized nations than the historical paradigms" (such as piracy and attacks on ambassadors) which were well established at the time ATS was enacted.[117]

3. *Reasons for Narrow Interpretation*

While recognizing that an opening, however small, exists for courts to consider claims asserting new causes of action under ATS based on modern international law, the majority urged lower courts to acknowledge that "good reasons [exist] for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" under ATS.[118] The majority identified an array of factors contributing to such conclusion.

Firstly, in addition to the aforementioned historic background which similarly implies a narrow understanding, the court stressed the fact that at the time of the enactment of ATS, the prevailing view was that common law was discovered or detected by judges but not developed and shaped as it is understood nowadays.[119] Secondly and related to the first, the very first Congress enacted ATS on the understanding that torts are cognizable at general

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[113] 124 S. Ct. at 2765.
[114] *Id.*
[115] *Cf. id.*
[116] *Id.* at 2761.
[117] *See id.* at 2765.
[118] *Id.* at 2762.
[119] *Id.*

common law which was in its general form abolished by the Supreme Court in *Erie R. Co. v. Tompkin*.[120] Thirdly, precedents have constantly emphasized and reinforced the notion that the creation of a private cause of action is better left to the legislative bodies and not to the courts.[121] Fourthly, the Supreme Court stated that a broad judicial discretion could undermine the broad legislative and presidential discretion in managing foreign affairs.[122] Lastly, the court has no congressional mandate to seek out and define new claims under ATS and modern expressions of Congressional perception of judicial role do not support greater judicial inventiveness.[123] For all these reasons, the court urged lower courts to strictly subject the recognition of new ATS claims based on present-day international law to "vigilant doorkeeping."[124]

4. *Exact Meaning of New Standard*

Under the doctrine of *stare decisis*, it is clear that lower courts are obliged to to apply the formula given by the Supreme Court.[125] Yet, the issue that arises is what kind of guidance exactly was given by *Sosa* to lower courts with the standard of elevated specificity and acceptance among nations combined with the urging of lower courts to exercise judicial restraint. Due to the immense rhetorical assertions of the majority on the standard's narrowness, the test proposed by the Supreme Court appears straightforward, narrow, and clear-cut. Nevertheless, applying it may not be as simple as it looks. Only two standards discussed above are clearly no longer viable after *Sosa*: the additional express cause of action (under domestic or international law) standard as proposed by applicant Sosa and Judge Bork and the law of prize approach of Professor Sweeney.[126] Yet, as to how the new standard – if it is concrete enough to amount to an applicable test that can be employed by lower courts – exactly stands with respect to the other proposed standards is not fully clear although it is lucid that any sort of a too liberal reading of ATS has been precluded by the Supreme Court. And more importantly, to what extent the seemingly strict standard would restrict ATS litigation against corporate defendants (as was earlier expected to be the result) also remains to be seen and may be the subject of future interpretation.

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[120] 304 U.S. 64 (1938).
[121] 124 S. Ct. at 2762–63.
[122] *Id*. at 2763.
[123] *Id*.
[124] *Id*. at 2764.
[125] Recently, *see*, *e.g., Bowoto v. Chevron Corp*., 2007 WL 2349343, at 2 (N.D. Cal. 2007).
[126] *See supra* II.D.; II.E.

Several issues question the thesis of a very narrow and extremely defendant-friendly standard put forward by the majority.

By illustrating its standard through reference to the definable, universal, and obligatory-standard developed in the aftermath of *Filártiga v. Peña-Irala*,[127] the court seemingly left the overwhelming majority of the case law intact.[128] Indeed, it is possible to categorize the majority's standard as a slightly more restrictive restatement of the *Filártiga v. Peña-Irala* standard. It is in this context that one can stress the importance of the fact that the court speaks not of "consent" which would require approval of the international norm at stake by every single State (in particular the one accused of its infringement) but of consensus which requires much less even though it is qualified by the adjective universal.[129]

Secondly, the court did not adopt a standard directly derived from international law, such as the concepts of *jus cogens*, individual (criminal) responsibility under international law, gross and systematic human rights violations, universal jurisdiction of domestic courts under international law in respect of a given wrong (as envisaged by Justice Breyer in his concurring opinion),[130]

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[127] 124 S. Ct. at 2766.

[128] The Supreme Court ruled that the proclaimed limit to the recognition of claims based on present-day international norms "is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court". *Id.* at 2765–66.

[129] For the distinction in international law, *see* Benedict Kingsbury, "Sovereignty and Inequality", 9 *EJIL* 599, 609–10 (1998), who argues that international law in recent years has moved more and more away from the specific-active consent requirement to a more general-passive consensus requirement. *Id.*

[130] Justice Breyer, agreeing on the standard of elevated specificity and consensus, offered an additional consideration for the determination of actionable torts under ATS. 124 S. Ct. at 2782. *See also* Brav, *supra* note 72, at 271. The core of his proposal is the avoidance of "potentially conflicting laws of different nations…in an ever more interdependent world", i.e., harmonization. 124 S. Ct. at 2782. Accordingly, Justice Breyer recommends an exercise of jurisdiction under ATS as far as possible under international law. *Id.* In other words, national courts should enforce international norms only to the degree that grounds for universal jurisdiction in international law exist. *Id.* In order to concretize his procedural standard, he refers to § 402 of the Restatement (Third) of Foreign Relations Law of the United States which describes traditional bases of territorial and national jurisdiction and § 404 which provides for universal criminal jurisdiction in respect of certain universally condemned activities. *Id.* at 2782–83. Relying on commentary b to § 404, he explains that universal criminal jurisdiction encompasses civil jurisdiction, particularly since many nations combine criminal with civil proceedings and allow the victim to seek monetary compensation as part of the criminal proceeding itself. *Id.* at 2783. Yet, such statement may be overly simplified. While it is generally acknowledged that international law provides for universal criminal jurisdiction over international crimes such as genocide, torture, war crimes, and crimes against humanity, *Committee on International Human Rights Law and Practice, International Law Association, Final Report on the Exercise of Universal Jurisdiction in*

or other imaginable standards, e.g., the non-derogability of a (human rights) norm under international law even in times of state emergency.[131] Most of these approaches would have severely reduced the flexibility and power of future federal courts to recognize and shape new torts under international law in the future or would at least tie the U.S. courts' discretion directly to the further development of international law. Indeed, given that ATS litigation results in possible liability for infringements of international law, one may intuitively be inclined to rely on the concept of individual criminal responsibility which would result in a very limited number of norms actionable under ATS. The absence of such holding is even more surprising considering that in *Sosa*, the court, in reviewing the historical evidence, explicitly stated that the First Congress assumed the power of courts to fashion new torts under ATS in respect of those norms "with a potential for personal liability".[132] In fact, the court did not even address these concepts as a possible standard in its decision.

By the same token, an a priori restriction of ATS litigation to gross and systematic human rights violations as opposed to individual misconduct would also naturally fit into this line of argumentation. However, in *Sosa*, the Supreme Court did not go this far, leaving the question open for the future. The court merely noted in respect of Alvarez's claim of arbitrary detention that the Restatement of Foreign Relations Law of the United States ("Restatement") speaks of arbitrary detention only when pursued as part of a general policy.[133] But again, it did not draw the conclusion that ATS human rights claims in general are limited to gross, widespread, or systematic violations.

Respect of Gross Human Rights Violations, 5–8 (2000), whether States under international law are similarly authorized to exercise universal civil jurisdiction is less firmly settled and the law on this point is still in the process of development. *See, e.g., Brief of Amicus Curiae, the European Commission in Support of Neither Party, in Sosa v. Alvarez-Machain*, 2004 WL 177036 at 17. *See also* Sarah Cleveland, "The Alien Tort Statute, Civil Society, and Corporate Responsibility", 56 *Rutgers L. Rev*. 971, 976 (2005). As a consequence, such an approach may provide little guidance in the very critical cases it aims to help resolve. The majority in *Sosa* was therefore correct in not expounding on the problems of the applicability of the standard to the exercise of jurisdiction as opposed to the substantive norm as such.

[131] *See* International Covenant on Civil and Political Rights ("ICCPR"), 19 December 1966, 999 U.N.T.S. 171, art. 4. *See* Jost Delbrück, "Safeguarding Internationally Protected Human Rights in National Emergencies", in *Internationale Gemeinschaft und Menschenrechte – Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005*, 35 (Jürgen Bröhmer *et al.*, eds., 2005).

[132] 124 S. Ct. at 2761. Such narrow approach would have ensured the mere complementary and substitutory nature of ATS litigation as a domestic remedy given the enforcement deficit in certain areas of international law.

[133] *Id.* at 2768.

Finally, the court itself understands its standard to be a concrete one as opposed to an abstract approach which similarly invites more and new ATS litigation. In other words, every factual situation not previously decided under ATS can be brought before the courts based on the argument that while the specific international norm as such has been rejected as enforceable under ATS in earlier cases, this time, the alleged conduct satisfies the requirements of elevated specificity and consensus. It is not the case that a priori in abstracto, certain norms of international law are, once and for all, precluded from actionability if unsuccessful in an ATS case. One can always argue that at least the core content of a given norm as opposed to the more controversial outer spheres are actionable under ATS.[134] In the case at hand, the majority only explicitly rejected Alvarez's claim that a single illegal detention of one day (in Mexico) followed by the transfer of the arrested to lawful authorities (in the United States) is sufficient as too broad to meet the narrow conception of arbitrary detention under international law.[135] It thereby left open the possibility of a different outcome if the facts are different in a future case.[136]

An early indication though that the Supreme Court's decision may not restrict liability for TNCs as much as it may appear is that several months after *Sosa*, the TNC Unocal extra-judicially settled a case filed by alleged human rights victims from Myanmar under ATS in relation to Unocal's gas pipeline project in said country by providing "voluntary" compensation to the plaintiffs.[137] However, given the careful wording of the majority urging lower courts to subject new claims based on present-day international law to "vigilant doorkeeping",[138] it is nonetheless not very likely that courts will add more and new claims under ATS in the near future. Rather, what has been achieved in earlier litigation will be largely confirmed in future cases. In sum, despite the majority's stress on judicial restraint in the adjudication of (new) claims under ATS, the *Sosa* standard may constitute nothing more than a slightly more restrictive reading of the *Filártiga v. Peña-Irala* test requiring a definable, universal, and obligatory norm of international law.

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[134] Sarah Joseph, *Corporations and Transnational Human Rights Litigation* 30 (2004).

[135] 124 S. Ct. at 2769. Alvarez advanced the respective provisions of the Universal Declaration of Human Rights and the ICCPR. *Id.* at 2767. For details, *see infra* Chapter Three: Civil and Political Rights.

[136] 124 S. Ct. at 2767–68.

[137] The *Unocal* case involving the use of forced labor in furtherance of a gas pipeline in Myanmar was ultimately settled by the parties. *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. Times, *available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm (accessed 11 September 2006).

[138] 124 S. Ct. at 2764.

C. *Minority's Criticism of the Majority View*

A minority of justices deviated from the majority but was still able to concur with the majority in the actual application of its own promulgated standard in the case at hand by denying Sosa's claim.[139] Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, wrote a separate concurring opinion in which he and his colleagues criticized the majority's announced standard.[140] In principle, Justice Scalia fully agreed with the majority that ATS is merely a jurisdictional statute.[141] He further concurred that ATS originally empowered courts to carefully recognize other torts than the original paradigms because the law of nations was deemed part of common law.[142]

1. *The* Erie *Precedent*

However, he declared that it no longer does.[143] In his view, later developments precluded courts from any "discretionary" power to apply ATS to new situations based on present-day norms of an international character.[144] This is, according to Justice Scalia, the Supreme Court's renowned civil procedure judgment *Erie R. Co. v. Tompkins* decided in 1938.[145] Justice Scalia argued that since *Erie* (not since ATS's original enactment in 1789), further implementing legislation by Congress is necessary to state a claim under ATS.

The Supreme Court's famous judgment in *Erie* is predominantly cited as the ultimate culmination of the one and a half century of power struggle between state and federal courts of the United States.[146] As a general rule, in the United

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[139] The majority held that an illegal detention of one day not authorized by national law (as the jurisdiction of the arrest is limited to the United States) is not actionable as arbitrary detention. *Id.* at 2767–68. The court likewise denied an award against the United States under the Federal Torts Claims Act. *Id.* at 2754. It found the headquarters exception to be inapplicable. *Id.*

[140] *Id.* at 2769–76.

[141] *Id.* at 2772.

[142] *Id.* at 2770.

[143] *Id.*

[144] *Id.* Accordingly, from this point of view, he joined in effect the applicant's position that positive legislation is required, such as TVPA, to enable plaintiffs to rely on ATS in respect of current norms of international law. *Id.* At the bottom line, Justice Scalia followed Sosa's argument of authorization needed, an approach under which, claims under ATS against TNCs would be restricted to torture and extrajudicial killing as these claims are authorized under TVPA.

[145] *Id.*

[146] On the *Erie* decision and its implications, *see generally* Klaus Thannhäuser, *Die "Erie-Doctrine" im Spannungsfeld zwischen den Bundes- und Staatengerichten der Vereinigten Staaten* (1969).

States, federal courts apply federal law while state courts apply state law.[147] However, federal courts also have diversity jurisdiction in cases in which the parties are citizens of different states.[148] Thus, from the beginning of U.S. legal history, the question posed is which law to apply in diversity cases.[149]

In 1842, the Supreme Court held in *Swift v. Tyson*[150] that application of state law is limited to statutory state laws and their construction and rights, titles to real estates, and other matters of immovable and intra-territorial character; in all other instances, courts were directed to apply federal common law.[151] In holding so, it opened the door widely to federal common law in all areas not covered by this definition (the Swift Doctrine).[152] In 1938, Supreme Court Justice Brandeis, writing for the court, sounded the death knell for the Swift Doctrine in the epoch-making decision *Erie*.[153] By declaring that general common law does not exist, and thus, state law is applicable in diversity cases regardless of whether it is statutory or judge-made in nature,

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[147] *Id.* at 6.

[148] *Cf.* U.S. Const. art. III, § 2; 28 U.S.C. § 1332.

[149] Thannhäuser, *supra* note 146, at 6. The members of the First Congress decided in § 34 of the Judiciary Act of 1789 that the state laws, "except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." 1 Stat. 92. Compare today (with only minor amendments) 28 U.S.C. § 1652. The background of such provision was the fear of many anti-federalists of usurpation of law-making power by federal courts at the expense of state courts. Charles Warren, "New Light on the History of the Federal Judiciary Act", 37 *Harv. L. Rev*. 49, 66 (1923). In the following decades, such fears proved to be realistic. Thannhäuser, *supra* note 146, at 6. The question of whether federal courts are only bound by state statutory law or whether the rule of preference of state law equally extends to judge-made common law was open. *Id*. Section 34 of the Judiciary Act of 1789 was not clear on this point. *Id*.

[150] 16 Pet. 1; 10 L. Ed. 865 (U.S. 1842). The case involved an action based on a bill of exchange. Defendant Tyson claimed that he had been fraudulently induced to draw the bill whereas plaintiff Swift was a bona fide holder. Justice Story, writing for the court, doubted whether New York law would allow the defense of fraudulent misrepresentation against a bona fide holder of the bill of exchange but declared it irrelevant as he found general common law to be applicable. *Id.*

[151] 16 Pet. at 18–19.

[152] Thannhäuser, *supra* note 146, at 9.

[153] 304 U.S. 64 (1938).

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Id. at 78.

Judge Brandeis legally turned the world upside down.[154] Ever since, federal courts apply in diversity cases the substantive law of the concerned state, e.g., torts or contract law.[155]

More important for purposes of this book, it is frequently neglected that *Erie* did not only rebalance the power between the federal and state courts but also – as Justice Scalia emphasizes – denounced a rather naive pre-modern understanding of common law in favor of legal positivism which is prevailing until the present time.[156] Before *Erie*, federal courts in diversity cases applied "general common law" as a third body of law next to state and federal law; *Erie* denied the existence of any pre-existing common law the limits of which in relation to natural law cannot be clearly demarcated by explaining that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[157] Accordingly, since *Erie*, courts do not apply and discover pre-existing common law to resolve disputes but rather fashion, develop, and legislate law, be it on the state or federal level.[158] And since ATS refers to the law of nations which was similarly deemed part of general common law, after *Erie*, Justice Scalia's argument goes, ATS refers to something which was dissolved by the triumphal procession of the Erie Doctrine.[159]

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[154] See further on *Erie* and its time, Henry J. Friendly, "In Praise of Erie – And the New Federal Common Law", 39 *N.Y.U. L. Rev*. 383 (1964); Allan D. Vestal, "Erie R.R. v. Tompkins: A Projection", 48 *Iowa L. Rev*. 248 (1963); Marina O. Boner, "Erie v. Tompkins: A Study in Judicial Precedent", 40 *Tex. L. Rev*. 509 (1962); Alfred Hill, "The Erie Doctrine and the Constitution", 53 *Nw. U. L. Rev*. 427 (1958); Arthur J. Keefe *et al.*, "Weary Erie", 34 *Cornell L.Q*. 494 (1949); John J. Parker, "Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits", 35 *A.B.A. J*. 19 (1949); James A. Gorrel & Ithamar D. Weed, "Erie Railroad: Ten Years After", 9 *Ohio St. L.J*. 276 (1948); Lawrence Earl Broh-Kahn, "Amendment by Decision – More on the Erie Case", 30 *Ky. L. Rev*. 3 (1941); Harry Shulman, "The Demise of Swift v. Tyson", 47 *Yale L.J*. 1336 (1938). On today's standing of the *Erie* precedent in the U.S. legal system, compare Gary B. Born, *International Civil Litigation* 13–16 (1997).

[155] Thannhäuser, *supra* note 146, at 8.

[156] *See* Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Law: A Critique of the Modern Position", 110 *Harv. L. Rev*. 815, 852 (1997).

[157] 304 U.S. at 79 *citing* J. Holmes, dissenting in *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co*., 276 U.S. 518, 533 (1928).

[158] Bradley & Goldsmith, *supra* note 156, 852–53.

[159] 124 S. Ct. at 2773. Accordingly, in employing strong wording as it is his general practice, Justice Scalia pleads for the exclusive law-making authority of the legislative branch: "We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect." *Id*. at 2776.

2. *General Constitutional Discourse*

Justice Scalia's criticism of the majority and his insistence that customary international law should not be recognized as supreme federal law should be seen behind the general discourse in U.S. constitutional law. *Erie's* famous holding that "there is no federal common law" provoked two different interpretations as to the status of customary international law within the U.S. legal system which shed light on Justice Scalia's opinion. The first interpretation was given by the prominent international law scholar Philip Jessup in an article published shortly after the *Erie* decision and laid the foundation for the modern line of reasoning. He argued that:

> Any attempt to extend the doctrine of the [*Erie*] case to international law should be repudiated by the Supreme Court. Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum. Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power.[160]

Thereby, Jessup implicitly called for the recognition of international law as falling within the limited exceptions where the courts in the aftermath of *Erie* have allowed few "enclaves of federal common law" where "a rule of decision is necessary to protect uniquely federal interests."[161]

In 1964, in the well-known *Banco Nacional de Cuba v. Sabbatino* decision,[162] the facts of which relate to expropriation acts exercised by the Cuban government under Fidel Castro, the question was arguably not ultimately settled. Defendants argued that the Cuban plaintiff's claim is not valid because the plaintiff had acquired certain sugar from a corporation which had been expropriated by Cuba in contravention of customary international law.[163] Refusing to consider the plaintiff's argument on the merits, the court explained that in the absence of a treaty or definite agreement, any judgment rendered on the validity of another State's legislative and administrative acts could undermine the executive's prerogative in managing foreign affairs.[164]

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[160] Philip C. Jessup, "The Doctrine of Erie Railroad v. Tompkins Applied to International Law", 33 *Am. J. Int'l L.* 740, 743 (1939). *See* Beth Stephens, "The Law of Our Land: Customary International Law as Federal Law After Erie", 66 *Fordham L. Rev.* 393, *passim* (1997).

[161] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), *citing Weeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

[162] 376 U.S. 398 (1964).

[163] *Id.* at 433.

[164] *Id.*

The legal literature understood *Banco Nacional de Cuba* as relying on the international law doctrine of State immunity. Over the years, Jessup's approach, the so-called modern position,[165] has found its way into the academe and the jurisprudence. Today, the Restatement categorizes international law as supreme federal law.[166] And many courts, including the Court of Appeals for the Second Circuit, have held that the issue has been settled.[167]

Some wanted to read *Banco Nacional de Cuba* as not adopting the doctrine of State immunity under international law (as excluding any judicial decision of the courts of one State over the judicial, administrative, and legislative decisions of another State) but that its holding rested on the domestic act of state doctrine thereby leaving open another understanding.[168] At this point in time, the second interpretation within U.S. constitutional law emerged: that Congress must specifically authorize courts to adopt customary international law as federal common law.[169] The so-called "Revisionists" deny

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[165] With respect to this term, *see* Bradley & Goldsmith, *supra* note 156, at 815–76.

[166] *See* § 111 cmt. d, 115 cmt. 3.

[167] Interestingly enough, many of these cases were brought under ATS. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995), in which the Second Circuit declared that it is a "settled proposition that federal common law incorporates international law", *cert. denied*, 116 S. Ct. 2524 (1996); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992), in which the Ninth Circuit confirmed that "[i]t is…well settled that the law of nations is part of federal common law"; *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995), in which the district court held that "it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law".

[168] *But see* 376 U.S. 454 in which the Supreme Court explains that "it is only because of the application of international rules to resolve other issues that the act of state doctrine becomes the determinative issue in this case".

[169] A relatively recent article furiously attacking the traditional view is Bradley & Goldsmith, *supra* note 156. A good overview is provided in T. Alexander Aleinikoff, "International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate", 98 *Am. J. Int'l L.* 91 (2004). Other prominent papers in this regard include Jordan J. Paust, *International Law as the Law of the United States* 1–66 (2003); Ernest A. Young, "Sorting Out the Debate over Customary International Law", 42 *Va. J. Int'l L.* 365 (2002); J. Patrick Kelly, "The Twilight of Customary International Law", 40 *Va. J. Int'l L.* 449 (2000); Harold Hongju Koh, "Commentary, Is International Law Really State Law?", 111 *Harv. L. Rev*. 1824 (1998); Stephens, *supra* note 160; Arthur Mark Weisburd, "State Courts, Federal Courts, and International Cases", 20 *Yale J. Int'l L.* 1 (1995); Phillip R. Trimble, "A Revisionist View of Customary International Law", 33 *UCLA L. Rev*. 665 (1986).

the categorization of the classic view[170] that the law of nations forms part of American law.[171]

3. *Majority's Response to Scalia and Analysis*

Not surprisingly in *Sosa*, the majority took the modern position which deems customary international law as federal common law although recognizing the abolition of general common law in *Erie*.[172]

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[170] The most prominent expression of this so-called classic view was stated by Justice Gray in the *Paquete Habana*: "International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often such questions are presented in litigation between man and man, duly submitted to their determination." 175 U.S. 677, 700 (1900). *See also Hilton v. Guyot*, in which the same justice proclaimed that international law is not restricted to "questions of right between nations". 159 U.S. 113, 163 (1894).

Likewise, in 1793, Alexander Hamilton declared in his Pacificus papers that the law of nations was embraced by the "laws of the land". Alexander Hamilton, "To Defence to No. XX (Oct 23–24, 1795)", in 19 *Papers of A. Hamilton* 34 (H. Syrett ed., 1969).

In 1790, Chief Justice Jay instructed a jury on circuit that the law of nations formed "part of the law of this, and of every other civilized nation." Stewart Jay, "The Status of the Law of Nations in Early American Law", 42 *Vand. L. Rev.* 819, 825 (1989) *citing Charge to the Grand Jury for the District of New York* (4 April 1790), in *New Hampshire Gazette* (Portsmouth 1790).

Similarly, Justice Wilson stated unambiguously in 1796 that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware v. Hylton*, 3 U.S. (3 Da.) 199, 281 (1796).

[171] *E.g.*, Trimble, *supra* note 169, at 684–707.

Admittedly, the criticism of the modern position is boosted by the fact that international law itself has come under attack since the fall of the Berlin wall, largely due to its perceived and actual deficiencies in terms of democracy and legitimacy while at the same time, it is constantly expanding. On the general legitimacy discussion on international law, *see* Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15 *Eur. J. Int'l L.* 907, 909–17 (2004). Kumm identifies three reasons why legitimacy of and in international law is nowadays under such high public and scholarly scrutiny. In his view, the first and foremost reason is the expansion of international law to new subject matters, *id.* at 913; second, the procedure by which international law is developed increasingly reduces the consent of a State to mere entry-ticking, *id.* at 914; and third, because of stricter interpretation and enforcement of international law, *id.* at 914–15. On different approaches taken by international scholars to tackle the challenges ahead, *cf.* Armin von Bogdandy, "Globalization and Europe: How to Square Democracy, Globalization, and International Law", 14 *Eur. J. Int'l L.* 885 (2004). This is particularly true compared to the late 18th century where international law was by and large restricted to mere regulation of State relations and today impacts almost any domestic field of law which, at the time, was perceived as exclusively domestic. Bradley & Goldsmith, *supra* note 156, at 867–68; Aleinikoff, *supra* note 169, at 92; Kelly, *supra* note 169; Trimble, *supra* note 169, 716–23.

[172] 124 S. Ct. at 2762.

It stressed previous case law in which the Supreme Court, despite the abolition of general federal common law, has developed special federal common law where the court "thought it was in order to create federal common law rules in interstitial areas of particular federal interest".[173] In support, the majority pointed to four Supreme Court precedents in which customary international law was recognized as part of American law.[174] In that respect, it read *Banco Nacional de Cuba* as unambiguously supportive of the modern view.[175] In other words, the majority states that *Erie* did not abolish federal common law in various special fields ranging from maritime law to the law of constitutional torts,[176] a fact which is not disputed by Justice Scalia.[177]

The majority in *Sosa* does not give any decisive reason why customary international law should fall within these categories of exception which is what Justice Scalia doubts. Rather, it relied on a precedential argument by asserting that "domestic law recognizes the law of nations" and uses the precedential argument that "[t]he position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filártiga v. Peña-Irala*"[178] and throughout this time, Congress has never objected.[179]

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[173] *Id. citing United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726–27 (1979) as an example.

[174] *Id.* at 2764. The court refers, inter alia, to *Banco Nacional de Cuba*, 376 U.S. at 423, where it held that "it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"; *The Paquete Habana*, 175 U.S. 677, 700 (1900), where it decided that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"; *The Nereide*, 9 Cranch 388, 423 (1815), where it ruled that "the Court is bound by the law of nations which is a part of the law of the land"; and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981), where it recognized that "international disputes implicating…our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist. *Id.*

The Supreme Court concluded by noting that "it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." *Id.* at 2764–65.

[175] *Id.*

[176] *Cf.* Born, *supra* note 154, at 15.

[177] Admittedly, Justice Scalia has a point when referring to Supreme Court precedents which refuse review of state court decisions on the grounds that interpretation of international law is not a federal legal question. *See* 124 S. Ct. at 2770 *citing New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1876). Yet, Scalia's view also denies a strong series of historic precedents which incorporated the law of nations as part of the law of the land. *E.g.*, *id.* at 2765, by the majority. Accordingly, both positions are not in full concordance with history and thereby cause jurisprudential ruptures.

[178] *Id.* at 2764.

[179] *Id.* at 2765.

Proponents of the modern position have given the following compelling reason why customary international law is exceptional.[180] The need to speak with one voice in the foreign relations of the United States fulfils the requirement of strong federal concern as a precondition for federal case law-making.[181] An application of the *Erie* holding to customary international law leads to the bizarre situation in which the United States faces dozens of different understandings of customary international law due to the multiplicity of states and state courts – a result which ultimately may impede its foreign relations with other nations and a consequence the founding fathers vigilantly attempted to avoid.[182] As a consequence of the minority's opinion, state courts of each state would be free to adopt or reject international law with or without disregard of federal interests, a result which is at odds with the experiences of the framers of the Continental Congress and its ability to counter infractions of international law by individual citizens.[183] It is not an overstatement to assume that other nations would be puzzled by the multiplicity of interpretations by various state courts.[184]

Moreover, in *Sosa*, the majority explicitly and extensively acknowledges the dangers combined with its approach.[185] Yet, the majority regards these and other dangers as manageable and controllable. And in the very rare case in which the exercise of federal judicial authority would indeed threaten to infringe the very foreign policy traditionally assigned under the U.S. Constitution to the non-judicial branches of government, the well-recognized and established nonjusticiability doctrines such as the political question or the act of state doctrine, as the majority indicated, offer sufficient leeway and flexibility to avoid a judicial ruling on the merits.[186]

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[180] *See* Hongju Koh, *supra* note 169. He declares that the "capacity of the federal courts to incorporate international law into federal law…is absolutely critical to maintaining the coherence of federal law in areas of international concern." *Id.* at 1838. "If all of these rules are federal…then the uniquely federal area of foreign relations operates on an entirely federal plane, with statutes and treaties providing the positive law framework and federal common law rules…filling the interstices." *Id.* at 1839.

[181] *See* Weisburd, *supra* note 169, at 50–51.

[182] Gerald L. Neuman, "Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith", 66 *Fordham L. Rev*. 371 (1997); Aleinikoff, *supra* note 169, at 94.

[183] Admittedly, the consequence presupposes that Congress does not enact a new authorizing statute under the U.S. Const., art. I, § 8.

[184] Weisburd, *supra* note 169, at 50–51.

[185] See above under III.C.3.

[186] *See infra* Chapter Twelve: Nonjusticiability Issues. In *Sosa*, the Supreme Court impliedly referred to this additional safeguard against judicial activism in its discussion of the ATS *Apartheid* case which both the U.S. and the South-African government deprecated. 124

And contrary to what Justice Scalia implies[187] and as the majority points out,[188] Congress, at least with the enactment of the Torture Victim Protection Act ("TVPA"), sent a clear and unequivocal signal of support for an effective enforcement of international law in cases appropriate for personal liability under ATS. In fact, with the enactment of TVPA which provides for an express cause of action for torture and extra-judicial killings and equally applies to victims who are U.S. citizens, Congress adopted in 1992 a broader reading of ATS.[189] The TVPA is not only an extension of ATS but also constitutes a clear, strong, and unambiguous modern congressional endorsement of *Filártiga v. Peña-Irala* and its progeny.[190] The House Report explicitly articulated the purpose of Congress to ratify human rights litigation under ATS instead of undermining case law established since *Filártiga v. Peña-Irala*. It unequivocally declared in this regard:

> [C]laims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered [by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.[191]

From the viewpoint of federal common law analysis, it is irrelevant that the legislative guidance was not given by virtue of the ATS itself, or that it was not given by the First Congress in respect of ATS but based on a different current perception of the creation and development of international law.[192]

Lastly, the strict and narrow interpretation of ATS given by the majority takes into account most of the democracy and legitimacy concerns raised by

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S. Ct. at 2764, n.21. The majority speaks in this respect of a "case-specific" deference to political branches. *Id*. For a detailed discussion, *see infra* Chapter Twelve: Nonjusticiability Issues.

[187] However, the majority does not seem to agree with this argument. It did not find any Congressional mandate to seek out and define new claims under ATS and modern expressions of Congressional perception of judicial role, in its view, do not support an even greater judicial inventiveness. 124 S. Ct. at 2763.

[188] 124 S. Ct. at 2765.

[189] Pub. L. No. 102–256, 106 Stat. 73 (1992).

[190] Beth Stephens, "Corporate Accountability: International Human Rights Litigation against Multinational Corporations in US Courts", in *Liability of Multinational Corporations under International Law* 209 (Menno T. Kaminga & Saman Zia-Zariffi eds., 2000); Ryan Goodman & Derek P. Jinks, "Filártiga v. Peña-Irala's Firm Footing: International Human Rights and Federal Common Law", 66 *Fordham L. Rev*. 463, 513 (1997).

[191] H.R. Rep. No. 367, 102d. Cong., 2d. 3–4. Admittedly, Justice Scalia would argue that this legislative history does not amount to a statutory authorization for claims other than those contained in TVPA.

[192] It is relevant that the Congress of 1991 was not aware of the grant of authorization because in a legislative system, what matters is merely the legislative will as expressed in statutes.

the revisionist view since only a very limited number of norms of international law are actionable via ATCA. And in the very rare case in which the exercise of federal judicial authority would indeed threaten to infringe the very foreign policy traditionally assigned under the U.S. Constitution to the non-judicial branches of government, the well-recognized and established nonjusticiability doctrines such as the political question or the act of state doctrine, as the majority indicated, offer sufficient leeway and flexibility to avoid a judicial ruling on the merits.[193]

IV. *Conclusions*

Courts and scholars have developed a bundle of different criteria to determine torts actionable under ATS fuelled by the lack of any legislative record and the vague wording of the law in the aftermath of the *Filártiga v. Peña-Irala* decision of the Court of Appeals for the Second Circuit which laid the groundwork for modern ATS litigation. The different standards of customary international law in general; definable, universal, and obligatory-standard; *jus cogens*; wrongs related to a lawful prize; and cause of action under international law reflect this uncertainty of the law although the definable, universal, and obligatory-standard which was followed by most courts remain the prevalent one.

For the first time in a long-awaited decision, the Supreme Court interpreted major parts of ATS in *Sosa v. Alvarez-Machain*. Contrary to the argument advanced by the plaintiff with the support of the United States, in the court's view (in line with *Filártiga v. Peña-Irala*), ATS was enacted based on the First Congress's understanding that courts would have the authority to recognize new claims with a potential for individual liability like the historic paradigms, e.g., batteries on ambassadors, and nothing in the later development has precluded such power of federal courts. As to the determination of norms of international law to be actionable under ATS, the majority, at the very least, cautioned courts not to recognize claims for violations of any international law norm "with less definite content and acceptance among civilized nations than the historical paradigms" which were well established at the time ATS was enacted. In other words, for a violation of a norm of international law to be actionable under ATS, universal consensus of States on the point and an elevated specificity are required.

While lower courts will apply the formula given by the Supreme Court under the doctrine of *stare decisis*, there are several reasons that suggest that the promulgated standard is less restrictive for plaintiffs than it looks at first

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[193] *See supra* note 186.

sight. Firstly, in illustrating its standard, the court referred to the standards employed by lower courts leaving virtually the whole case law on ATS intact, particularly the universal, specific, and obligatory-standard developed from the Second Circuit's decision in *Filártiga v. Peña-Irala*. Secondly, the Supreme Court did not hold any "international" standard as decisive such as universal jurisdiction or international individual criminal responsibility which would have set clear and unambiguous restraints on ATS litigation in the future. In addition, the Supreme Court, by holding that a single illegal detention of one day is too broad to suffice the narrow concept of international law, implied that the tort may be actionable based on different array of facts depending on whether the alleged conduct falls within the core content of the prohibition or covered only in a sporadic way, a holding which also invites further testing litigation. Therefore, the *Sosa* test may constitute a slightly more restrictive restatement of the specific, universal, and obligatory test and will not be as restrictive as believed. A monetary settlement in one ATS case involving corporate defendants which was pending after *Sosa* further confirms such view. However, given the careful wording in *Sosa*, it is also clear that the recognition of new claims in the near future is unlikely.[194]

The criticism raised by Justice Scalia and his colleagues of the majority's standard is unfounded. As to the application of the *Erie* precedent, although it is conventional wisdom that general federal common law does not exist, special areas of federal common law have persisted in fields where there is a special federal interest. Speaking with one voice in foreign relations in the interpretation and understanding of international law ideally falls into this category.

[194] For details with respect to the various areas of international law, see the remainder of Part II: International Law Covered of this book.

Chapter Two

International Criminal Law

I. *Introduction*

International criminal law is the branch of international law which determines crimes which are of international concern and therefore, cannot be left within the exclusive realm and discretion of the national criminal law of the States concerned.[1] While international criminal law largely emerged from the prosecution of war criminals after World War II under the Charter of the International Military Tribunal in Nuremberg ("Nuremberg Charter"),[2] it has grown broader and deeper during the last 15 years.[3] To a large degree, the emergence of a panoply of international criminal tribunals is responsible for such development: the International Criminal Tribunal for the Former Yugoslavia ("ICTY") which was established for the prosecution of the atrocities committed in the disintegration process of the former Yugoslavia set up by the United Nations ("UN") Security Council in 1993;[4] the International Criminal Tribunal for Rwanda ("ICTR") which was established for the prosecution of persons responsible for genocide and other serious violations of international

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[1] For a definition, *see In re List and Others, Hostages Trial*, US Military Tribunal at Nurnberg, 19 February 1948, 15 *Ann. Dig.* 632, 636 (1953). Genealogically, it was specifically derived out of international humanitarian law, i.e., the laws on war, which provided for many concepts now deemed the very core of international law. *See* Allison Marston Danner & Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise", 93 *Cal. L. Rev.* 75, 81–82 (2005). International criminal law as it stands today, however, also draws from and is influenced by three other legal traditions: domestic criminal law, international human rights law, and transitional justice in post-conflict situations. See the brief introduction into the foundations of international criminal law in Danner & Martinez, *id.* at 81–96.

[2] *See* Nuremberg Charter, 8 August 1945, 82 U.N.T.S. 279. *See also* Charter of the International Military Tribunal for the Far East (Tokyo), 19 January 1946, T.I.A.S. No. 1589.

[3] During the Cold War, the lack of political will and *realpolitik* concerns prevented the effective prevention and sanction of international crimes. Gerhard Werle, *Principles of International Criminal Law* 2 (2005).

[4] Pursuant to S.C. Res. 808, 22 February 1993, U.N. Doc. S/RES/808 (1993) and S.C. Res. 827, 25 May 1993, U.N. Doc. S/RES/827 (1993). *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 I.L.M. 1159 (1993); *available at* http://www.un.org/icty/legal-doc-e/index.htm (accessed 31 July 2006).

humanitarian law committed in the territory of Rwanda set up by the UN Security Council in 1994;[5] and as a consequence of the success of these ad hoc courts, the International Criminal Court ("ICC"), the first permanent, treaty-based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished in the future, the statute of which entered into force on 1 July 2002.[6] These courts' statutes and more so, their constantly growing jurisprudence through which the universally recognized substantive law is effectively applied on a day-to-day basis, have significantly contributed and will continue to contribute to the clarification and amplification of this field of law.[7]

This chapter analyzes the actionability of international crimes under ATS after the Supreme Court rendered its judgment in *Sosa v. Alvarez-Machain*.[8]

Part II addresses genocide. Part III deals with crimes against humanity. Part IV examines war crimes. Even the most ardent critics of ATS's applicability to TNCs would agree that externalizing the costs of an economic enterprise when it commits crimes proscribed by international criminal law is morally repugnant. Such commercial activity of a TNC can hardly be labelled by any respectable businessman as the "invisible hand" of the marketplace envisaged by Adam Smith.[9]

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[5] S.C. Res. 955, 8 November 1994, U.N. Doc. S/RES/955 (1994). *See, e.g.*, Statute of the International Tribunal for Rwanda, 33 I.L.M. 1602 (1994); *available at* http://69.94.11.53/ENGLISH/basicdocs/statute.html (accessed 31 July 2006).

[6] Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998); *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 31 July 2006). For details on the international criminal court, *see Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999).

[7] Previously, international criminal law was neglected since the end of the prosecution of war criminal trials after World War II. For a succinct and detailed work on the history of the various international tribunals and a reference to legal literature and documents on the subject, *see* M. Cherif Bassiouni, "Historical Survey: 1919–1998", in *ICC Ratification and National Implementing Legislation* 1–44 (M. Cherif Bassiouni ed., 1999).

[8] 124 S. Ct. 2739 (2004). The separate issue of whether the lack of legal personality of TNCs under international criminal law prevents the application of the latter to the former will be addressed in a separate chapter. *See infra* Chapter Six: Application to TNCs.

[9] Adam Smith's renowned "invisible hand of the market" postulates that the best results for society as a whole occur when everyone pursues his own self-interest. *See* Adam Smith, *The Wealth of Nations* 572 (1776) (Edward Cannan ed., 1994).

II. *Genocide*

In the ATS case *Kadic v. Karadzic*,[10] the plaintiffs, Muslim and Croat citizens of Bosnia-Herzegovina (a successor of the former Socialist Federal Republic of Yugoslavia) filed a case in New York federal court against Bosnian-Serb leader Radovan Karadzic, the former President of the self-proclaimed Republic of Srpska.[11] Here, plaintiffs advanced a genocide claim under ATS for the first time.[12]

A. *Actionability*

In *Kadic*, plaintiffs alleged that the "ethnic cleansing" of Muslims and Croats undertaken by Bosnian-Serbian paramilitary forces in the conflict which emerged during the process of the disintegration of the former Yugoslavia in the 1990s amounted to civil war.[13] On appeal,[14] the Second Circuit simply recognized without further discussion that in "the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad acceptance by the community of nations" and as a consequence, found genocide to be actionable under ATS.[15] Likewise, in *Xuncax v. Gramajo*, although plaintiffs did not rely on genocide, the district court of Massachusetts expressed its willingness to assume that there was a genocidal campaign directed against the Kanjobal Indians of Guatemala in the 1980s.[16]

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[10] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996).

[11] *Id.* at 236.

[12] *Id.* (in respect of the very same events which also led to the establishment of the ICTY by the UN Security Council).

[13] *Id.* at 236–37.

[14] The first instance dismissed the case based on the assumption that jurisdiction under ATS is restricted to violations by state actors. *See Doe v. Karadzic*, 866 F. Supp. 734, 739 (S.D.N.Y. 1994).

[15] 70 F.3d at 241. The court referred to an early General Assembly Resolution condemning genocide and the Nuremberg Charter. *Id.* Interestingly enough, the indictment of the Office of the Prosecutor of the ICTY against Karadzic likewise includes genocide charges. *See Prosecutor v. Karadzic & Mladic*, Amended Indictment, No. IT-95-5/18, para. 34(b) (ICTY 11 October 2002); *Prosecutor v. Karadzic & Mladic*, Amended Indictment, No. IT-95-5/18, para. 34(c), (d) (ICTY 31 May 2000).

[16] *Xuncax v. Gramajo*, 886 F. Supp. 162, 187–88 (D. Mass. 1995). In this case, the defendant Gramajo was the Vice Chief of Staff and Director of the Army General Staff from March 1982 to 1983 and commander from July–December 1982 of a military zone where the plaintiffs resided. *Id.* at 171. At the time, Guatemala was struggling with a bloody civil war-like conflict resulting in major atrocities. *See* Andrew N. Keller, "To Name or Not to Name? The

Genocide has been frequently labelled as the worst crime that can ever be committed.[17] The prohibition against genocide belongs to the very core of international criminal law since the systematic destruction of an entire group of people is irreconcilable with any form of humanity.[18] The prohibition on genocide is even codified in a separate convention: the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"),[19] which is almost universally ratified and is generally viewed as representative of customary international criminal law because it was narrowly drafted to increase acceptance of the convention.[20] The historic paradigm cases of genocide encompass the fate of the Armenian people under the Ottoman Empire during World War I, the Holocaust on Jews under the Nazi Regime during World War II, and the extermination of millions by the Khmer Rouge Regime in Cambodia in the mid-1970s.[21] Although *Kadic* was decided in 1995, the actionability of the prohibition on genocide was not touched upon by the Supreme Court's decision in *Sosa* because as *jus cogens*, i.e., peremptory norm

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Commission for the Historical Clarification in Guatemala", 13 *Fla. J. Int'l L.* 189, 291–94 (2001).

[17] Larry May, *Crimes against Humanity* 158 (2005) notes:

> Genocide is often characterized as the greatest of evil acts. Genocide is difficult to fathom because of the sheer size of the planned assaults and murders, and because of the fact that the crimes are not directed at people based on what they have done, or even based on mere random selection. Rather genocide involves crimes against people for having certain characteristics that they could not help having, and is aimed at exterminating an entire group of people. In this sense, genocide is indeed one of the, if not the, worst of crimes.

International law professor John Crawford stated that "[a]mong what were described as 'crimes of crimes', genocide was the worst of all". *Quoted in id.* at 159. *See also* Kriangsak Kittichaisaree, *International Criminal Law* 69 (2001), who correctly points out that under the crime of genocide, it is not the individual but the group itself which is the victim.

[18] Historically, the term genocide was introduced by the distinguished Polish attorney and scholar Raphael Lemkin. *See* Raphael Lemkin, *Axis Rule in Occupied Europe* 79–92 (1944). His neologism is derived from *genos* (Greek for race or tribe) and *cide* (Latin for killing). *Id.* He argued that genocide violated unwritten international law. He believed that the right to existence is not restricted to individuals. *Id.* In his opinion, groups possess the same right. *Id. See generally Genocide Watch* (Helen Fein ed., 1992).

[19] 9 December 1948, 78 U.N.T.S. 277. The United States ratified the convention on 25 November 1988 subject to certain reservations. *Cf.* 28 I.L.M. 782 (1989). There are 138 parties to the Genocide Convention. Information *available at* http://www.ohchr.org/english/countries/ratification/1.htm (accessed 31 July 2006).

[20] *See* Draft Convention on the Crime of Genocide, 26 June 1947, U.N. Doc. E/447, 16–17. The report of the Secretary-General emphasized the need to draft it in a way so as not to impede ratification.

[21] *See generally Genocide Watch, supra* note 18.

of international law,[22] it easily meets both the elevated degree of specificity and acceptance among nations requirements proclaimed therein.[23] This is confirmed by the fact that in the aftermath of *Kadic*, no court has doubted the actionability of genocide.[24]

B. *Enforceable Scope of the Definition*

Having determined that the crime of genocide is actionable, the next issue that arises is what kind of conduct that falls within this international norm is exactly enforceable via ATS. Article II of the Genocide Convention states:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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[22] *Jus cogens* norms take the first, highest and most prominent rank over all rules of international law. The Vienna Convention on the Law of Treaties refers to them as "a peremptory norm of general international law" which, in turn, is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." 23 May 1969, 1155 U.N.T.S. 332, art. 53.

[23] 124 S.Ct. 2739. *See infra* Chapter One: Actionability Standards. *See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 I.C.J. 15. The International Court of Justice elaborated that genocide is

> a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.… The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and the cooperation required "in order to liberate mankind from such an odious scourge.

Id. at 23.

[24] In fact, between the Second Circuit's ruling in *Kadic* and the Supreme Court's decision in *Sosa*, every circuit court which addressed the issue adopted the ruling. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Doe I v. Unocal Corp.* 395 F.3d 932, 936 (9th Cir. 2002). See also the reinforcement by the Second Circuit in *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 44 (2d Cir. 2000), and more recently, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 663 (S.D.N.Y. 2006). *See also* Beth Stephens *et al., International Human Rights Litigation in US Courts* 160 (2d ed. 2008), who note that it is unlikely that any court would hesitate to find genocide actionable under ATS given the "stature of genocide" under international law.

(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[25]

The definition given in the Genocide Convention is generally deemed to reflect customary international law.[26] It provides for objective and subjective elements as constitutive of the crime of genocide. The objective element as well as the subjective element is twofold: the first relates to the prescribed conduct which encompasses the killing (of members of the group), causing of serious bodily or mental harm, deliberate infliction of conditions of life meant to prevent the survival of a group, birth prevention measures, and the forcible separation of children from the group. The second concerns the targeted group. The subjective element consists of an intent to destroy, at the very least, partially, the targeted group combined with criminal intent for the underlying action.

1. *Protected Groups*

In *Estate of Valmore Lacarno Rodriguez v. Drummond Co. Inc.*,[27] the plaintiffs were relatives and heirs of three leaders of a Colombian trade union, all of whom were killed in the midst of bargaining negotiations on behalf of the TNC defendants' employees.[28] The background of their allegations is the long-time civil war in Colombia which significantly impeded the central government's capability to control and rule large areas of its territory outside the capital. In the complaint, plaintiffs alleged that paramilitary forces acted as defendants' agents,[29] and that the union leaders were murdered as part of a genocidal campaign committed in the course of Colombia's civil war.[30] Acting on a motion to dismiss, the court plainly rejected this argument noting that the union, of which the murdered victims were leaders, represents workers at the Drummond facilities in Colombia and therefore, does not constitute a national, ethnical, racial, or religious group.[31] Accordingly, the genocide

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[25] *See* Genocide Convention, *supra* note 19.

[26] *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 495; *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment of 2 August 2001, para. 451; Antonio Cassese, *International Criminal Law* 98 (2003).

[27] 256 F. Supp. 2d 1250 (N.D. Ala. 2002). For more details on the case, *see infra* Chapter Four: Labor Standards.

[28] 256 F. Supp. 2d at 1253–54. The plaintiffs also belong to the trade union. The defendants were two American companies, Drummond Ltd., an Alabama company that manages the daily coal operations in Colombia, and its holding company, Drummond Co., also an Alabama company. *Id.* at 1254. The third non-corporate defendant is Garry N. Drummond, the chief executive officer. *Id.*

[29] *Id.*

[30] *Id.* at 1260. This was allegedly done to deunionize the mine. *Id.*

[31] *Id.* at 1261.

claims were dismissed.[32] The holding matches the definition of genocide in international law which embraces only national, ethnical, racial, and religious groups and does not encompass the concept of a political group such as a party or a union.[33] The historical reason for this restriction is that membership in a political group is, to a large degree, a matter of personal choice and to a lesser degree, based on culture and ancestry.[34] This is not true for the other groups with the notable exception of membership in a religious group. The approach taken by the Genocide Convention may be criticized by some as "outdated" because in today's world, one's religion can also be a matter of personal taste and choice,[35] but attempts to open the definition of genocide in the negotiation of the ICC Statute similarly failed.[36] Accordingly, such criticism does not affect the legal situation in international law.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[37] plaintiffs alleged a genocidal campaign by the Sudanese government with the support of Canadian TNC Talisman upon the local communities around Talisman's oil operations in the long time civil war-shaken Southern Sudan. On a motion to dismiss, Talisman argued that the plaintiffs failed to identify a potentially protected group under the prohibition on genocide as the term "non-Muslim, African Sudanese minority" does not amount to a national, ethnical, racial, or religious group as required by the definition of genocide.[38] Judge Schwartz of the Southern District of New York, however, refused to accept this argument and held that the plaintiffs have sufficiently alleged genocide in respect of the Christian and Animist groups predominant in Southern Sudan as these constitute religious groups under the genocide definition.[39] Furthermore, although the population in the South is vastly diverse in itself,

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[32] *Id.*

[33] *See supra* text accompanying note 25. The case also alleges other claims which are still pending. *See infra* Chapter Five: Environmental Destruction.

[34] *See* Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 44 (2001). The probable reason for raising the rather weak genocide claim in this case is that it does not require state action like most other violations of international law which is particularly difficult to establish in private employer-employee relationships as in the case at hand. Nonetheless, the case is still pending. On labor rights, *see infra* Chapter Four: Labor Standards. On the state action requirement, *see infra* Chapter Seven: Norms that Can Be Violated by State Actors Only.

[35] Ratner & Abrams, *id.*

[36] *See* William A. Schabas, *Art. 6*, para. 6, in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999).

[37] 244 F. Supp. 2d 289 (S.D.N.Y. 2003). The case was latter dismissed on other grounds, 453 F.Supp.2d 633 (S.D.N.Y. 2006).

[38] *Id.* at 327.

[39] *Id.*

he ruled that the Non-Muslim, African Sudanese group constitutes "certainly an ethnic group".[40]

Such reasoning touches upon definitional uncertainties under the Genocide Convention in respect of the correct interpretation of "ethnic group".[41] The prosecution of the crimes committed in Rwanda by Hutus on Tutsis has shed some light on the difficulty of determining an ethnic group under the genocide definition. Like in many other developing countries the boundaries of which were arbitrarily drawn by the former colonial powers and often with total disregard of ethnic, historic, economic, or social realities, the population in Rwanda was not homogenous. Thus, the question as to how to identify a proper and distinct group within the definition of genocide constituted one key issue in the jurisprudence of the ICTR.[42] The ICTR in its landmark *Prosecutor v. Akayesu* judgment addressed the problem with a mixed objective-subjective test and was able to identify an ethnic group under the genocide definition.[43] It found that persons were, in fact, treated as being a member of a separate group because the official identity card of a person included a statement of such person's Hutu or Tutsi ethnicity for example, and subjectively, the Tutsis themselves perceived themselves as a separate and distinct group as evidenced by the spontaneous answers of the witnesses to the court's questions on their ethnic identity. The same coexistence of subjective and objective standards can be found in another judgment of the ICTR, *Prosecutor v. Kayishema and Ruzindana*.[44] Moreover, in the *Prosecutor v. Rutaganda* case, the ICTR expedited the development of the test by creating a seemingly mere subjective test for the determination of a protected group.[45] It stated:

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[40] *Id*.

[41] Ratner & Abrams, *supra* note 34, at 33. "Race" may be viewed as a group of people who are similar by the presence of common and constant hereditary features. "Ethnicity" has a broader meaning referring to people linked by the same customs, language, and race. "Nation" appeals to the notion of a given legal and political community. *See id*.

[42] In fact, for outsiders, outbursts of violence in Rwanda is extra-ordinarily puzzling since both groups, Hutus and Tutsis, share the same language, the same religion, the same culture, populate the same areas, and in addition, mixed marriages between the groups were generally prevalent.

[43] *Prosecutor v. Akayesu, supra* note 26, paras. 510 et seq.

[44] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment of 21 May 1999. It held:

> An ethnic group is one whose members share a common language and culture; or a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes the denomination or mode of worship or a group sharing common beliefs.

Id. para. 98.

[45] *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment of 6 December 1999.

> that for the purposes of the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.[46]

Although two other ICTY trial chambers followed this line of reasoning,[47] given the wording of the Genocide Convention, it is debatable whether such standard would survive scrutiny under the *Sosa* standard. However, the objective-subjective test should. Otherwise, given the ethnic diversity, mixture, and flowing lines of many countries the borders of which were often arbitrarily drawn with no regard to ethnic, local, or religious considerations, it would be almost impossible to ever separate a distinct victimized group from the rest of the population under the crime of genocide.

2. *Individual Acts*

Article II of the Genocide Convention lists as individual acts falling within the prohibition, the killing (of members of the group), causing of serious bodily or mental harm, deliberately undermining the physical conditions necessary for the survival of a group, birth prevention measures, and the forcible separation of children from the group.[48] In principle, given the status of genocide in the international community, all variations of article II should be enforceable under ATS.

In ATS cases against TNCs, "cultural genocide" may frequently be an issue. The issue was considered in *Beanal v. Freeport-McMoran, Inc.*[49] The defendants in this case, the U.S. corporations Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. (together, "Freeport"), owned a subsidiary which operated a huge open pit copper, gold, and silver mine located in a wide area in the Jayawijaya Mountain in Irian Jaya, Indonesia.[50] The plaintiff Tom Beanal, a resident of the region and a leader of the Amungme Tribal Council of Lambaga Adat Suku Amungme, asserted, inter alia,[51] that Freeport committed "cultural genocide" because the project led to the relocation and

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[46] *Id.* at 56.

[47] *Prosecutor v. Jelisic*, Case No. IT-95-10-T, Judgment of 14 December 1999, paras. 70–71; *Prosecutor v. Krstic, supra* note 26, paras. 556–57, 559–60.

[48] *See supra* text accompanying note 25.

[49] 969 F. Supp. 362 (E.D. La. 1997). *See* Jean Wu, "Pursuing International Environmental Tort Claims under the ATS: Beanal v. Freeport-McMoran", 28 *Ecology L.Q.* 487 (2001); Anastasia Khokhryakova, "Beanal v. Freeport-McMoran, Inc.: The Liability of Private Actor for an International Environmental Tort under the Alien Tort Claims Act", 9 *Colo. J. Int'l Envtl. L. & Pol'y* 463 (1998).

[50] *See* Wu, *id.* at 496.

[51] As to the environmental and other claims, *see infra* Chapter Five: Environmental Destruction.

displacement of Amungme members to other areas of the country where they struggled to maintain and preserve their ancestors' unique culture.[52]

The common background behind allegations of cultural genocide is the common phenomenon of the decline of a culture, mostly of indigenous peoples, caused by relocation in the furtherance of TNC projects since in such instances, the indigenous people who are deprived of their ancient familiar surroundings which nurtures and allows their culture to flourish and survive tend, in many instances, to adopt the lifestyle of the place where they are relocated to enable them to adjust to their new environment and hence, they lose their own culture. In *Beanal*, while accepting the Amungme tribe as a group under the prohibition on genocide, Judge Duval of the Federal District Court for the Eastern District of Louisiana held, however, that the crime of genocide embraces acts which destroy the conditions of living of a targeted group but does not encompass displacement or relocation in the absence of any physical destruction of the group.[53] In other words, Beanal did not plead the destruction of the group in the sense of genocide as defined in international law. Judge Duval noted that if "Beanal in fact means that Freeport is destroying the Amungme culture, then he has failed to state a claim for genocide."[54] Indeed, while earlier drafts of the Genocide Convention considered the notion of cultural genocide and included the prohibition of languages and the destruction or prevention of use of places of worships and other cultural institutions as prohibited acts, the Sixth Committee and the General Assembly Plenary rejected them during their deliberations.[55] Only one act of cultural genocide which does not presuppose physical destruction was maintained in article II(e) in the form of forcible separation of children from their group.[56]

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[52] 969 F. Supp. at 373.

[53] *Id.*

[54] *Id.*

[55] *See* Ratner & Abrams, *supra* note 34, at 31. On the negotiation history, *see generally* Johannes Morsink, "Culture Genocide, the Universal Declaration, and Minority Rights", 21 *Hum. Rts. Q.* 1009 (1999). Communist and Arab States favored a cultural genocide provision in the Genocide Convention. However, the American countries repudiated their proposals due to potential interference with their assimilation programs. *Id.* Western European nations argued that the right place for the protection of minorities should be the Universal Declaration of Human Rights. *Id.* at 1010. Later, the Cold War prevented them from including it in the Universal Declaration of Human Rights. *Id.*

[56] Ratner & Abrams, *supra* note 34, at 31. Said act does not necessitate any form of physical violence. Instructive in this respect and confirming the court's holding is the reasoning of the ICTR in *Prosecutor v. Krstic* stating, "an enterprise attacking only the cultural and sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall

3. *Mental Element: Specific Intent*

Additionally in *Beanal*, Judge Duval found another hurdle which renders the regulation of TNCs under ATS through allegations of genocide difficult. He noted that Beanal did not allege specific intent as required under genocide.[57] Indeed, genocide requires not only general intent but also specific intent. Discriminatory intent is not sufficient. The wording of the genocide convention, which reflects customary international law, requires intent against a group as such in the sense that the act must be aimed at the destruction of the group or a part thereof.[58] Generally and as a practical matter, the intent to destroy

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under the definition of genocide." *Supra* note 26, para. 580, *aff'd*, Case No. IT-98-33-A, Judgment of 19 April 2004, para. 25.

[57] 969 F. Supp. at 373. Other than crimes against humanity where a systematic attack against a civilian population is required, genocide is not conditioned on the destruction of the group since this structural element is shifted to the intent required. Werle, *supra* note 3, at 204–05.

[58] Targeting certain members of a group under the genocide definition because of their membership does not suffice to meet the requirement of specific intent. Only when it is committed with the intent to destroy the whole group or a substantial part of it is there specific intent. It is important to draw a line between the closely related but nonetheless different legal concepts of crimes against humanity through persecution which requires discriminatory intent and genocide which requires specific intent. Even though there are victims and corporate perpetrators, it may still be impossible to prove mens rea. During the negotiations for the Genocide Convention, the Union of Soviet Socialist Republics proposed to include negligent genocide because individuals may escape punishment by claiming lack of specific intent. Regarding the negotiation history, *cf.* Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide", 15 *Ariz. J. Int'l & Comp. L.* 415, 454 (1999). This suggestion, however, was rejected. The U.S. argued successfully that intent is a necessary requirement to differentiate genocide from mass killing. *Id.* Criminal law in civil law countries traditionally classifies mens rea into *dolus directus, dolus indirectus*, and *dolus eventualis*. *Dolus directus* is present if the result (in the foregoing example, destruction of group members) is the primary purpose of the act and the perpetrator intended the result. *E.g.*, A kills the new lover, C, of his former girlfriend B. On the other hand, the dominant factor in the determination of *dolus indirectus* is knowledge. The actor does not primarily intend the result, may even truly regret it, but knowing with (absolute) certainty that his act will cause it and nevertheless commits the crime. *E.g.*, A places a time bomb on his insured vessel to collect the proceeds of the insurance. On the high seas, the bomb explodes killing all the crew on board. A might feel very sorry about all his employees on board the vessel but their death is the necessary result of his crime. *Dolus eventualis* as a category of intent is designed to exlude pure negligent acts. Here, the perpetrator believes the result is possible but nevertheless continues with the act because he is willing to accept such an outcome. *E.g.*, A wants to shoot a bird, which is close to where B is standing. A recognizes the possibility that if he shoots the bird, he may instead hit B. When A shoots the bird and instead hits B, he is liable for the result. Generally, commentators take the view that *dolus directus* is required for genocide referring to the wording ("as such") and the special nature of the crime, i.e., the destruction of the group must be the primary purpose of the act, and not the

directed against a particular group specifically in a business setting is difficult to prove in ATS proceedings. Direct and explicit evidence, such as the Wannsee Conference, where Nazi Germany formally decided to pursue the "*Endloesung der Judenfrage*",[59] is exceptional. Thus, international tribunals have relied on circumstantial evidence to infer specific intent from the emergence and pattern of particular acts.[60] The reasoning of the ICTY trial chamber in *Prosecutor v. Krstic* provides some useful guidance in this regard.[61] The situation of the atrocities committed in Srebrenica by Bosnian Serbs on Bosnian Muslims, which initiated the establishment of the ICTY, seems comparable as the Muslim enclave was situated between two Serb dominated territories. The chamber elaborated:

> The Trial Chamber is…of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number

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furtherance and success of an industrial project in the region against opposition. *See, e.g.*, Leo Kuper, *The Prevention of Genocide* 13 (1985). Some commentators, however, argue that knowledge of the destruction as a result of the act is sufficient. Thomas W. Simon, "Defining Genocide", 15 *Wis. Int'l L.J.* 243, 248 (1996); Ratner & Abrams, *supra* note 34, at 34–35. In view of the fact that the test demands that the norm must be universally accepted, one can sensibly assume that a court confronted with the issue will state that a dispute which is not yet resolved by the nations should not be decided by a court of law.

[59] Wolf-Dieter Rothe, *Die Endloesung Der Judenfrage* (1974). The "Endloesung der Judenfrage", which means "final solution to the Jewish question", is the Nazi euphemism for the Holocaust.

[60] For this reason, the ICTY held that intent to commit genocide may be inferred from "the general political doctrine which gave rise to the acts…or the repetition of destructive and discriminatory acts[,]…the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group". *Prosecutor v. Karadzic & Mladic*, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 16 July 1996, para. 94. Similarly, the ICTR stated that

> it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the preparation of other culpable acts systematically directed against the same group, whether those acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent.

Prosecutor v. Akayesu, supra note 26, para. 522.

[61] *Prosecutor v. Krstic, supra* note 26.

> of members of a protected group might not thus qualify as genocide, despite the high total number of casualities, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction sufficient to annihilate the group as a distinct entity in the geographical area at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.[62]

In *Prosecutor v. Akayesu*, on the one hand, the trial chamber of the ICTR found specific intent of genocide in respect of the accused, inter alia, in the commission of mass rape of Tutsi women.[63] However, in *Prosecutor v. Jelisic* on the other hand, the prosecution did not succeed in proving the necessary subjective element of genocide where the accused repetitively killed Muslim detainees as well as a smaller number of Croats at a detention facility. The main justification for the trial chamber's negative response was the perpetrator's random choice of victims. The chamber stressed that the accused carried out the atrocities without an evident scheme, plan, or system. According to the chamber, this made proving his intent difficult.[64]

As a consequence, the manifest defence of a TNC that its primary purpose was the pursuit of an industrial project and not the destruction of any group is thus difficult to rebut. In accordance with such understanding, the *Beanal* case was dismissed and the dismissal was affirmed on appeal without deeper analysis.[65]

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[62] *Id*. at 590. The decision clarifies the distinction between genocide and crimes against humanity by persecution, which, although related, are different legal concepts under international criminal law. Mass killings based on discriminatory intent suffices to establish crimes against humanity but genocide rests on the additional requirement of the intent to destroy the group or at least, part of the group. Without the existence of a general governmental plan or policy to destroy, the supposed specific intent may indeed be a mere wish.

[63] *Prosecutor v. Akayesu, supra* note 26, para. 706.

[64] *Prosecutor v. Jelisic, supra* note 47, paras. 94–108.

[65] *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). Other claims also failed. *See infra* Chapter Five: Environmental Destruction.

III. *Crimes against Humanity*

Crimes against humanity can be briefly described as mass crimes against a civil population. The crime was separately categorized as an international crime in the Nuremberg Charter which defined it as

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[66]

In *Kadic*, plaintiffs advanced not only genocide claims but also relied upon crimes against humanity.[67]

A. *Actionability*

As was the case for genocide, the Second Circuit in *Kadic*, without further elaboration, confirmed subject matter jurisdiction as to crimes against humanity deeming the crime actionable under ATS.[68] Crimes against humanity, as the name already reveals,[69] strike against the core content of universal values and constitute one major pillar of international criminal law.[70] A preeminent expert explains that "genocide stands to crimes against humanity as premeditated murder stands to intentional homicide."[71] And like genocide, crimes against humanity form part of the substantive law enshrined and defined in the respective statutes of the ICTY, the ICTR, and the ICC.

While its origins clearly date back to World War I, its actual emergence as a legally well-fashioned crime was largely due to the fact that Germans also performed atrocities and other acts of an inhumane nature on their own citizens and others not covered by the laws of war.[72] As to TNCs, U.S. military

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[66] Nuremberg Charter, *supra* note 2, art. 6(c).

[67] 70 F.3d at 236.

[68] *Id.*

[69] The term "crimes against humanity" can be traced back to the Declaration of 28 May 1915 of the Governments of France, Great Britain, and Russia declaring the massacres of the Armenian population by the Turkish "as crimes against humanity and civilization for which all members of the Turkish government will be held responsible together with its agents implicated in the massacres". *Quoted in* Egon Schwelb, "Crimes against Humanity", 23 *Y.B. Int'l L.* 178, 181 (1946).

[70] Cassese, *supra* note 26, at 4.

[71] William Schabas, *Genocide in International Law* 12 (2000).

[72] *See* Cassese, *supra* note 26, at 68. Prosecution after World War I by and large failed. On war crimes, *see infra* Chapter Two: International Criminal Law, sec. IV.

tribunals in three trials, the *I.G. Farben Case*,[73] the *Flick Case*,[74] and the *Krupp Case*,[75] charged and convicted with crimes against humanity the managers and owners of the three major German steel, coal, and armistice TNCs which enabled Germany to draw the world into a long and bitterly fought war.[76] Similarly in the 1990s, the trial chamber of the ICTY stated that "since the Nuernberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned".[77] In addition, again, like genocide, no court before *Sosa* has doubted the actionability of crimes against humanity under ATS.[78] Given its common recognition and definitional clarity, its actionability as such should remain and remains untouched by the Supreme Court's reasoning in *Sosa*.[79]

B. *Enforceable Scope of Definition*

Although definitions of crimes against humanity have slightly changed over the years,[80] the core has attained the status of customary international law.[81] All three statutes of the ICTY, the ICTR, and the ICC provide jurisdiction and definitions. In particular, the ICC Statute, which is not innovative or liberal in this regard, but is a culmination of almost a century of legal development,[82]

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[73] *The Farben Case, United States v. Carl Krauch and Others*, Military Tribunal VI, Case 6, *VII & VIII Trials of War Criminals before the Nuremberg Military Tribunals* (1950).

[74] *United States v. Friedrich Flick and Others*, *VI Trials of War Criminals* (1950).

[75] *United States v. Alfred Krupp, IX Trials of War Criminals* (1950).

[76] *Supra* notes 73–75.

[77] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment of 7 May 1997, para. 623.

[78] In the opposite, in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 244 (2d Cir. 2003), decided one year prior to *Sosa*, the Second Circuit strongly reinforced its ruling in *Kadic* regarding crimes against humanity. *Id.*

[79] Compare the statement of the prominent international criminal law scholar Cassese who declares that "[u]nder general international law the category of crimes against humanity is sweeping but sufficiently well defined." Cassese, *supra* note 26, at 64. More recently, *see Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457, 466–67 (S.D.N.Y. 2006), where the district court affirmed the acitonability of crimes against humanity. See also the post-*Sosa* ATS case *Doe v. Savaria*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004), where the district court found that the assassination of Archbishop Romero formed part of a crime against humanity. *Id.* at 1157.

[80] The most recent and detailed definition is provided in ICC Statute, art. 7. *See also Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence of 1 June 2000, paras. 19–21.

[81] See Werle, *supra* note 3, at 218, which notes that various formulations of the crime do not imply legal uncertainty over its scope in customary international law but rather are meant to explain the factual context of each formulation. *Id.*

[82] Ratner & Abrams, *supra* note 34, at 44.

can be said to be highly representative of customary international law on the point. Unlike war crimes, crimes against humanity also cover acts against the perpetrator's own citizens if they are targeted specifically and do not presuppose an armed conflict.[83] And unlike genocide, crimes against humanity do not require the targeting of a group combined with a corresponding specific intent; targeting a civilian population is sufficient. Given this rather wide scope of application, as a matter of strategy, plaintiffs have alleged crimes against humanity in almost every ATS case against a TNC with a high number of casualties. However, most of these cases are at a very early stage in the proceedings.

Given that crimes against humanity are easier to establish than genocide, it is likely that crimes against humanity will serve as a fallback for all genocide cases.

1. *Attack on a Civilian Population*

Crimes against humanity compromise only those acts which are undertaken as "part of a widespread or systematic attack directed against any civilian population."[84] According to the definition in article 7(2)(a) of the ICC Statute, an "attack on a civilian population" means "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[85] In this respect, the core of the definition of civilian population is its defenselessness vis-à-vis the state military or other organized force.[86] The criterion "widespread" is of a quantitative nature whereas the criterion "systematic" is of a qualitative nature.[87]

In the *Unocal* case involving the use of forced laborers in the construction of a gas pipeline in Myanmar by the Californian TNC Unocal, the plaintiffs alleged increased numbers of systematic military attacks on local villages in the form of killings, rapes, and forced labor in the area of the pipeline construction.[88] In the *Wiwa* case relating to the oil extraction activities of TNC

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[83] Werle, *supra* note 3, at 216.

[84] ICC Statute, *supra* note 6, art. 7.

[85] *Id.*

[86] Werle, *supra* note 3, at 222. Given that crimes against humanity can be committed in peacetime, simple recourse to international humanitarian law for the determination of civilian population is not permissible. *Id.*

[87] *Id.* at 225.

[88] *See Doe v. Unocal*, 395 F.3d 932, 946–47 (9th Cir. 2002). While the Nuremberg Charter did not contain rape as one of those acts enumerated under article 6, *supra* note 2, the statutes of the ICTR, the ICTY, and the ICC do. For the ICTR Statute, *see supra* note 5; for the ICTY Statute, *see supra* note 4; and for the ICC Statute, *see supra* note 6.

Royal Dutch Shell in Nigeria ("Shell Nigeria"), headed by two companies, Royal Dutch Petroleum Co. and Shell Transport and Trading Co., which was operating despite heavy resistance from local populations, plaintiffs relied on crimes against humanity by alleging that Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity.[89] The case is still pending. A dismissal based on procedural grounds was reversed on appeal by the Second Circuit.[90] Similarly in the abovementioned *Presbyterian Church of Sudan* case, plaintiffs also alleged crimes against humanity.[91] In all these cases, if the acts alleged are proven to be of a sufficient magnitude, such acts would amount to crimes against humanity.

So far, *Sarei v. Rio Tinto*[92] is the only decision which has issued a statement on the definitional scope of crimes against humanity enforceable under ATS other than the special case of *Apartheid*. The events that led to the filing of the case happened in Bougainville, an island situated in the Pacific Ocean close to the main island of Papua New Guinea ("PNG").[93] It is rich in natural resources, particularly minerals such as copper and gold. Defendants Rio Tinto Plc., a British corporation, and Rio Tinto Ltd., an Australian corporation (together, "Rio Tinto"), form part of a TNC which operates more than 60 mines and processing plants in 40 countries worldwide.[94] In the 1960s, Rio Tinto decided to establish a mine in the village of Panguna in Bougainville.[95] Its operations allegedly destroyed the island's environment necessary for the subsistence of its inhabitants and harmed the health of the people to a degree that it incited a bloody civil war.[96] Plaintiffs alleged that in 1990, Rio Tinto convinced the government of PNG to impose a sea blockade on the island and to maintain it because it believed such means a useful tactic to overcome the war and the resistance and enable it to reopen the mine.[97] Plaintiffs contended that the blockade prevented "medicine, clothing and other essential supplies" from reaching the people of Bougainville.[98] They cited the local Red Cross

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[89] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92, 94 (2d Cir. 2000).

[90] *Id.*

[91] 244 F. Supp. 2d 289.

[92] 221 F. Supp. 2d 1116 (C.D. Cal. 2002). The district court ultimately dismissed the case based on the political question and act of state doctrines. On appeal, the Court of Appeal reversed. *See Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007); Chapter Twelve: Nonjusticiability Issues.

[93] 221 F. Supp. 2d at 1121.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1126.

[98] *Id.*

in central Bougainville which estimated in 1992 that the blockade, "through the lack of medicines and vaccines, had caused the death of more than 2,000 children in its first two years of operation" and contended that a constantly growing number of people died of curable diseases.[99] One reporter present on the island of Bougainville allegedly explained:

> Some [Bougainvilleans] were killed in combat or in civilian massacres by the [army of PNG], but most died because of the lack of basic medical treatment caused by the blockade on an island where all hospitals were soon destroyed and all qualified doctors dead or gone. When we visit, everyone has a horror story to remember – a wife and a baby dying in an unattended jungle birth, a husband thrown into the sea from an Australian supplied helicopter, a child hit by a dum-dum bullet, a daughter raped and then mutilated by the [army of PNG].[100]

In sum, plaintiffs claimed an estimate of 10,000 deaths as a result of the blockade.[101] Plaintiffs argued, inter alia, that the imposition of the medical blockade and its continuation constituted a crime against humanity. Although Judge Morrow emphasized that the actionability of crimes against humanity has been recognized since *Kadic*, he declared that the exact scope of the definition of crimes against humanity is less clear.[102] He cited the plaintiff's expert, Steven Ratner, a prominent international law scholar, who explained that crimes against humanity "are a set of acts against human life, liberty, physical welfare, health, or dignity, undertaken as part of a widespread or systematic attack against a civilian population."[103] Referring to the general discussion of crimes against humanity in the treatise "Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy" by Steven Ratner and Jason Abrams, Judge Morrow held that construing the complaint in the light most favorable to plaintiffs as required on a motion to dismiss, the plaintiffs have stated a claim for crimes against humanity under ATS.[104] Indeed, if the

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[99] *Id*.

[100] *Id*. at 1126–27.

[101] *Id*. at 1127.

[102] *Id*. at 1150. In accordance with international law, Ratner further opined that crimes against humanity can occur in peacetime as well as during times of war. *Id*.

[103] *Id*.

[104] Ratner and Abram state that generally, crimes against humanity consist of four elements: (a) the act committed is inhuman in nature and character resulting in great suffering or serious injury to body or health; (b) the act is committed as a part of a widespread or systematic attack; (c) the attack is committed against members of the civilian population; and (d) mens rea must be present. *See* Ratner & Abrams, *supra* note 34, ch. 3, 67–74. From this discussion, Judge Morrow suggested that crimes against humanity target a particular group of people for political, racial, or religious reasons. 221 F. Supp. 2d at 1150–51. Plaintiffs also alleged genocide. *Id*. at 1151.

allegations of a well-designed and well-implemented indeterminate military blockade of the island are true, these could be interpreted as a systematic attack on a civilian population.

2. *Mental Element*

Under international customary law, the perpetrator must act with knowledge of the attack on the civilian population.[105] Accordingly, one must be likewise aware of the attack on a civilian population and of the fact that his action is forming part of such attack.[106] Once again, whether these requirements can be applied to a TNC as opposed to an individual is dealt with in a separate chapter.[107]

3. *Individual Acts*

In *Sarei*, Judge Morrow again relied on the discussion by Ratner and Abrams of crimes against humanity in their treatise "Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy"[108] which mentions murder and extermination, enslavement and forced labor, deportation, imprisonment, torture, rape, other inhumane acts, persecutions, property crimes, and disappearances as well-recognized prohibited acts under the definition of crimes against humanity.[109] The ICC Statute also contains a list of acts with the potential to constitute a crime against humanity: 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, national, ethnic, cultural, religious, or gender grounds; and enforced disappearance of persons.[110]

Accordingly, the alleged acts in *Unocal* where killings, rapes and forced labor were alleged; in *Wiwa*; and *Presbyterian Church of Sudan* where general

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[105] Werle, *supra* note 3, 230–31. The view that the attack on a civilian population constitutes merely a precondition to the exercise of jurisdiction can no longer be maintained after the conclusion of the ICC Statute. *Id.*, n. 89.

[106] *See Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T, IT-96-23-1-T, Judgment of 22 February 2001, para. 434, *aff'd, Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23, IT-96-23/1-A, Judgment of 12 June 2002, para. 121. It is not necessary to know all the details of the State's or government's policy. Werle, *supra* note 3, at 231.

[107] *See infra* Chapter Six: Application to TNCs.

[108] *Supra* note 34, ch. 3.

[109] 221 F. Supp. 2d at 1150 *citing* Ratner & Abrams, *supra* note 34, 69–77.

[110] The list of enumerated acts in the statutes of the currently standing international criminal tribunals, ICTY, ICTR, and ICC, vary slightly.

violence and persecution were asserted may well amount to those individual acts covered by the scope of crimes against humanity.

4. *Crime of Apartheid*

A special kind of crime against humanity is the crime of apartheid. The term as such is the Africaans expression for separateness and refers to the racial segregation and discrimination in all spheres of society pursued by the white minority in South Africa after 1948.[111] Individual victims of the system of the South African apartheid system sued TNCs which took an active role and profited from the system of apartheid in South Africa until the abolition of white supremacy under ATS.[112] The list of the defendants in this case include prominent global business players.[113] Each of these TNCs did business with the government of South Africa during the time of apartheid or at the very least, was able to increase its profits within the system of suppression that provided employers with a cheap, willing, and flexible black labor force.[114] Many of the products supplied to the government by the defendants were crucially employed to promote and maintain the system of apartheid. For example, the infamous passbook system under which Africans were required to carry passbooks containing information on identity, ethnic group, and employer in order to gain access to urban areas was made available to the government due to IBM's technology.[115] The cars from which South African police forces shot African demonstrators were armoured by Daimler and the military kept its machinery going through oil supplied by Shell.[116] The government took

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[111] *See* Werle, *supra* note 3, at 262.

[112] *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

[113] The list of defendants include UBS AG; Citigroup, Inc.; Minnesota Mining and Manufacturing Co.; General Electric Co.; Bristol-Myers Squibb Co.; Commerzbank AG; Dresdner Bank AG; E.I. DuPont de Nemours; Shell Oil Co.; Xerox Corp.; IBM Corp.; General Motors; Honeywell International, Inc.; ExxonMobil Corp.; Deutsche Bank AG; Colgate-Palmolive Co.; National Westminster Bank Plc; Bank of America, N.A.; Dow Chemical Co.; Ford Motor Co.; Barclays Bank Plc.; Coca-Cola Co.; J.P. Morgan Chase & Co.; DaimlerChrysler Corp.; EMS Chemie (North America), Inc.; ChevronTexaco Corp.; ChevronTexaco Global Energy; American Isuzu Motors, Inc.; Nestle USA, Inc.; Holcim (US) Inc.; Fujitsu Ltd.; Credit Suisse Group; and BP Plc. The list of defendants is limited to those TNCs over which the court's personal jurisdiction is not contested. *Id.*, n. 3.

[114] *Id.*

[115] *Id.* at 544.

[116] *Khulumani v. Barclays Nat'l Bank Plc (In re South African Apartheid Litigation), Complaint* 129–33, *available at* http://www.cmht.com/pdfs/apartheid-cmpl.PDF (accessed 2 August 2006).

loans and capital at preferred conditions from UBS and other banks which may have prolonged the survival of the apartheid system.[117]

Before the decision in this case, courts, although not ultimately deciding the issue, have issued positive statements on the actionability of apartheid under ATS. In the mid-1980s, in addressing generally the issue of how to determine torts falling within the scope of ATS, Judge Edwards of the District Court of Columbia cited in a footnote in *Tel-Oren v. Libyan Arab Republic* Paul Sieghart's 1983 published work "The International Law of Human Rights" which categorized, inter alia, apartheid as an example of a "recognized international crime".[118] In *Tachiona v. Mugabe*,[119] involving the action of an opposition party in Zimbabwe against the ruling party in respect of an alleged campaign of violence designed to intimidate and suppress the opposition movement, Judge Marrero of the Southern District of New York held in 2002 that "systematic racial discriminations and racially-motivated violence, especially where practiced as a matter of policy, is proscribed as violations of international standards in various international instruments"[120] and listed in support of such ruling, inter alia, the International Convention on the Suppresion and Punishment of the Crime of Apartheid ("Anti-Apartheid Convention").[121] In *Wiwa v. Royal Dutch Petroleum Co.*,[122] which is still pending and involves the commission of human rights violations in the furtherance of oil exploration by the TNC Shell in Nigeria, Judge Wood of the Southern District of New York cited article 7 of the ICC Statute which explicitly lists apartheid as a crime against humanity in addressing the issue of whether alleged crimes against humanity are actionable under ATS.[123] Before the ICC

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[117] *Id.* at 123–25.

[118] 726 F.2d 774 (D.C. Cir. 1984) *citing* Paul Sieghart, *The International Law of Human Rights* 48 (1983).

[119] 234 F. Supp. 2d 401 (S.D.N.Y. 2002). The action against Robert Mugabe himself and members of his government were dismissed based on sovereignty and diplomatic immunity grounds. *Id.; see Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001). The United States which filed a Suggestion of Immunity on behalf of Mugabe moved for reconsideration, arguing that the court's exercise of jurisdiction over ZANU-PF grounded on personal service on Mugabe was impermissible under federal law and international principles governing sovereign and diplomatic immunity that the Government suggested applied to Mugabe. The motion was not granted. *See Tachiona v. Mugabe*, 186 F. Supp. 2d 383 (S.D.N.Y. 2002).

[120] 234 F. Supp. 2d at 439.

[121] *Id.*, n. 153.

[122] 2002 WL 319887 at 9 (S.D.N.Y. 2002).

[123] *Id.* The ICC Statute defines it as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." ICC Statute, *supra* note 6, art. 7. *See* Protocol I to the Geneva Conventions, art. 85(4)(c), 1125 U.N.T.S. 42, declaring

Statute, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[124] as well as the Anti-Apartheid Convention,[125] a separate treaty devoted to the topic, describes apartheid as a crime against humanity.[126] Even the Restatement of the Law on Foreign Relations which follows a rather restrictive and conservative view of international law and upon which courts frequently rely on in the determination of what violation of international law is covered by ATS unequivocally states that "[r]acial discrimination is a violation of customary law when it is practiced as a matter of state policy, e.g., apartheid in the Republic of South Africa".[127]

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apartheid a grave breach when committed wilfully and in violation of the Geneva Conventions or the protocol. *See also* Ronald C. Slye, "Apartheid as a Crime against Humanity: A Submission to the South African Truth and Reconciliation Commission", 20 *Mich. J. Int'l L.* 267 (1999) which contains the views of 21 scholars. Based on these views, the South African Truth and Reconciliation Commission deemed apartheid "as a systematic form of racial discrimination and separation to be a crime against humanity". 5 Truth and Reconciliation Commission, Final Report para. 101 (1998).

[124] Adopted by the General Assembly in G.A. Res. 2391 (XXIII), 25 November 1968, 754 U.N.T.S. 75.

[125] Adopted by the General Assembly in G.A. Res. 3068 (XXVIII), 30 November 1973, 1015 U.N.T.S. 243.

[126] *See id.*, arts. 1, 3; *supra* note 124, art. 1(b).

[127] § 702 cmt. i. It may be defined as an institutionalized system of racial discrimination for the purpose of establishing and maintaining the domination of one racial group over others. *See* Werle, *supra* note 3, at 262. Article II of the Anti-Apartheid Convention defines the crime of apartheid as any of:

> the following acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person…; (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or part; (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic, and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedom, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association; (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them

Yet, in the *Apartheid* case, Judge Sprizzo of the Southern District of New York dismissed the action against TNCs doing business under the former South African-Apartheid Regime.[128] However, a careful reading of the judgment suggests that Judge Sprizzo does not doubt the actionability of apartheid as a crime against humanity under ATS as such.[129] Segregation and suppression based on race pervading all classes and spheres of the civil and public society is something so remote from any form of minimum standards of civilization regardless of cultural background, and given its universal condemnation, it is difficult to argue that the prohibition on apartheid does not meet the standard announced by the Supreme Court in *Sosa*. Rather, he questioned whether doing business with such system results in international law violations by private actors, i.e., whether the private actors already participate in such violation by conducting business with the regime. This issue of indirect liability under ATS is indeed questionable in respect of apartheid but separate from the issue of actionability.[130] In fact, on appeal, the Court of Appeals reversed the dismissal of the ATS claim on other grounds.[131] Accordingly, despite the dismissal of the case at first instance, a good argument can be made that the crime of apartheid is actionable under ATS. As of today, as long as no State pursues an active policy of apartheid, it is unlikely that the crime of apartheid will play any further role in ATS litigation against TNCs in the future.

IV. *War Crimes*

War crimes refer to criminal conduct committed in the course of war or armed conflict.[132]

They differ in one respect from genocide and crimes against humanity. While the latter two form independent crimes, war crimes presuppose a

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to forced labour; (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

There are more than 100 parties to the Anti-Apartheid Convention. Information *available at* http://www.ohchr.org/english/countries/ratification/7.htm (accessed 2 August 2006); http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm (accessed 2 August 2006). *See also* Jost Delbrück, "Apartheid", I *Encyclopedia of Public International Law* 192 (Rudolf Bernhardt ed., 1992).

[128] 346 F. Supp. 2d 538.

[129] *Id.*

[130] *See infra* Chapter Seven: Norms that Can Be Violated Only by State Actors; Chapter Eight: Norms that Can Be Violated by Everyone.

[131] *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); Chapter Eight: Norms that Can Be Violated by Everyone.

[132] Werle, *supra* note 3, at 269.

violation of international humanitarian law. International humanitarian law, i.e., the laws of war, establishes a legal regime for the conduct of warfare with the purpose of limiting the effects of armed conflicts (*jus in bello*). In contrast to what is commonly thought, it does not cover the issue of whether the recourse to the use of force is legal (*jus ad bellum*).[133] While international humanitarian law suspends the prohibition on killing of combatants (and forbids the punishment of lawful combatants for killings under international or domestic law)[134] it nonetheless also has a substantial limiting effect on warfare. The classic example of the restriction of warfare imposed by international humanitarian law is on attacking combatants (as opposed to civilians).[135] One who is not participating or is no longer participating in armed conflict for reasons of wounding, sickness, shipwreck, or prisoner of war status is not a legitimate target and must be protected by the parties to the armed conflict.[136] Throughout the last decades, this restrictive side of international humanitarian law has increasingly expanded and deepened. Modern international humanitarian law which has to cope with all the theoretical possibilities of modern warfare consists of a large body of rules, many of which are highly technical.[137] Today, international humanitarian law rests on two pillars: the so-called The Hague Law and the so-called Geneva Law which emerged side by side and overlap in many respects. Between the two, the four Geneva Conventions of 1949[138] constituting the core of the Geneva

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[133] *Id*. For the longest time in human history, recourse to warfare was considered a legitimate means to achieve political, economic, and religious goals. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 697 (2003). Even today, the use of force is allowed in certain circumstances. It is only allowed under chapter VII of the UN Charter or as a matter of self-defense. Charter of the United Nations, 26 June 1945, 59 Stat. 1031, art. 51. *See* Malcolm N. Shaw, *International Law* 1013 et seq. (2003).

[134] *Cf.* Knut Ipsen, "Combatants and Non-Combatants", in *The Handbook of Humanitarian Law in Armed Conflicts* para. 302 (Dieter Fleck ed., 1999).

[135] Cassese, *supra* note 26, at 47.

[136] Werle, *supra* note 3, at 275.

[137] *Id*. at 279.

[138] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 ("Geneva Convention I"); the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 ("Geneva Convention II"); the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 ("Geneva Convention III"); the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 ("Geneva Convention IV"). The common article 3 reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Law are the definitive written sources of international humanitarian law.[139] They codify the standards that States have set for humane conduct in war and represent an assertion that even in wartime, there are limits to what is acceptable conduct and they are almost universally ratified.[140] Of these laws, international criminal law covers only those the violation of which results in criminal responsibility, the determination of which is one of the principal challenges of international criminal law.[141]

A. *Actionability*

In *Kadic*, the plaintiffs also asserted acts of murder, rape, torture, and arbitrary detention of civilians committed in the hostilities of war, i.e., war crimes.[142] In addressing the issue, the Second Circuit referred to the holding of the Supreme Court in *In re Yamashita*[143] and held that "[a]trocities of the types alleged here have long been recognized in international law as violations of

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(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[139] Ratner & Abrams, *supra* note 34, at 82.

[140] *Id.*

[141] On the issue of whether individual criminal responsibility extends to TNCs, *see infra* Chapter Six: Application to TNCs.

[142] 70 F. 3d at 242.

[143] *Id.* referring to 66 S. Ct. 340, 347 (1946).

the law of wars".[144] The Second Circuit explained that the laws of war were codified in the four Geneva Conventions which have been ratified by more than 180 nations including the United States and that the common article 3 which prohibits infringements on the life, limb, and dignity of non-combatants in armed conflicts, in particular civilians, is substantially identical in each of the four conventions, binds "each Party to the conflict…to apply, as a minimum, the following provision", and therefore, is actionable under ATS.[145] From that time on, no court has impaired such holding.[146]

In *Kadic*, the Second Circuit was confronted with war crimes allegedly committed within a civil war. Historically, however, international humanitarian law was restricted to international conflicts since traditionally, international humanitarian law was derived out of rules for disputes among States. This is not true anymore although the set of rules and the degree of regulation of international conflict as opposed to internal conflicts such as civil wars is still considerably larger. In any case, it is conventional knowledge among international lawyers and pronounced by several international courts, including the International Court of Justice, that article 3 which protects the well-being of civilians (those who are not taking part in combat) in non-international armed conflict, in particular civil wars, serves as an absolute minimum standard in non-international armed conflicts under any kind of circumstances and has attained the status of universally recognized international customary law.[147] In 1994, with the creation of the ICTR, the international community decided for the first time to actually apply international humanitarian law to a conflict with only international aspects. Moreover, another innovative milestone in

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[144] 70 F. 3d at 242. In addition, the Second Circuit explained that international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities. *Id.*

[145] *Id.* at 243.

[146] *E.g., Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352, 1354 (N.D. Ga. 2002); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d. 1345, 1360–61 (S.D. Fla. 2001). The Second Circuit has recently confirmed its earlier holding. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 150, n. 18 (2d Cir. 2003).

[147] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* 1986 I.C.J. 14, 114; *Prosecutor v. Akayesu, supra* note 26, para. 608; *Prosecutor v. Delalic et al. (Mucic et al.)*, Case No. IT-96-21-T, Judgment of 16 November 1998, para. 301; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment of 3 March 2000, paras. 164–68. This also applies to the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts ('Geneva Additional Protocol II'), *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545 (accessed 3 August 2006). See the well-reasoned decision of the ICTY Appeals Chamber in *Prosecutor v Tadic*, Case No. IT-94-1, Decision of 2 October 1995, paras. 96–136.

this respect is the judgment of the ICTY Appeals Chamber in *Prosecutor v Tadic* where the chamber held that violations of international humanitarian law applicable in non-international conflicts can also be criminal under customary international law.[148] Similarly, article 8(2)(c) of the ICC Statute declares violations of common article 3 of the Geneva Conventions to be of a criminal punishable nature.[149] The Second Circuit's holding is fully in line with these developments. Given the widespread acceptance of these developments as expressed in the ICC Statute, the actionability of common article 3 under ATS should not be affected by *Sosa*.[150]

B. *Enforceable Scope of Definition*

1. *Overall Requirements*

By definition, all war crimes presuppose the temporal and geographical scope of application of war crimes, the existence of armed conflict, the nexus between the wrongdoing and the armed conflict, and the mental element.

(a) Applicability *Ratione Temporis* and *Loci*

The ICTY Appeals Chamber explained:

> International humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[151]

Accordingly, in respect of ATS, war crimes are not limited in time and location to the scene of the actual ongoing fighting but as a general rule, extends until the armed conflict is, in one way or another, resolved and terminated.[152]

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[148] *See Prosecutor v Tadic*, Case No. IT-94-1, ICTY Appeals Chamber, Decision of 2 October 1995, para. 129, where the Appeals Chamber expressed no doubts that certain violations result in individual criminal responsibility regardless of whether the "conflict is categorized as an internal or international armed one."

[149] *Supra* note 6.

[150] This result can be further supported by the fact that the U.S., through its ratification of the four Geneva Conventions, has undertaken to provide for "effective penal sanctions" for any grave breaches. *See* Geneva Convention I, art. 49, *supra* note 138; Geneva Convention II, art. 50, *supra* note 138; Geneva Convention III, art. 129, *supra* note 138; Geneva Convention IV, art. 146, *supra* note 138. This presupposes that one labels the tort law sanction under ATS as a penal sanction within this meaning.

[151] *Prosecutor v Tadic, supra* note 147, para. 70.

[152] Werle, *supra* note 3, at 294.

(b) Existence of Armed Conflict

War crimes necessitate the existence of an armed conflict, be it international or non-international. In the above-mentioned *Sarei v. Rio Tinto* case, defendants argued that the laws of war are not applicable, asserting that the clashes and violence were not massive enough to amount to an armed conflict, not even of an internal character.[153] Since international humanitarian law applies only in the presence of armed conflict, TNCs may, in future cases, resort to the defense that the use of military force does not amount to an armed conflict within this meaning. The ICTY Appeals Chamber in its decision in *Prosecutor v Tadíc* characterized armed conflict as a "resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[154] In the light of the decade-long and extensive civil war on the island with allegedly thousands of death, Judge Morrow simply rejected the argument noting that PNG was a party to such conflict.[155]

(c) Nexus to Armed Conflict

However, not every atrocity committed during civil unrest or war amounts to a war crime, in particular if the perpetrator merely takes advantage of the absence of any effective rule of law. A war crime is present only if the criminal acts bear a functional relationship to the armed conflict and does not just occur simultaneously.[156] In *Estate of Valmore Lacarno Rodriguez v. Drummond Co. Inc.*, plaintiffs alleged not only genocide but also war crimes contending that the extra-judicial killings amounted to war crimes as such.[157] The trade union alleged that the laws of war also apply to defendants because the paramilitary members who murdered the trade union leaders were paid by defendants and thus, were essentially acting as defendants' agents.[158] Accordingly, their argument rested on the assumption that the paramilitary forces were a party to an armed conflict, i.e., the civil war in Colombia, and thus as such, covered by international humanitarian law. As an initial matter, the court found that the international humanitarian law as set forth in the Geneva Conventions apply to the United Self-Defense Forces of Colombia and other paramilitary

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[153] 221 F. Supp. 2d at 1141.

[154] *Supra* note 147. This was followed in *Prosecutor v. Delalic et al., supra* note 147, para. 183; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 59; *Prosecutor v. Nateltilic and Martinovic*, Case No. IT-98-34-T, Judgment of 31 March 2003, para. 177.

[155] 221 F. Supp. 2d at 1141.

[156] *Cf.* 256 F. Supp. 2d at 1261.

[157] *Id.* at 1260.

[158] *Id.*

rebel groups operating in Colombia.[159] As of date, the case is still pending. Again, it reveals though that managers may be seduced to take advantage of civil chaos to murder or torture union leaders in order to deunionize their plants. The ICTY Appeals Chamber held in this regard that "it is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue".[160] The *Estate of Valmore Lacarno Rodriguez* case shows that the nexus requirement between the alleged crime and the armed conflict may pose an obstacle to reliance on war crimes in ATS proceedings against TNCs. Without a nexus to an armed conflict, the crime does not amount to a war crime but constitutes an ordinary criminal offense punishable under national criminal law.[161] The nexus requirement is particularly problematic to establish if the victims of the crime, like in ATS-TNC cases, are civilians and if members of paramilitary forces which are in combat in an internal conflict are hardly distinguishable from ordinary criminals and lawless persons. The argument can be made that the nexus is absent because the private actor TNC simply takes advantage of the lack of any rule of law and a power vacuum which result from a lasting and bloody civil war.

(d) Mental Element

In accordance with customary international law, the mens rea of war crimes requires intent and knowledge of the crime, unless otherwise provided.[162] In particular, the existence of the armed conflict is not only a material element of war crimes, but it must also be mirrored in the perpetrator's mind.[163] No ATS case has specifically addressed this issue as the mental element is typically present if the objective elements have been established.

2. *Particular Crimes*

Within war crimes, several categories may be distinguished.

(a) War Crimes against Persons

As previously stated, international humanitarian law clearly allows the killing or wounding in armed conflicts subject to the rules and conditions of international humanitarian law. Thus, definitions of war crimes must specify

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[159] *Id.*

[160] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment of 25 June 1999, para. 45.

[161] Cassese, *supra* note 26, at 49.

[162] Werle, *supra* note 3, at 297.

[163] *See* Knut Dörmann, "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", 7 *Max Planck Y.B. United Nations L.* 341, 359 (2003).

the rules the violation of which renders the otherwise permissive killing and wounding illegal.[164] This determination focuses primarily on defining which persons are protected from any kind of harmful conduct.[165] As to international armed conflicts, the definition of the protected persons is not fully uniform in the Geneva Conventions.[166] However, as is true for non-international conflict, every civilian, that is, anybody who is not or is no longer participating in the military conflict is protected.[167] At the core of international humanitarian law in general is the protection and the avoidance of bloodshed among innocent civilians who are not taking part in the armed conflict. Accordingly, acts of killing, wounding, sexual violence, humiliating and other forms of abuses on civilians committed in the hostilities of war are prohibited, like the ones allegedly committed in *Kadic*, certainly violate this basic rule, and remain actionable after *Sosa*.

The case of *Sarei v. Rio Tinto*,[168] if the allegations are proven, would be within this category. In this case, in addition to the medical blockade, plaintiffs asserted that throughout the conflict, the army of PNG with the assistance of Australian pilots and helicopters, attacked towns and villages on the island with mortar bombs, guns, grenades, and ammunition. They explained that PNG led the war against the civilian population of Bougainville in constantly bombing civilian, non-military targets; engaging in burning houses and villages; raping women; perfidiously using the Red Cross emblem; and pillaging.[169] They stated that an estimated 15,000 civilians which equals 10 percent of Bougainville's population were killed during the war and that 67,000 people still live in care centers or refugee camps although the conflict ended in 1999.[170]

Plaintiffs argued that the medical blockade amounted to a war crime. In a first line of defense, defendants argued that the effects of a medical blockade do not state a claim for violation of the laws of war because they constitute a non-violent economic pressure.[171] Judge Morrow found this position to be

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[164] Werle, *supra* note 3, at 298.

[165] *Id.*

[166] *See id.* at 299–301.

[167] Cassese, *supra* note 26, at 53.

[168] 221 F. Supp. 2d 1116.

[169] *Id.*

[170] *Id.*

[171] Defendants relied on the declaration of their expert, Prof. Barry Carter who stated that

> [t]he allegation that a sovereign state's blockade of an island within its recognized territory is illegal runs contrary to customary international law, which recognizes and respects the political independence and territorial sovereignty of a state[,] including the inherent right to police within its own territory.

Id. at 1140. In reaction, the court simply noted that Prof. Carter cites no authority in support of his conclusion. *Id.*

in contradiction to the Geneva Conventions which, according to a precedent of the Fourth Circuit,[172] represent international consensus on the minimum standard required by the laws of war regarding conduct in times of war.[173] Following the approach developed in the aftermath of *Filártiga v. Peña-Irala* in determining universality of the rule, Judge Morrow noted that more than 180 States, including the United States, have ratified them.[174] Relying on *Kadic*, he described common article 3, without mentioning the provision explicitly, stating that the conventions prohibit violence to life and person, specifically murder of all kinds, mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity, particularly humiliating and degrading treatment, the imposition of sentences and carrying out of executions without previous judgment pronounced by a regularly-constituted court affording all indispensable judicial guarantees, and providing that the wounded and sick shall be collected and cared for.[175] Indeed, with respect to international armed conflicts, article 23 of Geneva Convention IV provides explicitly that all shipment of medicines, medical personnel, as well as essential foodstuff, clothing, and tonics intended for groups in need of special protection, are to be guaranteed safe passage.[176] Therefore, the denial of access to medicines and medical treatment and the starvation of a civilian population is, at least in principle, recognized as a war crime.[177] As to the alleged bombing of civilians and other targeting of the civilian population, Judge Morrow observed that the defendants did not deny the illegality of such conduct under the conventions which are widely recognized as codifying the laws of war.[178] Ultimately, the case was dismissed based on the political question doctrine,[179] but this dismissal was later reversed by the Court of Appeals.[180]

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[172] *M.A.A26851062 v. U.S. INS*, 858 F.2d 210, 219 (4th Cir. 1988).

[173] 221 F. Supp. 2d at 1127.

[174] *Id.*

[175] *Id.* at 1141.

[176] These rules were inspired by World War II abuses on civilians. *See Geneva Convention IV Commentary* 319–21 (Jean S. Pictet ed., 1958).

[177] *See* Rüdiger Wolfrum, "Enforcement of International Humanitarian Law", in *The Handbook of Humanitarian Law in Armed Conflicts* 535 (Dieter Fleck ed., 1995), who explains that under article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts ("Geneva Additional Protocol I"), *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 (accessed 3 August 2006), and article 14 of the Geneva Additional Protocol II, *supra* note 147, the passage of essential foodstuff for civilians is to be guaranteed. *Id.*, para. 19.

[178] 221 F. Supp. 2d at 1141.

[179] *Id.* at 1208–09.

[180] Accordingly, the Court of Appeals did not address the issue.

(b) War Crimes against Property

Other war crimes are directed against property. In *Bodner v. Banque Paribas*,[181] the court assumed jurisdiction over the claim of expropriation of Jewish property by the Nazi and Vichy Regime filed against French banks which conspired with the German occupying powers and the Vichy government.[182] It is well-established that crimes against property protected the property of owners in occupied territories from undue interference. This is, inter alia, evidenced by the Nuremberg Charter, which prohibits the plunder of private property by occupying powers and article 46 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land which proscribes the confiscation of private property by occupying powers.[183] Accordingly, today, if not pre-empted by reparation or other treaties, TNCs which participated in such expropriations or are legal successors of corporations which participated therein may be successfully held responsible under ATS.

(c) Enforcement of International Humanitarian Law in General?

The next question then is whether only those violations of international humanitarian law which are criminally sanctioned by international law can be enforced through ATS, or are other violations of international humanitarian law, although not reaching the level of individual responsibility under international criminal law, actionable under ATS. In this respect, the point can be made that with a long history in international law, war crimes as violations of the laws of war occupy in terms of general acceptance, one of the highest ranks among the norms of international law.[184] Yet, as a prominent scholar on the laws of war, Yoram Dinstein, describes it, "as one descends from fundamentals to specifics, consensus shrinks."[185] A good example in this regard is the principle of distinction and military objectives. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice acknowledged the principle of distinction, i.e., between combatants on one hand and civilians on the other as a fundamental and cardinal principle of international humanitarian law.[186] It is not contested that the principle of distinction which lies at the root of international humanitarian law is part of

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[181] 114 F. Supp. 2d. 117 (E.D.N.Y. 2000).

[182] *Id.* at 128.

[183] *Available at* http://www.lawofwar.org/hague_iv.htm (accessed 3 August 2006).

[184] *See* Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 255 (2004).

[185] *Id.*

[186] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 26, 257.

customary international law.[187] However, the problem then is how to define the notion of military objective. A definition is provided by article 52(2) of Geneva Additional Protocol I. It provides that attacks must be limited to military objectives and continues to provide a definition, which some scholars perceive as representative of customary international law,[188] that

> military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[189]

A prominent international law scholar has openly declared that this definition is "so sweeping that it can cover practically everything."[190] This is not an exaggeration since the concepts of nature, location, and purpose or use leave significant leeway in interpretation.[191] For example, while attacks on civilians are clearly forbidden, a bridge used by civilians which is of a strategic importance in an armed conflict may arguably constitute a "military objective" although its destruction may cause the death of hundreds of non-combatants. A similar uncertain account has to be taken in respect of the principle of proportionality. As of today, customary international law recognizes the principle of proportionality[192] according to which, even a legitimate target may not be attacked if the collateral damage and casualties would be disproportionate to the specific military gain from the attack.[193] Accordingly, in international humanitarian law, everything seems to depend on the concrete factual situation and the circumstances in which the attack is conducted and only in very extreme cases can unequivocal violations of the laws of war be discernable. As a consequence, the prevalence of only broadly defined principles and the

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[187] *See* Horace B. Robertson, "The Principle of the Military Objective in the Law of Armed Conflict", in *The Law of Military Operations, Liber Amicorum Professor Jack Grunawalt* 197, 207 (Michael N. Schmitt ed., 1998).

[188] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 114 (Louise Doswald-Beck ed., 1995).

[189] *Supra* note 177. Several instruments have picked up the definition verbatim: *See* e.g., Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices of the Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137, 19 I.L.M. 1523 art. 2(4); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 38 *Int'l Legal Materials* 769 (1999), art. 1(f).

[190] Cassese, *supra* note 26, at 339.

[191] *See, e.g.*, Dinstein, *supra* note 184, at 88–94.

[192] *Id.* at 120.

[193] *See Legality of the Threat or Use of Nuclear Weapons, supra* note 186, at 587 (Dissenting Opinion of Judge Higgins).

fact-dependency of international humanitarian law may render actual actionability under ATS difficult because the Supreme Court's *Sosa* standard, which requires not only universal consensus, which is present, but also an elevated degree of specifity, excludes cases which are not clear-cut and provide a large margin of discretion to the federal judge.

V. *Conclusions*

At present, no TNC has been held liable under ATS for violation of international criminal law although numerous cases are pending in this regard. The prohibitions on genocide, crimes against humanity, and violations of common article 3 of the Geneva Conventions (the killing, wounding, and mistreatment of civilians in armed conflicts) are universally recognized and in their core, are sufficiently defined to meet the *Sosa* standard.

With respect to genocide, some definitional uncertainties in respect of groups covered and acts prohibited may pose obstacles. Further, the mere destruction of indigenous peoples for economic reasons may not amount to genocide. Soldiers causing the destruction of a tribe so as to enforce a huge roll dam project being implemented with a TNC; indigenous peoples massacred by the military to deter resistance against a pipeline project of a TNC; or the pollution of the habitat of ethnic groups by a mining operation of a TNC – all these activities may not result to liability of the TNC concerned under ATS under the current concept of genocide in the law of nations. In addition, the defendant TNCs can claim that the primary purpose of their actions was the building of a roll dam, the construction of a pipeline, or the operation of a mine, and the necessary specific intent is missing as evidenced by the *Beanal* decision.[194]

In these situations, crimes against humanity and war crimes may serve as a fallback. Violent military attacks on local populations opposing an industrial project may well fall within the reach of the crime if sufficiently large-scaled and organized. As to apartheid, it is similarly prohibited by international law and thus, is actionable as such under ATS. However, given the stigma connected to crimes against humanity, a positive finding, as is true for genocide, may be possible only in very extreme, exceptional cases.

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[194] This result appears unsatisfactory. On the other hand, nothing prevents the plaintiffs from claiming torture, extrajudicial killings, or crimes against humanity. The latter situation was envisaged in the *Beanal* case. 197 F.3d. at 167–68; 969 F. Supp. at 372–73. Note that the aider and abettor liability does not depend on sharing the principal's intent. *See infra* Chapter Six: Corporate Participation Covered.

War crimes, at least the core content of international humanitarian law, the protection of those who are not actively participating in the armed conflict from killing and wounding, are equally actionable under ATS as long as a nexus to the armed conflict in the country where the alleged acts occurred exists. The same should be true for instances of starvation of civil populations and the denial of access to medical treatment. Moreover, war crimes against property during World War II may also lead to actions against legal successors of the companies involved at the time.

Beyond the core meaning of war crimes, it is unclear if, even a rule of international humanitarian law that has reached the status of international customary law meets the requirements of the *Sosa* test as enunciated by the Supreme Court as the law in the field appears to be still largely in development.

Chapter Three

Civil and Political Rights

I. *Introduction*

Universally recognized human rights are those enshrined in the so-called International Bill of Rights adopted by the United Nations ("UN") General Assembly.[1] The International Bill of Rights encompasses the Universal Declaration of Human Rights ("UDHR")[2] which, although not of a treaty nature, contains almost the whole range of human rights and constituted a major step forward in the advancement of international human rights law as adopted in 1948[3] and the two consecutive treaties which expand the rights proclaimed by the (technically non-binding) UDHR, i.e., the International Covenant on Civil and Political Rights ("ICCPR")[4] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[5] As of now, the ICCPR, together with the UDHR, is widely accepted as the "consensus of global opinion on fundamental rights",[6] and as such, are therefore highly reflective of customary international law.[7]

This chapter addresses whether, and if yes, to what degree, civil and political rights are actionable under ATS.[8] The issue whether the rights enshrined

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[1] On the International Bill of Rights, *see generally* Rhona K.M. Smith, *Textbook on International Human Rights* 38–52 (2005).

[2] U.N.G.A. Res. 217(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

[3] Asbjørn Eide & Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge", *in Economic, Social and Cultural Rights* 3–7 (Asbjørn Eide *et al.*, eds., 2001).

[4] 19 December 1966, 999 U.N.T.S. 171.

[5] 16 December 1966, 993 U.N.T.S. 3.

[6] In respect of the UDHR, *see* Smith, *supra* note 1, at 38.

[7] Currently, 152 States, including the United States, have ratified the ICCPR. *See* Office of the High Commissioner on Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties as of June 9, 2004*, 11 *available at* http://www.unhchr.ch/pdf/report.pdf (accessed 4 August 2006).

[8] Again, so far, no TNC has been held liable for a violation of human rights under ATS. However, many cases are still pending. *See infra* II–VI. For strategic reasons, plaintiffs in these ATS cases targeting TNCs typically do not focus a priori in their allegations simply on one or two human rights but rely, in accordance with American litigation practice, on any

in the ICESCR and in other UN instruments adopted by the UN General Assembly are actionable will be dealt with in separate chapters.[9]

Part II examines the right to life. Part III explores the right not to be subjected to torture. Part IV scrutinizes the right not to be subjected to cruel, unusual, or inhuman treatment. Part V scrutinizes the right against arbitrary detention. Part VI focuses on the right not to be subjected to medical experimentation without informed consent. Part VII evaluates the right to free speech. It is exactly in this area of classic human rights law where non-corporate ATS litigation has proven quite successful in the past: victims of former and current oppressive regimes have celebrated a number of early legal victories in federal court with the notable support and advice of U.S.-based human rights activists.[10]

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right which may have been violated. For example, in the still pending *Wiwa* case involving the use of force in the furtherance of Royal Dutch Shell's oil extraction in the Nigerian Delta, plaintiffs allege that the defendants are liable for summary execution; crimes against humanity; torture; cruel, inhuman, and degrading treatment; and arbitrary arrest and detention. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

[9] *See infra* Chapter Four: Labor Standards; Chapter Five: Environmental Destruction.

[10] For example, in *In re Estate of Ferdinand Marcos, Human Rights Litigation,* 25 F.3d 1467, 1475 (9th Cir. 1994), involving claims against the estate of the former Philippine dictator, a jury awarded to individual plaintiffs and to a class of almost 10,000 victims of the Marcos Regime $766 million in compensatory damages and $1.2 billion in punitive damages. *Id*. at 348. Plaintiffs are still currently seeking to recover all awards. The following is an illustrative example of the damages (compensatory and punitive) awarded cited in Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts, Appendix K: Summary of Damage Awards under the Alien Tort Claims Act and the Torture Victim Protection Act* 343–48 (1996): *Filártiga v. Peña-Irala*, involving summary execution and torture, $385,000 in compensatory damages and $10 million in punitive damages; *Xuncax v. Gramajo*, for the victims of summary execution, $2 million in compensatory damages and $5 million in punitive damages and for the torture victims, $1 million in compensatory damages and $2 million in punitive damages; *Forti v. Suarez-Mason*, for arbitrary detention, torture, and summary execution, $3 million in compensatory damages and $3 million in punitive damages; *Quiros de Rapaport v. Suarez-Mason*, for torture, murder, and disappearance, $15 million in compensatory damages and $15 million in punitive damages; *Paul v. Avril*, for six victims of torture and arbitrary detention, each was awarded between $2.5 million to $3.5 million in compensatory damages and $4 million in punitive damages; *Trajano v. Marcos*, for torture and summary execution, $4,161,000 in total damages. However, actual recovery of damages was rare. This would be different if ATS cases results in awards against TNCs with huge financial resources.

The success achieved so far has led to an almost synonymous use of the terms "human rights litigation" on the one hand and "ATS litigation" on the other in contemporary U.S. legal and political literature. *See* Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004).

II. *The Right to Life*

In article 6, the ICCPR guarantees every human being the "inherent right to life".[11]

A. *Actionability*

In the ATS case *Trajano v. Marcos*, plaintiff brought an action against the former Philippine dictator and his daughter.[12] The plaintiff's son was kidnapped, interrogated, and tortured to death by military intelligence personnel after he asked a critical question at a university presentation given by the dictator's daughter.[13]

In response, the Court of Appeals for the Ninth Circuit held that wrongful death, committed by military intelligence officials through torture is prohibited by the law of nations and is actionable under ATS.[14]

In the aftermath, other courts have similarly held that extra-judicial killings or executions fall under ATS.[15]

Such practice accords to the fact that international law recognizes a right to life combined with a right not to be killed without judicial authority as evidenced by article 6 of the ICCPR. The right to life has been labelled the supreme human right since the taking of one's life disables the person from exercising all other rights.[16] Given this high rank, the right to life meets the standard of elevated degree of specificity and acceptance among nations promulgated by the Supreme Court in *Sosa v. Alvarez-Machain*.[17] Moreover,

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[11] *Supra* note 4.

[12] 978 F.2d 493, 495–96 (9th Cir. 1992).

[13] *Id*.

[14] *Id*. at 499. In many earlier cases, the issue was drafted as one of torture. The *Filartiga* precedent is a good example in this respect where the victim was tortured to death. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

[15] More recently, *see Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at 6 (S.D.N.Y. 2002); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1144–45 (E.D. Cal. 2004); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178–79 (C.D. Cal. 2005); *Enahoro v. Abubakar*, 408 F.3d 877, 884–85 (7th Cir. 2005).

[16] If one puts aside human dignity as the overarching topos of human rights law for the moment. *See* Stephens & Ratner, *supra* note 10, at 25–26. *See also* Yoram Dinstein, "The Right to Life, Physical Integrity and Liberty", in *The International Bill of Rights: The Covenant on Civil and Political Rights* 114, 115 (Louis Henkin ed., 1981), who states that the right to life forms part of customary international law.

[17] See the post-*Sosa* judgments cited in *supra* note 15 and generally, the judgment of the Supreme Court, 124 S. Ct. 2739 (2004).

its actionability under ATS is confirmed by the TVPA[18] which was meant as a complement to ATS by Congress[19] and which provides an explicit cause of action for extra-judicial killings.[20]

B. *Enforceable Scope of Definition*

Despite being the supreme human right, the right to life is by no means absolute.

1. *Extra-Judicial Killing*

In *Bowoto v. Chevron Texaco Corp.*, Chevron Texaco was accused of extra-judical killings in the brutal violence committed against oppositors to its oil operations in Nigeria.[21] The Nigerian plaintiffs allege, inter alia, that Chevron Texaco recruited the Nigerian military and police officials to fire weapons at Nigerians staging a protest on the Chevron oil platform Parabe where two protestors were killed; that a Chevron helicopter flown by pilots employed by Chevron flew Nigerian military and/or police officials over the Opia and Ikenyan communities where they opened fire on the villagers resulting in the killing of two persons and injury to several others; and that similarly, Chevron truck drivers drove military personnel to Opia where the soldiers jumped off and started firing on the villagers killing several people.[22] In respect of the

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[18] Torture Victim Protection Act, Pub.L. No. 102–256, 106 Stat. 73 (1992) codified at § 28 U.S.C. § 1350 note.

[19] The legislative history of the TVPA is replete with expressions of support for the *Filártiga* decision and the case based on it. It highlights the role of U.S. courts in providing a legal forum for outrageous violations of human rights regardless of where they are committed. The legislative reporter declares:

> Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law.…
> The Torture Victim Protection Act would respon[d] to this situation.

H.R. Rep. No. 102–367, at 3 (1992).

Defendants typically argued that the TVPA has preempted rather than supplemented ATS. A significant number of courts have rejected such proposition. They declared that the TVPA merely creates additional claims. *See Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 380–81 (E.D. La. 1997); *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). After *Sosa*, this position has been confirmed in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d. 1242 (11th Cir. 2005). *But see Enahoro v. Abubakar*, 408 F.3d at 884–85.

[20] *See supra* note 18.

[21] *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004). The defendant's motion for summary judgment was denied. *Id.*

[22] *Id.*

Parabe incident, Chevron's defense could argue that the resort to the use of force towards protestors who illegally occupied private property is still a legitimate exercise of a State's sovereign police powers under which, it is not only justified but also obliged to protect private subjects from the illegal acts of other private actors.

In determining whether the deprivation of life conforms to the conditions set in the limitations of the right, if crucial, courts look for guidance in the definition given in the TVPA as an expression of what right should be actionable under ATS.[23] The act defines extra-judicial killing as:

> a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.[24]

In respect of TVPA (and ATS), it has been declared that the term "deliberate" as opposed to "extrajudicial intent" in the definition of extra-judicial killing is exactly drafted so as to exclude actions that carry only extrajudicial intent such as the death caused by a police officer exercising deadly use of force[25] although in both instances, the argument goes, the government officials were merely exercising the police powers inherent in any legal system. Such an argument could be raised by the defendants in the *Bowoto* case (in the future).

However, while TVPA and ATS certainly do not restrict a legitimate exercise of police powers by other States in critical situations for the protection of other citizens' life or property (even if such exercise results in multiple deaths, shooting, and killing of peaceful demonstrators), the excessive force used in *Wiwa* to suppress opposition or even though private property may have been occupied as in *Bowoto* is excessive under international law and cannot be labelled as a legitimate exercise of police powers either under international law or under Nigerian law.

This interpretation is supported by international law where the situation is even clearer. Under international law, the deprivation of life by security personnel is only permissible if it is absolutely necessary and proportionate in light of all facts and circumstances.[26] Therefore, it condemns such activities

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[23] *E.g.*, *Wiwa*, 226 F.3d at 105, n. 11; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

[24] *See supra* note 18, § 3(a).

[25] Stephens & Ratner, *supra* note 10, at 25–26. It also excludes murder on behalf of the United States. *Id*.

[26] On deaths caused by state security forces, *see* Smith, *supra* note 1, at 211. *See* Office of the High Commissioner for Human Rights, *General Comment No. 6: The Right to Life (Art. 6)*, para. 3, 30 April 1982, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/

which are unnecessary und disproportionate.[27] For example, a policeman threatened by a burglar needs to look first at alternatives for the neutralization of the criminal subject before taking resort to absolute force.

Therefore, resort to the use of deadly force under these circumstances must be understood as a "deliberate" decision in the meaning of the definition in the TVPA and as such, is actionable under ATS. Accordingly, even in *Bowoto* where the court has not yet addressed the issue, such treacherous killings, if proven, could be found ultimately as falling within the right to life actionable under ATS.

2. *Death Penalty*

Even more complex questions arise in the context of the death penalty. Contrary to popular belief, international law does not prohibit capital punishment per se; nor does the TVPA.[28] The TVPA explicitly reserves in the second sentence of the above-cited definition the right to impose the death penalty in accordance with U.S. legal tradition.[29]

In *Wiwa v. Royal Dutch Petroleum Co.*,[30] the plaintiffs allege the involvement of Royal Dutch Shell in the execution of Ken Saro Wiwa and eight other Ogoni tribe leaders for protesting Royal Dutch Shell's environmental policies in Nigeria.[31] The background of the dispute is the extensive oil discovery and exploration by Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), a company which belongs to the Royal Dutch Shell Group, in the Ogoni region. The complaint states that Shell Nigeria coercively appropriated land for its purposes without adequate compensation and caused extensive pollution to the air and water of the traditional homeland of the Ogoni Tribe.[32] Wiwa was an opposition leader and president of the Movement for the Survival of the Ogoni People ("MSOP") while John Kpuinen

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84ab9690ccd81fc7c12563ed0046fae3?Opendocument (accessed 6 August 2006), which calls upon States to prevent arbitrary killings by security forces. The committee's reports and general comments are not technically binding. Nevertheless, they help clarify the scope and extent of the covered rights. Smith, *supra* note 1, at 50.

[27] Smith, *supra* note 1, at 211.

[28] Note, however, that the death row phenomenon and/or certain methods of execution, such as stoning, as such may amount to a violation of article 7 of the ICCPR (cruel and inhuman treatment). *See* Manfred Nowak, "The Death Penalty under Present International Law", in *EU–China Human Rights Dialogue* 68, 71–72 (Manfred Nowak & Xin Chunying eds., 2000).

[29] See quotation accompanying *supra* note 24.

[30] 226 F.3d 88.

[31] *Id*. at 92.

[32] *Id*.

was the head of the MSOP youth organization.[33] The movement opposed the activity of Shell Nigeria and its consequences in the traditional land of the Ogoni.[34] The complaint contends that Shell Nigeria recruited the Nigerian military and police in terrorizing Ogoni villages through attacks and to suppress the MSOP which was opposing its economic expansion.[35] The military allegedly carried out random killings and shootings, rapes, and floggings.[36] The plaintiffs claim that the "Royal Dutch/Shell Group . . . provided money, weapons and logistic support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks."[37] The plaintiffs also contended that leaders of the movement were repeatedly arrested, detained, and abused to deter further protests.[38] Such killings, if proven, would be actionable as extra-judicial killings under ATS as presented above.[39] The case was dismissed by Judge Wood of the District Court for the Southern District of New York based on the doctrine of forum non conveniens[40] but was reversed by the Court of Appeals for the Second Circuit on appeal.[41]

In 1995, at the height of the conflict between MSOP and the government of Nigeria, Wiwa, Kpuinen, and seven other leaders of the MSOP were charged with treason and sentenced to death for murder by a military tribunal and executed.[42] The relatives of the convicted claim that the evidence leading to the conviction was fabricated to halt the opposition movement and the accused were denied the protection of the law.[43] According to the complaint, the Nigerian government authorities, police, and military implemented the policy of violence and deterrence and that it was Shell Nigeria which "instigated, orchestrated, planned and facilitated the abuses under its direction."[44] The plaintiffs claim that Royal Dutch Shell participated in the fabrication of murder charges against Wiwa and Kpuinen and bribed witnesses to give false

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 92–93.
[38] *Id.* at 92.
[39] *See supra* II.B.1.
[40] 226 F.3d at 92.
[41] *Id.* at 108. *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), 318, where the court held that the right to life amounts to one of the basic human rights that corporations need to respect. This case was dismissed on other grounds. 453 F. Supp. 2d 633 (S.D.N.Y. 2006).
[42] 226 F.3d 88.
[43] *Id.*
[44] *Id.*

testimony against them.[45] As to whether Shell Nigeria or the other defendants which are also members of the Royal Dutch Shell group were involved in the trial of Wiwa *et al*. remains to be seen. Purportedly, Royal Dutch Shell kept a watching brief in the Port Harcourt courtroom where the proceedings took place.

Article 6(2) of the ICCPR provides:

> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.[46]

Accordingly, article 6(2) of the ICCPR imposes four limitations to the death penalty. The death penalty may only be imposed (a) for the most serious crimes, (b) in accordance with the other provisions of the ICCPR, (c) based on a law in force at the time of the commission of the crime, and (d) by a final judgment rendered by a competent court.[47]

(a) Most Serious Crimes

As to the first requirement, the Human Rights Commission in its General Comment on the right to life interpreted the term "most serious crimes" strictly by declaring that "the death penalty should be a quite exceptional measure".[48] The UN Safeguards Guaranteeing Protection of the Rights of Those Facing Death Penalty adopted by the UN General Assembly unanimously in 1984 explain that the restriction of "most serious crimes…should not go beyond international crimes with lethal or other extremely grave consequences."[49] The definition of most serious crimes may not cover the allegations brought against the executed in *Wiwa*.[50] However, the applicable definition in the TVPA does not contain the requirement of restriction to serious crimes.

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[45] *Id*. at 92–93.

[46] *Supra* note 4.

[47] *See also Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457, 463–64 (S.D.N.Y. 2006), where plaintiffs framed a capital punishment case as an extra-judicial killing case but failed. *Id*. at 464–65.

[48] *See* Office of the High Commissioner for Human Rights, *supra* note 26, para. 7.

[49] *See* UN ECOSOC Res. 1984/50, May 1984, para. 1, which was adopted by the UN General Assembly without a vote in U.N.G.A. Res. 39/118, 14 December 1984.

[50] Such restriction may not play a role in the *Wiwa* case as the definition enshrined in the TVPA is silent on the issue. However, it can be argued that the TVPA is not exclusive in this respect because members of Congress naturally assumed the restriction of death pen-

(b) Minimum Fair Trial

As to the second requirement, in the jurisprudence of the Human Rights Committee which is in charge of monitoring the ICCPR, the reference applies largely to the right to a fair trial under article 14 of the ICCPR. Therefore, any violation of the (minimum) right to fair trial may amount to a violation of the right to life which requires under the ICCPR, inter alia, an independent and impartial court, presumption of innocence, and adequate possibilities for the defense.[51] However, under the applicable definition given by the TVPA, the legal result may be different. It can be argued that some procedural errors are allowable as long as they do not negate that the proceedings "afforded all judicial guarantees to the accused" as required by the TVPA. In this respect, a distinction could be drawn between a mere illegal or improper trial as opposed to one which violates the right to life. The objective formulation of the TVPA's "judicial guarantees" suggests that as long as the legal protections and remedies in principle were available to the accused, the second requirement is not met even if the guarantees have failed in the concrete case. Accordingly, from this perspective, only when corruption or the pressure from the executive branch or from Royal Dutch Shell was so pervasive that the trial is turned into a mockery as opposed to mere illegality is the standard met.

(c) Nulla poena sine lege

The third requirement, *nulla poena sine lege*, is not mentioned in the TVPA. Yet, it is unlikely that the courts would read the TVPA as not encompassing such requirements. It could be understood as a "judicial guarantee" which is "recognized as indispensable by civilized peoples" in the meaning of the definition given by the TVPA.[52]

(d) Competent court

The ICCPR requires a "final judgment rendered by a competent court", while the definition given by the TVPA requires "previous judgment pronounced by a regularly constituted court." The difference in wording does not seem to imply a difference in standard.

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alty to a class of more serious crimes as inherent and too self-evident to require stating it explicitly.

[51] *See* Smith, *supra* note 1, at 256–62.

[52] See quotation accompanying *supra* note 24.

III. *Torture*

The ICCPR states in article 7 that "[n]o one shall be subjected to torture".[53] In *Filártiga v. Peña-Irala*, Dr. Joel Filártiga, a prominent critic of the Stroessner regime in Paraguay, and his daughter, Dolly Filártiga, filed an action against Americo Noberto Peña-Irala, likewise a citizen of Paraguay and the former Inspector-General of Police in Asuncion.[54]

A. *Actionability*

The Filártigas filed a civil suit against Peña-Irala in the District Court for the Eastern District of New York.[55] Judge Kaufman, writing for the Second Circuit, had "little difficulty"[56] in stating that

> [i]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of international law of human rights, and hence of the law of nations.[57]

From that time on, all federal courts followed the *Filártiga* ruling that the prohibition on torture can be enforced through ATS.[58]

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[53] The formulation of the first sentence of article 7 corresponds literally to that in article 5 of the UDHR.

[54] 630 F.2d 876.

[55] At first instance, District Court Judge Nickerson was sympathetic to the human right claims of the plaintiffs but felt restrained by two precedents which, in his opinion, govern a State's treatment of its own citizens under international law *See id*. at 880 Thus, he found no subject-matter jurisdiction and dismissed the complaint. *Id*. On appeal, the judgment of the district court was reversed. *Id*. at 890.

[56] *Id*. at 883.

[57] *Id*. at 880.

[58] Case law in this respect is extensive. *See, e.g., Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (Mem.) (1995); *Trajano*, 978 F.2d at 499, *cert. denied*, 113 S. Ct. 2960 (1993); *Xuncax*, 886 F. Supp. at 184–85; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541–42 (N.D. Cal. 1987); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993), 901 F. Supp. 330 (S.D. Fla. 1994); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1995); *Hamid v. PriceWaterhouse*, 51 F.3d 1411, 1417 (9th Cir. 1995); *Wiwa*, 226 F.3d at 104; *Doe I v. Unocal Corp.*, 395 F.3d 932, 969 (9th Cir. 2002); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 149–50, (2d Cir. 2003). See also the discussion on the status of the prohibition against torture in international law in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713–19 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). On the actionability of the prohibition on torture under the ATS, *see also* Beth Stephens *et al*., *International Human Rights Litigation in US Courts* 140–148 (2008).

The TVPA, which was meant by Congress as a complement to ATS, further confirms its actionability by providing an explicit cause of action for torture.[59] Its legislative record states that "[t]he Filártiga v. Peña-Irala case met with general approval".[60]

Lastly, in *Sosa*, the Supreme Court referred to the Second Circuit's positive holding on the actionability of torture as an example of its reasoning that frequent violations of a norm of international law alone does not prevent the norm from meeting the standard of elevated degree of specificity and acceptance among nations for purposes of ATS. Accordingly, the Supreme Court has indirectly affirmed the actionability of torture in an obiter dictum.[61] Rising to the level of *jus cogens*,[62] the prohibition on torture fulfils not only the *Sosa* standard but even the most stringent standard employed to determine wrongs actionable under ATS.

Not surprisingly, in the few decisions rendered after *Sosa*, courts have continued to maintain the actionability of the prohibition on torture, including one case against a TNC.[63]

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[59] *See* Stephens *et al., supra* note 58, at 80–81; Stephens & Ratner, *supra* note 10, at 25. The Bush Sr. Administration opposed the passage of the bill on the grounds that it did not merely implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but would improperly provide a legal forum for disputes with no connection whatsoever to the United States, entail retaliatory lawsuits against U.S. officials, and allow the interference of individuals in foreign policies. *Id*.

[60] H.R. Rep. No. 367 at 3, 4.

[61] *Sosa*, 124 S. Ct. at 2769, n. 29, *citing Filártiga*, 630 F.2d at 884, n. 15, where the Second Circuit reasoned that "[t]he fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law".

[62] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 157–58 (2005). Nowak correctly notes that despite universal condemnation of torture from the second half of the 20th century until today, it has been practically impossible to effectively ban its use in "all corners of the world". *Id*. at 158. Both the Human Rights Committee and the Committee against Torture have constantly held that the right not to be subjected to torture is of an absolute nature allowing no room for exceptions, not even in times of armed conflict or in the fight against terrorism. *See* Economic and Social Council, Commission on Human Rights, *Guantanamo Report on the Situation of Detainees*, U.N. Doc. E/CN.4/2006/120, 15 February 2006, para. 42. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), 10 December 1984, 39 U.N. GAOR, Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), 1468 U.N.T.S. 85, *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm (accessed 5 August 2006), which declares that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

[63] *E.g., Mujica*, 381 F. Supp. 2d at 1179.

B. *Enforceable Scope of Definition*

The TVPA contains a detailed formulation of torture. As the TVPA was meant by Congress to support ATS litigation, courts will look for definitional guidance in ATS cases in the TVPA.[64] It states that:

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a concession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, of for any reason based on discrimination of any kind, and
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[65]

Accordingly, as opposed to genocide or crimes against humanity, the prohibition against torture is not limited to atrocities on a large scale; instead, every single instance of torture amounts to a violation of international law,[66] a fact which substantially broadens the possibility of enforcing the prohibition through ATS. In *Aldana v. Del Monte Fresh Produce, Inc.*, the Eleventh

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[64] See examples given in respect of the right to life in *supra* note 23.

[65] *Supra* note 18. Compare article 1 of the Convention against Torture, *supra* note 62, codifying the customary international law prohibition stating:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[66] Antonio Cassese, *International Criminal Law* 117 (2003). Therefore, typically and as a matter of strategy, plaintiffs typically advance claims of torture.

Circuit reversed the dismissal of claims of mental torture on behalf of trade unionists who were taken into a security force's custody and in revenge for the union activities, repeatedly threatened with imminent death.[67]

In many respects, the definition in the TVPA resembles the definition given in the Convention against Torture, the treaty exclusively devoted to these two human rights, i.e., the right not to be subjected to torture and the right not to be subjected to cruel, inhuman, or degrading treatment or punishment, which was not yet existing at the time of the *Filartiga* decision.[68] However, the definition given by the TVPA is slightly more restrictive: The TVPA, in comparison to the Convention against Torture, elaborates on the mental side of torture and requires that the victim be in the custody or physical control of the offender.[69]

IV. *Cruel, Inhuman or Degrading Treatment*

Article 7 of the ICCPR stipulates that "[n]o one shall be subjected…to cruel, inhuman or degrading treatment". *Forti v. Suarez-Mason* arose out of the so-called Argentine "dirty war" of the 1970s. During this "dirty war", more than 12,000 people disappeared under the hands of military and police officers.[70] Accordingly, plaintiffs, victims and relatives of victims of the former military regime, brought action against a former Argentine general in charge of certain districts under the state of siege declared at the time.[71]

For the first time in an ATS proceeding, plaintiffs argued that they received, inter alia, cruel, inhuman, and degrading treatment during their detention by military and police officers under the authority of the defendant.[72] They claimed, inter alia, that (a) in one case, a victim was held without communication with the outside world for one whole month; (b) in another, a victim was held blindfolded for one week with her hands handcuffed behind her back with no provision of food or water; and that (c) a guard attempted to rape her.[73]

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[67] 416 F.3d. 1242, 1252–53 (11th Cir. 2005).

[68] *Supra* note 62; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("Declaration on Torture"), U.N.G.A. Res. 3452, 30 U.N. GAOR Supp. No. 34 at 91, U.N.Doc. A/1034 (1975).

[69] Unlike the TVPA, ATS is not limited to acts of foreign sovereigns.

[70] 672 F. Supp. 1531, 1536 (N.D. Ca. 1987).

[71] *Id.* at 1541–42.

[72] *Id.* at 1543.

[73] *Id.* at 1537.

A. *Actionability*

Relying on the definable, universal, and obligatory standard[74] derived from the *Filártiga* decision of the Second Circuit,[75] Judge Jensen of the Central District of California took a cautious approach by explaining that the court is not aware of such evidence of universal consensus in respect of the right to be free from "cruel, inhuman and degrading treatment as it exists for official torture".[76] Moreover, he pointed out difficulties in ascertaining the conduct falling within the prohibition due to the lack of parameters.[77] Accordingly, he dismissed the claims based on cruel, inhuman, and degrading treatment.[78]

Plaintiffs moved for reconsideration.[79] This time, they pointed to an array of international instruments and authorities enshrining the right against cruel, inhuman, or degrading treatment.[80] They argued that torture and cruel, inhuman, or degrading treatment can be found along the same continuum and that the latter embraces misconduct of a lesser evil in declaring that almost every legal instrument which recognizes torture likewise recognizes cruel, inhuman, or degrading treatment.[81] In support, they advanced various instruments such as the Restatement of the Law of Foreign Relations of the United States (the "Restatement"), the U.S. domestic statute 22 U.S.C. 2304(d)(1) (which prohibits security assistance to countries with a record of human rights infringements), article 5 of the UDHR, and a decision of the Fifth Circuit,[82] all of which refer to torture as well as to cruel, inhuman, and degrading treatment without any distinction.[83] In addition, but not relied upon by plaintiffs, article 7 of the ICCPR states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[84]

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[74] *See supra* Chapter One: Actionability Standards.

[75] *See* 630 F.2d 876.

[76] 672 F. Supp. at 1543.

[77] *Id.* In addition, he noted that most outrageous wrongs were already covered by torture, summary execution, and prolonged arbitrary detention. *Id.*

[78] *Id.*, *recon. denied*, 694 F. Supp. 707, 711–12 (N.D. Cal. 1988).

[79] 694 F. Supp. at 711–12.

[80] *Id.*

[81] *Id.*

[82] *See De Sanchez v. Banco Central De Nicaragua,* 770 F.2d 1385, 1397 (5th Cir. 1985), which recognized a "right not to be . . . tortured, or otherwise subjected to cruel, inhuman or degrading treatment".

[83] 694 F. Supp. at 711–12.

[84] *Supra* note 4.

Judge Jensen, while this time admitting that these sources may represent broad acceptance among nations, declared that they still do not offer parameters as to what conduct is actually prohibited.[85]

In this respect, plaintiffs specifically pointed to a decision of the European Court of Human Rights in which "degrading treatment" was defined as conduct which grossly humiliates the victim before others or drives the victim to act against his will or conscience.[86]

However, this point of reference was blatantly discarded by Judge Jensen as a regional as opposed to global expression of consensus as required under ATS since *Filartiga*. He declared that treatment of such kind would largely depend on the personal, regional, cultural, or religious context.[87] To exemplify the intricacies of interpretation, he even asked the rhetorical question of whether a pacifist being drafted against his will is subject to cruel, inhuman, or degrading treatment.[88] Stating that "[t]o be actionable under the Alien Tort Statute the proposed tort must be characterized by universal consensus in the international community as to its binding status and its content," Judge Jensen held that the plaintiffs had "fail[ed] to establish anything approaching universal consensus as to what constitutes 'cruel, inhuman, or degrading treatment'" and dismissed the motion.[89]

The problem of specificity is particularly acute if one perceives torture and cruel, inhuman, and degrading treatment as located along the same scale as article 1(1) of the Declaration on Torture which provides that "[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[90] Arguably, while the legal concept of torture is directly clear, convincing, and self-evident even for laymen, the contours of the tort of cruel, inhuman, or degrading treatment are more subtle and open to sophisticated distinctions. Notably, as opposed to torture, the Convention against Torture which likewise covers cruel, inhuman, or degrading treatment does not contain a definition of the term; it merely declares in article 16 that each State party to the convention shall not allow such treatment not amounting to torture as defined in article 1 when undertaken under public authority.[91]

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[85] 694 F. Supp. at 711–12.
[86] *Id.*
[87] *Id.* at 712.
[88] *Id.*
[89] *Id.*
[90] *Supra* note 68.
[91] *Supra* note 62.

1. *Implant from Domestic Law to Increase Determinateness*

The case *Abebe-Jira v. Negewo* related to the cruel, inhuman, or degrading treatment which arose out of the so-called "red terror" in Ethiopia in the late 1970s undertaken by the military.[92] Plaintiffs, all of whom had been arrested as suspected opponents to the regime, asserted, among others, severe mistreatment, e.g., they were beaten naked, hung from a pole, whipped with wires, and salt water poured on their wounds.[93] Without discussing *Forti*, Judge Tidwell of the Northern District of Georgia concluded that the plaintiffs had demonstrated sufficient evidence of cruel, inhuman, and degrading treatment or punishment.[94] He noted that the prohibition forms part of the major human rights instruments including the ICCPR and the Convention against Torture, both ratified by the United States.[95] In respect of the latter, he further clarified that in October 1990, the U.S. issued a reservation that the United States considers itself bound by article 16

> regarding cruel, inhuman and degrading treatment or punishment to the extent that this term has the same meaning as the kind of cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendment of the United States Constitution.[96]

In *Xuncax v. Gramajo*,[97] Guatemalan plaintiffs brought suit against the military under ATS relying, inter alia, on cruel, inhuman, or degrading treatment.[98] Judge Wood of the District Court of Massachusetts admitted that the international prohibition does not appear less universal than torture and is contained in many relevant international instruments; however, he had doubts as to the exact content of the norm.[99] In this situation, plaintiffs again relied on the foregoing reservation given by the U.S. Senate to the Convention against Torture and argued that by interpretative implant from U.S. domestic law, specific content should be given to the claim under ATS. Judge Wood, however, drew a clear distinction between domestic law and international law.[100] He held that the mere fact that constitutional law may inform the norm for one

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[92] 1993 WL 814304 (N.D. Ga. 1993).

[93] *Id.* at 1–3, *appeal denied*, 72 F.3d. 844, 848 (11th Cir. 1996) based on lack of private cause of action and political question doctrine.

[94] 1993 WL 814304 at 4.

[95] *Id.*

[96] *Id., citing* S. Exec. Rep. (Sen.) 101–30, 101st Cong., 2d Sess., Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1990); *aff'd*, 72 F.3d. at 848.

[97] 886 F. Supp. 162.

[98] *Id.* at 186.

[99] *Id.* at 187.

[100] *Id.*

single country, the United States, does not substitute for universal consensus required for actionability under ATS since *Filártiga v. Peña-Irala* since this aspect of the norm would not be truly international in this respect.[101]

In *Hilao v. Estate of Marcos*, brought by political opponents of former Philippine President Ferdinand Marcos for injuries sustained out of human rights abuses, the district court refused to instruct the jury on cruel, inhuman, and degrading treatment (as opposed to torture claims) and therefore, implicitly rejected such claims under ATS.[102]

In *Estate of Cabello v. Fernandez-Larios*,[103] Chilean relatives of Chilean economist Winston Cabello who was appointed by the then incumbent President Salvador Allende and who was tortured, killed, and mistreated after the coup d'état of the military junta, brought an action against the military official who allegedly took part in the infringements. Without discussing previous decisions, the court pointed to article 7 of the ICCPR, its ratification by the U.S., and the afore-mentioned reservation and held that cruel, inhuman, or degrading treatment is actionable under ATS "to the extent courts read Article 7 of the ICCPR as legal authority equivalent to the Fifth, Eighth and Fourteenth Amendments of the Bill of Rights."[104] In *Tachiona v. Mugabe*, involving the suppression of political opponents in Zimbabwe, Judge Marero similarly did not follow *Forti* and upheld claims based on ATS due to the general recognition of a separate human right not to be subjected to cruel, inhuman, and degrading treatment in international law and accepted the claim as long as the misconduct would also be violative of the Fifth, Eighth, or Fourteenth Amendments to the United States Constitution.[105]

In the first ATS decision with a TNC defendant addressing the issue, *Sarei v. Rio Tinto Plc.*,[106] which Papua New Guinea residents brought against an international mining group actively operating a mine on their island Bougainvaille, the court cited *Forti* and *Hilao* and declared that it is unable to determine a sufficiently precise norm of customary international law.[107]

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[101] *Id.*

[102] *See Hilao v. Estate of Marcos* 103 F.3d 789 (9th Cir. 1996), where the Court of Appeals for the Ninth Circuit discussed the district court's refusal without the necessity to decide the issue itself.

[103] 157 F. Supp. 2d 1345 (S.D. Fla. 2001); *aff'd*, 402 F.3d 1148 (11th Cir. 2005).

[104] *Id.* at 1361.

[105] 234 F. Supp. 2d 401, 436–38 (S.D.N.Y. 2002).

[106] 221 F. Supp. 2d 1116, 1162 (C.D. Cal. 2002).

[107] *Id.* The decision of the district court was reversed on other grounds on appeal. *See Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007).

2. *Jurisprudence of New Tribunals as Guiding Force*

The first ATS proceeding to consider the issue after the Supreme Court's decision in *Sosa* was also an action against a TNC, *Mujica v. Occidental Petroleum Corp*.[108] In this case, helicopters of the Colombian military knowingly attacked civilians which caused, inter alia, severe personal injuries.[109] One victim was hit by bomb shrapnel which "tore through his chest, breaking both of his collar bones" and continues to suffer chronic pain from the injuries after medical treatment and hospitalization.[110] Judge Rea of the Central District of California confirmed the actionability of the norm pointing out that international tribunals for the former Yugoslavia and Rwanda recognized such norm in their jurisprudence of the last decade.[111] Accordingly, he affirmed the actionability based on a new argument: recent developments in international criminal law. It remains to be seen whether other courts would take a similar stance as to the definability of the wrong. As a consequence of such jurisprudence, a TNC which surrenders one of its workers to the government due to the worker's attempts to unionize the factory for example, could face legal responsibility under ATS if the accused is abused by government officials even if the abuse does not amount to torture.

3. *Result*

In general, actionability may be easier to acknowledge if one conceptualizes the cruel, inhuman, or degrading treatment not as the Declaration on Torture does as an aggravated form of torture. Then, the distinguishing factor is the subjective purpose of the perpetrator to achieve a direct result from his victim (such as a confession) which is required only for torture but not for cruel, inhuman, or degrading treatment. A strong argument in favor of the actionability of the right is the fact that, just like the prohibition on torture, justifications or exceptions are not envisaged under article 7 of the ICCPR and which, States may not even derogate in times of public emergency under article 4 of the ICCPR.[112]

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[108] 381 F. Supp. 2d 1164.

[109] *Id*. at 1169.

[110] *Id*.

[111] *Id*. at 1181.

[112] *See* Office of the Commissioner for Human Rights, General Comment No. 20 Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment, 10 March 1992, para. 3, stating that article 7 allows "no limitation", *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument (accessed 6 August 2006).

B. *Enforceable Scope of Definition*

If one answers the question of actionability positively, the next question that arises is what the exact scope of the enforceable right is. In this respect, again as developed above, the legal contours are sufficiently determinate if one perceives cruel, inhuman, or degrading treatment not as an aggravated form of torture and the subjective purpose of the perpetrator to achieve a direct result from his victim (such as a confession) as the distinguishing factor between torture and cruel, inhuman, or degrading treatment. In addition, as suggested above, the current and future jurisprudence of international tribunals can be employed as a guiding force.

In *Mujica v. Petroleum*, the district court dismissed claims based on death threats and threats of violence in case plaintiffs would not relocate.[113] In *Wiwa v. Royal Dutch Petroleum Co.*, the district court found that several abuses fell within the scope of cruel, inhuman, or degrading treatment and as such, actionable under ATS, in particular forcing a plaintiff into exile under credible fear of arbitrary arrest, torture, and death or trying to extort the plaintiffs to take certain actions to save his brother's life.[114]

V. *Arbitrary Detention*

Article 9 of the ICCPR declares that "[n]o one shall be subjected to arbitrary arrest or detention" nor "be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[115] In the afore-mentioned *Forti v. Suarez-Mason* case, Judge Jensen further faced claims of (prolonged) arbitrary detention.[116] One of the plaintiffs was even arrested and detained for more than four years without charge.[117]

A. *Actionability*

Judge Jensen held that prolonged arbitrary detention is actionable under ATS.[118]

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[113] 381 F. Supp. 2d 1164, at 1183 (C.D. Cal. 2005).
[114] *Wiwa v. Royal Dutch Petroleum Co.*, Civ. No. 96–8386, 2002 US Dist. LEXIS 3293, at 21–27 (S.D.N.Y. 2002).
[115] *Supra* note 4.
[116] 672 F. Supp. at 1541–42.
[117] *Id.*
[118] *Id.*

1. *Courts' Approach in the* Filartiga *Era*

In justifying his conclusion, he pointed mainly to the existing draft at the time of the Restatement, generally considered as a conservative formulation of international law, according to which, prolonged arbitrary detention amounts to a violation of customary international law.[119] Thereafter, U.S. courts have consistently held that arbitrary detention is a cognizable international wrong under ATS.[120]

2. Sosa *Decision on Arbitrary Detention*

In *Sosa*, arbitrary detention was the underlying claim in the civil proceedings.[121] The plaintiff, Alvarez-Machain, a Mexican physician, was accused of prolonging the life of a Mexican agent of the United States Drug Enforcement Agency ("DEA") in 1985 in order to facilitate torture and interrogation by Mexican druglords.[122] Despite the issuance of a warrant for his arrest by the District Court for the Central District of California, the request of and negotiations by the DEA with the Mexican Government for support in bringing the plaintiff to justice in the United States failed and the plaintiff was then abducted by Mexican nationals, including defendant Sosa, hired by officials of the DEA and brought to the United States where he was arrested.[123] Alvarez could only claim an arbitrary detention of a single day – the time it took to bring him to United States territory where a valid arrest warrant was waiting.

In support of his claim, Alvarez pointed to the UDHR and the ICCPR both of which prohibited arbitrary detention.[124] Article 9 of the ICCPR declares that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law" and "[t]hat "anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation. The Supreme Court avoided a final ruling on the issue of actionability. It simply rejected Alvarez's claim in the case at hand on the ground that a single illegal detention of one day is insufficient to meet the narrow conception of arbitrary detention under international

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[119] *Id*. He referred to the Tentative Draft No. 6 (1985).

[120] *Paul v. Avril*, 901 F. Supp. 330; *Xuncax v. Gramajo*, 886 F. Supp. at 184–85; *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090–94 (S.D. Fla. 1997); *Ahmed v. Goldberg*, 2001 WL 1842390, 11–12 (D.M. Mar. I.); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1349 (N.D. Ga. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at 6–7. *See also Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998), distinguishing arbitrary detention from detention of an innocent person.

[121] 124 S. Ct. 2739.

[122] *Id.* at 2746.

[123] *Id*.

[124] *Id.* at 2768.

law.[125] Therefore, the actionability of arbitrary detention under ATS is still an open question.

B. *Enforceable Scope of Definition*

If one affirms the actionability of arbitrary detention as such, the question as to its exact scope arises. The Restatement declares that arbitrary detention infringes "customary law if it is prolonged and practiced as state policy"[126] and although the Supreme Court was not forced to decide the issue since it held that one single day in a singular case is insufficient, it appeared inclined to uphold such proposition which would exclude any shorter or singular detention regardless of how arbitrary it is.[127]

However, in other parts of the decision, the Supreme Court did not appear to be necessarily willing to follow this conservative approach. In referring to the difference between arbitrary detention and illegal detention and by suggesting that in a concrete case, not every mistake on the part of the government, although an excess of power, can arguably transform a legal arrest based on a warrant into an arbitrary detention, the Supreme Court's decision can also be read to have left open the possibility that detentions other than within a State policy and not prolonged may still be sufficient to meet the Court's own standard (as long as they are arbitrary). In *Kiobel v. Royal Dutch Petroleum*, likewise involving ATS claims surrounding Shell's operations in Nigeria, the district court was willing to accept prolonged arbitrary detention of four weeks or more as an alleged result of a state policy to detain members of the Ogoni people who opposed oil extraction and pipelines.[128] In *Doe v. Liu Qi* the district court decided that plaintiffs who were detained for three or

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[125] *Id*. at 2765, 2768. Justice Souter wrote that:

> Alvarez . . . invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of one government, regardless of the circumstances. Whether or not this is an accurate reading of the [International] Covenant [on Civil and Political Rights], Alvarez cites little authority that a rule as broad has the status of a binding customary norm today . . . His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment.

Id. *See supra* Chapter One: Actionability Standards; 124 S. Ct. at 2769. Alvarez advanced the respective provisions of the UDHR and the ICCPR. 124 S. Ct. at 2767.

[126] § 702 comment (h) (1987).

[127] 124 S. Ct. at 2767–68.

[128] 456 F. Supp. 2d 457, 465–66 (S.D.N.Y. 2006).

more days without access to a family member or lawyer and tortured were subjected to arbitrary detention.[129]

VI. *Right to Informed Consent to Medical Experimentation*

The second sentence of article 7 of the ICCPR declares that "no one shall be subjected without his free consent to medical or scientific experimentation."

A. *Actionability*

It is not uncommon for pharmaceutical companies incorporated or headquartered in developed countries to frequently conduct clinical drug trials in developing countries because obtaining a license for new drugs in developed countries requires a considerable number of humans on which the new drug was tested; and these numbers are easier to achieve in developing countries where there is more supply of human resources.[130] At the same time, governments in developing countries may perceive clinical testing as the only way to easily obtain otherwise unaffordable medical treatment for the larger population and therefore, may not be inclined to insist on strict regulation and informed consent to a degree internalized by authorities in the developed world.[131]

1. *Factual Allegations in* Abdullahi v. Pfizer

In *Abdullahi v. Pfizer*,[132] the Nigerian plaintiffs alleged grave injuries sustained from an experimental antibiotic administered by Pfizer, the world's largest pharmaceutical company, without the plaintiffs' informed consent.[133]

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[129] 349 F.Supp.2d 1258, 1326 (N.D. Cal. 2004).

[130] Samanta Evans, "The Globalization of Drug Testing: Enforcing Informed Consent through the Alien Tort Claims Act", 19 *Temp. Int'l & Comp. L.J.* 477 (2006).

[131] *Id.* at 478.

[132] 2005 WL 1870811 (S.D.N.Y. 2005). The class action was filed in 2001. In 2002, the district court dismissed the case based on forum non conveniens grounds. *See* 2002 WL 31082956 (S.D.N.Y. 2002). On appeal, the Second Circuit remanded the case to the first instance because in the meantime, the parallel proceeding in Nigeria had been dismissed, and this fact may influence a forum non conveniens dismissal. 77 Fed. Appx. 48 (2003). For a discussion on the relationship between the doctrine of forum non conveniens and ATS, *see infra* Chapter Eleven: Forum Non Conveniens. On remand, the first instance addressed issues of substantive law. See also the related case *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005).

[133] 2005 WL 1870811 at 1.

In the mid-1990s, Pfizer had developed a new antibiotic made known under its brand name "Trovan".[134] Trovan was expected to gross up to $1 billion a year.[135]

However, clinical tests in the United States revealed that the new drug might cause significant negative side effects in children such as joint disease, abnormal cartilage growth, and liver damage.[136]

In 1996, when epidemics of bacterial meningitis, measles, and cholera beleaguered the city of Kano in Nigeria, Pfizer dispatched a medical team in order to establish a treatment center at Kano's Infectious Disease Hospital.[137]

Other than Pfizer, several other organizations such as the Médécins Sans Frontiéres were also offering medical treatment to the patients affected by the epidemics.[138]

Plaintiffs contend that while other medical teams provided efficient and safe cure for bacterial meningitis, Pfizer took advantage of the situation to test the new antibiotic.[139]

Plaintiffs specifically alleged that the only purpose for offering medical treatment in Kano was to obtain the U.S. Federal Drug Agency's permission to market Trovan for pediatric patients in the United States.[140]

Plaintiffs contend that before the trials in Kano, only one child had ever been treated with Trovan, only after all other antibiotics had failed, and in no case, orally.[141] In Kano, plaintiffs assert that Pfizer selected around 200 children waiting for treatment ranging from 1 to 13 years showing symptoms of meningitis[142] and treated half of them with Trovan and half of them with a WHO-recommended drug, Ceftriaxone.[143] To improve the comparative results for Trovan, plaintiffs alleged that the patients received only one-third of the recommended dosage of Ceftriaxone.[144]

While Pfizer's trial protocol provided for blood testing prior to treatment and after five days, plaintiffs assert that Pfizer failed to do so and thus, negative

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[134] *Id.*

[135] Joe Stephens, *Panel Faults Pfizer in '96 Clinical Trial In Nigeria—Unapproved Drug Tested on Children*, Washington Post, 7 May 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/06/AR2006050601338.html (accessed 18 July 2006).

[136] *Id.*

[137] 2005 WL 1870811 at 1.

[138] *See* 2002 WL 31082956 at 1.

[139] *Id.*

[140] *Id.* at 2.

[141] *Id.*

[142] The symptoms of the disease are neck stiffness, joint stiffness, and high fever combined with headache. *Id.*

[143] *Id.*

[144] *Id.*

reaction could not be determined until the manifestation of serious visible injury.[145] Moreover, while the protocol called for obtaining the parents' consent for the children too young to consent themselves, it is asserted that few parents were able to speak or read English.[146]

After two weeks, the Pfizer team left Kano without any follow-up examinations. Plaintiffs alleged that five children treated with Trovan and six treated with low-dosed Ceftriaxone died while others suffer from paralysis, deafness, and blindness.[147]

In the United States, Trovan was approved for adult use in 1997 but never for children.[148] However, later reports of liver damage and deaths caused the FDA to severely restrict its use in 1999. In Europe, regulators banned the drug totally.[149]

2. *Pfizer Reasoning*

In support of their ATS claims, plaintiffs argued that Pfizer's failure to get informed consent violated customary international law as expressed in an array of international documents related to medical experimentation. Plaintiffs relied on the Nuremberg Code, the Helsinki Declaration and the Guidelines as non-binding instruments the aspirational language of which do not satisfy the standard announced by the Supreme Court in *Sosa*.[150]

At the outset, Judge Pauley reviewed the Supreme Court's decision in *Sosa*.

(a) Nuremberg Code

In 1946, the U.S. military tribunal at Nuremberg conducted the trial of over 20 Nazi physicians for murder, torture, and other crimes committed through medical experimentation against inmates of concentration camps and prisoners of war in *United States v. Karl Brandt*.[151] The tribunal sentenced a majority of the defendants to death while others were sentenced to life in prison or a prison term of several years.[152] During the trial, the tribunal developed a

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[145] *Id*.

[146] *Id*.

[147] *Id*.

[148] *See* Stephens, *supra* note 135.

[149] *Id*.

[150] 2005 WL 1870811 at 11–13. For a background or the full title of these instruments, *see infra* VI.A.2(a)–(b).

[151] *See Military Tribunal Case 1, United States v. Karl Brandt et al., I & II Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, (1950).

[152] *See* Benjamin Mason Meier, "International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent", 20 *Berkeley J. Int'l L.* 513, 521–24 (2002).

set of legal and ethical standards, later known as the Nuremberg Code, to be applied when carrying out experimental research on humans which enshrined for the first time the principle of informed consent.[153] The Nuremberg Code mandates a human being subject to medical research to be able to "exercise the free power of choice" and as having sufficient knowledge as to the experiment so as to allow an "enlightened decision." The research subjects must be informed of the

> nature, duration, and purpose[,] . . . the method and means[,] . . . all inconveniences and hazards reasonably to be expected . . . [,] and the effects upon his health or person which may possibly come from his participation in the experiment.[154]

The Nuremberg Code is the first international condemnation of medical research without informed consent. However, the Nuremberg Code was not well-received by the medical science community because it was considered as too strict on medical progress[155] and was declared to be applicable only to non-therapeutic research.[156]

In *Abdullahi*, Judge Pauley stressed that the Nuremberg Code was never formally adopted by the world community or the UN General Assembly and criticized it as too strict and uncompromising for the advancement of the sciences.

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[153] *Reprinted in United States v. Karl Brandt et al., supra* note 151, at 181–82.

[154] The so-called Nuremberg Code provides in Principle One:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.
>
> The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

Id.

[155] *See* Meier, *supra* note 152, at 524.

[156] *See* Michelle D. Miller, "The Informed Consent Policy of the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use: Knowledge Is the Best Medicine", 30 *Cornell Int'l L.J.* 203, 209–10 (1997).

(b) Declaration of Helsinki and CIOMS Guidelines

Two decades later, the medical community articulated its own standards for the first time in the so-called Helsinki Declaration of 1964 promulgated by the World Medical Association and revised in 2000.[157] In comparison to the Nuremberg Code, the Helsinki Declaration watered down the informed consent requirements in demanding free and fully informed consent only in respect of "non-therapeutic clinical research" (and not to the same degree with regard to "clinical research combined with patient care").[158] For therapeutic research, the declaration assigns considerable discretion to the researchers whether to obtain consent or not.[159] In addition, it also diminished the rights of legally incompetent persons by specifying that consent must conform only to national standards (as opposed to international standards).[160]

The strictest guidelines to date for medical research on humans were developed by the World Health Organization and the Council of International Organization of Medical Societies in 1982 and revised in 2002.[161] The International Ethical Guidelines for Research Involving Human Subjects (the "Guidelines")[162] serve as a model statute for national legislators drafting statutes to protect humans in medical research. Compared to the Helsinki Declaration, the Guidelines specifically identify the steps a researcher must follow to obtain consent and what information must be conveyed before such consent is considered free and informed.[163] However, like the Helsinki Declaration, the Guidelines are, by no means, a binding instrument.

With little effort, Judge Pauley declared the Helsinki Declaration and the Guidelines on which the plaintiffs relied upon as non-binding instruments the aspirational language of which do not satisfy the standard announced by the Supreme Court in *Sosa*.[164]

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[157] World Medical Association, Declaration of Helsinki, 52nd Assembly, *available at* http://www.wma.net/e/policy/b3.htm (accessed 29 August 2006). *See* Meier, *supra* note 152, at 525–26.

[158] *See* Finnuala Kelleher, "The Pharmaceutical Industry's Responsibility for Protecting Human Subjects of Clinical Trials in Developing Nations", 38 *Colum. J.L. & Soc. Probs*. 67, 74 (2004).

[159] Meier, *supra* note 152, at 526.

[160] *Id*. at 525–26.

[161] *Id*. at 526–27.

[162] *Available at* http://www.cioms.ch/frame_guidelines_nov_2002.htm (accessed 29 August 2006).

[163] Kelleher, *supra* note 158, at 74.

[164] 2005 WL 1870811 at 11–13.

(c) The Second Sentence of Article 7 of the ICCPR

The ICCPR declares in the second sentence of article 7 that "no one shall be subjected without his free consent to medical or scientific experimentation." It is enshrined in the same article as the prohibition on torture, which suggests that the right takes a high rank within the hierarchy of human rights. However, practice is poor in this regard. The Human Rights Committee which receives reports from parties to the ICCPR to monitor the latter's implementation has noted that States provide little information on consent and medical research.[165] Likewise, it appears that the Human Rights Committee has not reviewed a single case based on such a claim.

As to article 7 of the ICCPR as another expression of customary international law on the point and on which plaintiffs also relied, Judge Pauley explained that the vague language fails to identify what type of conduct is necessary to obtain a free and informed consent.[166] The same is true for the UDHR.

(d) Outcome

Accordingly, the case was dismissed.[167] The plaintiffs have already filed an appeal which is pending.

B. *Enforceable Scope of Definition*

Given the afore-mentioned uncertainties as to the actionability of the right to informed consent to medical experimentation, the court in the *Abdullahi* case was not forced to address the exact enforceable scope of the right under ATS. However, it could be argued that although the exact steps and requirements under customary international law are uncertain, in the instance that there is no consent at all, i.e., the patients do not even know that they form part of an experiment, as in the *Abdullahi* case, the core of the right is breached which is also sufficiently defined and accepted among nations to meet the standard announced by the Supreme Court in *Sosa*.

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[165] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30, para. 7 (1994).

[166] 2005 WL 1870811 at 13.

[167] *Id*. at 12. In addition, the court held that even if the court had subject matter jurisdiction, the court would condition dismissal on forum on conveniens grounds. *See id*. at 6–12.

VII. *Freedom of Expression*

In article 19(2), the ICCPR guarantees everyone the right to freedom of expression. It continues to explain that "this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[168]

A. *Actionability*

In the mid-1980s, the district court for the Southern District of California already addressed the actionability of the First Amendment right of free speech under ATS in *Guinto v. Marcos*.[169]

In this case, Filipino citizens and filmmakers brought an action against the former Philippine dictator.[170] They alleged that the defendant, while still in office and together with unnamed aides and associates in the government, violated plaintiffs' right to freedom of expression by seizing and restraining the distribution of a film that plaintiffs produced and directed.[171] In addressing the issue, the district court analyzed the District Court of Columbia's decision in the ATS case *Tel-Oren* involving a PLO massacre on a highway to Tel-Aviv.[172] The court referred to the opinion of Judge Edward who listed some violations of international law which are generally recognized such as genocide, slavery, murder of individuals, torture, etc., and concluded that regardless of the high rank of freedom of speech in the United States, the right of free speech does not reach the level of such universally recognized rights and therefore, does not constitute a law of nations under ATS.[173] Accordingly, the action was dismissed.[174]

Almost 20 years later, in *Tachiona v. Mugabe*,[175] the district court for the Southern District of New York had another possibility to rule on freedom of speech and other political rights. Judge Marrero took a positive view on political human rights in customary international law declaring that some of

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[168] *Supra* note 4.

[169] 654 F. Supp. 276, 277 (S.D. Cal. 1986).

[170] *Id.*

[171] *Id.*

[172] *Id.* at 280 *citing Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779–80 (D.C. Cir. 1984).

[173] *Id.*

[174] *Id.* The court also held that even if jurisdiction could be asserted, the claims would be barred under the Act of State doctrine. *Id.* at 280–81. For a more positive stance, however, *see Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 421–30 (S.D.N.Y. 2002).

[175] 234 F. Supp. 2d 401.

the rights covered even reach the status of *jus cogens* or peremptory norms.[176] He argued that since the freedom of expression is subject to more specific limitations than most other human rights guarantees in the ICCPR and since its guarantees are more highly structured, it may be

> ordered on a higher plane on the scale of universal acceptance and definition, and thus vested with a higher grade of protection, than associational and participatory rights such as freedom of association, assembly and political participation in government, each of which is subject to many more practical constraints associated with other public imperatives.[177]

The court thus drew a distinction between limitations placed on the exercise of rights of peaceful assembly and association on the one hand and freedom of expression on the other hand.[178] Determining that limits on the former must be "'necessary' in connection with the specified public purposes," limits on the latter must be "necessary to 'protect' public safety, order, health or morals". He found that the ICCPR imposes lower hurdles for States to restrict the participation in politics where restrictions must simply be not "unreasonable" than for the freedom of speech.[179] Judge Marrero further referred to a holding of the Supreme Court where it depicts the freedom of expression as "the matrix, the indispensable condition of nearly every other form of freedom."[180] Finally, he held that the freedom of speech should be actionable if it is violated systematically or grossly.[181] An October 2004 decision by the United States Court of Appeals for the Second Circuit overturned the *Tachiona* ruling in part. The court of appeals struck down the district court's holding against the ZANU-PF based on immunity and did not reach the issue of substantive law.[182]

As enshrined in article 19(3) of the ICCPR, the freedom of expression is subject to restriction. Indeed, article 19(3) explicitly emphasizes the right's limits by stating: "3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities."[183] It then continues to elaborate on possible restrictions:

> It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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[176] *Id.* at 412.
[177] *Id.* at 428–29
[178] *Id*. at 429, n. 129.
[179] *Id*. at 426.
[180] *Id*. at 430.
[181] *Id*. at 432.
[182] *See Tachiona v. U.S.*, 386 F.3d 205 (2d Cir. 2004).
[183] *Supra* note 4.

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.[184]

Accordingly, restrictions must be "provided by law", serving one of the purposes provided for in the article such as war, public emergency, national security, public order, public health, morals, and even more importantly, the rights and interests of others, and further, must be necessary to achieve such goal.[185] Admittedly, the legal hurdles for restrictions on the freedom of peaceful assembly (article 21 of the ICCPR)[186] and freedom of association (article 22 of the ICCPR)[187] are lower compared to the freedom of expression, a phenomenon which relates to the fact that those rights have a greater potential to impact and to conflict with the rights and interests of others since these rights are typically exercised in the public sphere. However, this does not make article 19 enforceable through ATS. Rather, it means that neither articles 21 and 22 are actionable.

Moreover, as revealed by the strong reaction of Muslim communities around the world to caricatures depicting the prophet Mohamed, the strong protests around the world have shown that the human right to freedom of speech and its limits is not equally settled within international human rights

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[184] *Id.*

[185] *See* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, art. 19, (19th Session, 1983), U.N. Doc. HRI/GEN/1/Rev.6 at 132 (2003), para. 4.

[186] *Supra* note 4. Article 21 states:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

[187] *Id.* Article 22 provides:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

law compared to most of the Western democracies where heavy case law and literature can usually be found.[188] One leading treatise on human rights states in this respect that the scope of the freedom of expression is still evolving.[189] While almost any right is subject to limitations in any legal system, one needs to admit that the often case-specific necessity of balancing the right to free speech with the rights and interests of others may not be a suitable task for federal courts in ATS proceedings.

Indeed, one of the main arguments against corporate litigation under ATS is the threat to the strategically important foreign and economic relations of the United States[190] with the People's Republic of China since the latter, despite rhetorical assertions to the contrary, does not guarantee in actual State practice free speech to its citizens to a degree acceptable in other countries. Under this scenario, American blue chip companies face multibillion dollar law suits for their cooperation with the Chinese government.[191] Yet, the risks of confrontation with China due to ATS litigation in respect of the right to free speech are low although it may be desirable in certain instances. The Supreme Court's decision in *Sosa* has likely strengthened such view. As explained, despite the ICCPR recognition of the right of freedom of expression in article 19, given the widespread censorship in crucial countries such as Russia, Saudi Arabia, or China, one cannot speak of a settled and defined universal consensus expressed by existing State practice as required by the *Sosa* standard.

B. *Enforceable Scope of Definition*

Given the legal difficulties regarding actionability, no ATS court has reached the point where it had to substantially address the exact enforceable scope of a perceived freedom of speech.

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[188] The U.S. is the best example of such a developed country.

[189] Smith, *supra* note 1, at 294.

[190] *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, 1 (2003).

[191] *Id*. For example, Yahoo, the internet company, is currently facing a suit in federal court in San Francisco, California based on ATS, among others, for its alleged cooperation with the Chinese government which led to the imprisonment of a Chinese citizen who was the editor of an online publication supporting political reforms in China. The case was filed in April 2007 and is still pending. Information *available at* http://www.npr.org/templates/story/story.php?storyId=9678505 (accessed 11 November 2008).

VIII. *Conclusions*

It is in the classic field of civil and political rights that ATS human rights litigation has celebrated its greatest victories.

The right to life as the supreme human right is actionable. It is sufficiently recognized and sufficiently defined to meet the *Sosa* standard of elevated degree of acceptance among nations and specificity. As to the exact scope of enforcement, courts will employ the definition offered by the TVPA. Problems may arise in situations where a defendant can claim legitimate exercise of police powers towards demonstrators or protestors, etc. However, the definition in the TVPA should not be read to exclude the arbitrary, excessive, and disproportionate resort to the deadly use of force. As to the imposition of the death penalty, it is clear that the accused must be afforded all judicial guarantees in order not to fall within the definition of the TVPA. The *Bowoto* and *Wiwa* cases are two pending cases against TNCs where such claims are raised.

The prohibition on torture has always been recognized by courts as actionable under ATS since the Second Circuit's decision in *Filártiga v. Peña-Irala*. Since then, the TVPA has confirmed its actionability. The Supreme Court in *Sosa* also implicitly affirmed its actionability. In its scope, it is sufficiently recognized and defined to meet the *Sosa* standard. What is more difficult to evaluate is the right not to be subjected to cruel and inhuman treatment. Before *Sosa*, courts have faltered as to whether its actionability should be recognized or not. The determinacy of the prohibition may not be as obvious as is true for torture. Definitional problems can be reduced though if cruel and inhuman treatment is not conceptualized as a lesser form of torture but as acts of a similar nature and evilness but without the mental elements, such as the intended extraction of information of the one being abused. The first court to reconsider the issue after *Sosa* has affirmed its enforceability pointing to the practice of international tribunals.

As to arbitrary detention, the Supreme Court held in *Sosa* that arbitrary detention of one single day is not covered by ATS. However, prolonged arbitrary detention in one single incident may be covered even in the absence of a State policy. Such behavior should meet the standard of universal consensus and elevated specificity.

As to the right not to be subjected to medical experimentation without informed consent, further development of international law has to be awaited. There is certainly a need for regulation of TNCs conducting medical trials in developing countries where standards are lower or not enforced. However, the lack of clear parameters as to the correct scope of the right in international law renders the fulfilment of the *Sosa* standard difficult.

With regard to freedom of expression, it is considered as not universally recognized in actual State practice and not sufficiently defined to meet the strict *Sosa* standard. As of today, freedom of expression in many countries is not implemented at a level comparable to the protection provided in the Western World. Thus, it is not actionable under ATS.

Chapter Four

Labor Standards

I. *Introduction*

On the global level, the International Labor Organization ("ILO") is the key actor in establishing, defining, and clarifying labor standards in international law within the United Nations.[1] The organization as such was created in 1919 as envisaged by the Treaty of Versailles and after World War II, was transformed into a specialized United Nations agency.[2] For the time being, it enjoys almost universal membership of countries, territories, and areas.[3] In the ILO's history, more than 180 conventions and 185 recommendations have been adopted, covering a wide range of labor issues the content of which form the core of today's international labor law.[4]

This chapter explores the option of enforcing established international labor standards against employer-TNCs through ATS litigation.[5]

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[1] *See* ILO, *About the ILO*, *available at* http://www.ilo.org/public/english/about/index.htm (accessed 4 August 2006). The preamble of its charter states that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required." *See* ILO, *ILO Constitution, available at* http://www.ilo.org/public/english/about/iloconst.htm#pre (accessed 4 August 2006). Interestingly enough, all of its bodies under international law enjoy a unique tripartite structure consisting of union, employer, and government representatives. *See* ILO, *Structure of ILO, available at* http://www.ilo.org/public/english/depts/fact.htm (accessed 4 August 2006).

[2] ILO, *About the ILO, supra* note 1.

[3] See the list *available at* http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm (accessed 7 August 2006).

[4] For the respective promulgated standards, *see* ILOLEX – Database of International Labor Standards, *available at* http://www.ilo.org/ilolex/english/ (accessed 4 August 2006). The ILO conventions are international treaties binding on States subject to the ratification of the ILO members while the ILO recommendations are non-binding instruments that set out basic guidelines for the national policies of ILO members.

[5] *See generally*, Sarah Cleveland, "Global Labor Rights and the Alien Tort Claims Act", 76 *Tex. L. Rev*. 1533 (1998); Melissa Torres, "Labor Rights and the ATS: Can the ILO's Fundamental Rights Be Supported through ATS Litigation?", 37 *Colum. J.L. & Soc. Probs*. 447 (2004); Maria Annee Pagnattaro, "Enforcing International Labor Standards: The Potential of the Alien Tort

Part II discusses the enforcement of so-called core labor rights under ATS. Part III examines the actionability of ordinary labor standards. Generally, the analysis is undertaken given the general background that in many developing countries, there is still little or even no labor law enforcement, and many workers are prevented from joining organizations which could improve their working conditions. Such facts put employers in a strong position towards their employees.[6]

II. *Core Labor Standards*

The ILO has identified four so-called core labor rights or standards[7] with the widest support and recognition among States in international labor law in its 1998 Declaration on Fundamental Principles and Rights at Work (the "Declaration"): the elimination of all forms of forced or compulsory labor; the elimination of discrimination in respect of employment; the effective abolition of child labor; and the freedom of association and the effective recognition of the right to collective bargaining.[8] The Declaration explicitly states that all members are bound by these core standards by membership whether or not

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Claims Act", 37 *Vand. J. Transnat'l L.* 203 (2004); Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation – Examining Bonded Labor Claims and Corporate Liability", 106 *Colum. L. Rev.* 106 (2006). The issue of whether international labor law can be applied to private actors such as TNCs will be addressed in a separate chapter. *See infra* Chapter Six: Application to TNCs.

[6] Millions of workers around the globe toil for extremely long hours in physically-intensive labor with low pay and very often, under unsanitary and unsafe conditions. *See* U.S. Department of State, *Country Reports on Human Rights Practices 2004*, released by the Bureau of Democracy, Human Rights, and Labor, Appendix B: Reporting on Worker Rights and Commentaries on Individual Countries, information *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/index.htm (accessed 7 August 2006).

[7] The restriction to core labor standards means, in practice, that any attempt by plaintiffs in labor-related ATS cases to advance negligence claims must fail because the *Sosa* standard is not met. *See Frazer v. Chicago Bridge and Iron*, 2006 WL 801208 (S.D. Tex. 2006).

[8] The Declaration formalized the decision to focus on the implementation of certain core labor rights in the attempt to put an end to ILO's perceived marginalization. *See* ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, text *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT (accessed 7 August 2006). *See* Janice R. Bellace, "The ILO Declaration on Fundamental Principles and Rights at Work", 17 *Int'l J. Comp. Lab. L. & Indus. Rel.* 269 (2001); Christopher R. Coxson, "The ILO Declaration on Fundamental Principles and Rights at Work", 17 *Dick. J. Int'l L.* 469 (1999); Mouloud Boumghar, "La Déclaration de l'Organisation internationale du Travail du 18 juin 1998 relative aux principes et droits fondamentaux au travail – une technique juridique singulière de relance des conventions fondamentales", 10 *Afr. Y.B. Int'l L.* 365 (2002).

they have ratified the eight ILO conventions out of which the core standards were derived from.[9]

A. *Forced Labor*

The last decade has witnessed a wave of litigation by forced laborers in the United States.

1. *Actionability*

In particular, World War II forced laborers have initiated this wave against Austrian, American, German, and Japanese companies and their legal successors that used and benefited from their slave labor at the time.[10] Many complaints were based at least partially on ATS, while others advanced general torts law (of various sources).[11] The background for this litigation is that during World War II, the Axis Powers, Japan and to a higher degree, Germany, relied heavily on forced laborers either forcibly deported from the occupied territories or if not deported, used as workers in their respective countries in

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To ensure compliance by all members with all of the core standards, the Declaration provides for an additional supervisory mechanism for those members who have not yet ratified all eight core conventions. *See* ILO, *Follow-Up to the Declaration, available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONFOLLOWUP (accessed Aug. 7, 2006). They are required to submit reports on the progress made in respect of the implementation on the national level of these core labor standards. *Id*. In sum, the ILO Declaration sought to "universalize" the reach of the core labor standards.

[9] *See Declaration, supra* note 8. The eight conventions are as follows: (a) ILO Convention No. 29 – Convention concerning Forced or Compulsory Labour, 28 June 1930, 39 U.N.T.S. 55; (b) ILO Convention No. 105 – Convention concerning the Abolition of Forced Labour, 25 June 1957, 320 U.N.T.S. 291; (c) ILO Convention No. 87 – Convention concerning Freedom of Association and Protection of the Right to Organise, 9 July 1948, 68 U.N.T.S. 17; (d) ILO Convention No. 98 – Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1 July 1949, 96 U.N.T.S. 257; (e) ILO Convention No. 100 – Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29 June 1951, 165 U.N.T.S. 303; (f) ILO Convention No. 111 – Convention concerning Discrimination in Respect of Employment and Occupation, 25 June 1958, 362 U.N.T.S. 31; (g) ILO Convention No. 138 – Convention concerning Minimum Age for Admission to Employment, 26 June 1973, 1015 U.N.T.S. 297; (h) ILO Convention No. 182 – Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999, 38 I.L.M. 1207.

[10] *See* Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations", 20 *Berkeley J. Int'l L.* 91, 121 (2002).

[11] *Id*.

armament and war-related industries as the drafting of their nationals had resulted in a tremendous labor shortage.

(a) Cases Relating to World War II

At the height of the war, Germany even employed more than five million forced laborers in support of its efforts in more than 400 German companies.[12] These manpower included prisoners of war; involuntary foreign workers captured in manhunts in churches, on the streets, in motion houses, or even at private homes; and concentration camp inmates.[13] Within the course of their enslavement, forced laborers were mistreated, terrorized, tortured, butchered, and exterminated due to heavy work, inadequate housing, and feeding.[14] Fritz Sauckel, who was appointed Plenipotentiary General for the Utilization (Allocation) of Labor with authority over all available manpower, issued the following instructions regarding the treatment and management of laborers: "All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure".[15] Most infamous was the TNC I.G. Farben's rubber and fuel plants at Auschwitz.[16] The laborer output at the Auschwitz plant was more than 300 percent due to hard work, inadequate housing, and feeding, and the

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[12] *The Farben Case*, Military Tribunal VI, Case 6, *United States v. Carl Krauch and Others*, VII & VIII *Trials of War Criminals before the Nuremberg Military Tribunals* 1173 (1953). In respect of German corporations participating in the war efforts, *cf.* Ramasastry, *supra* note 10, at n. 122 *citing* American Jewish Committee, *Press Release: American Jewish Committee Issues Second List of German Firms that Used Slave and Forced Labor During the Nazi Era*, 27 January 2000.

[13] *The Farben Case, supra* note 12.

[14] *Id.*

[15] *Id.*

[16] The name I.G. Farben A.G. stands for "Interessen Gemeinschaft Farbenindustrie Aktiengesellschaft" which translates to "Community of Interests of the Dyestuffs Industry, Incorporated". Josiah E. DuBois, Jr., *The Devil's Chemists* 10 (1952).

I.G. Farben's example shows how horrifically a business entity can impact on people all over the world within its sphere of influence. It was a true TNC in the meaning that no stockholder had a controlling interest. It was a typical "management corporation" the stocks of which were widely distributed. Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law* 10, 79 (1949). I.G. Farben had more than 500,000 stockholders. *The Farben Case, supra* note 12, VIII at 1086. Its history is a story of glorious success and constant expansion. For the rise and fall of the I.G. Farben empire, *cf.* Richard Sasuly, *IG Farben* (1947). Its beginning marked a merger of six major German chemical groups, including the "Badische Anilin und Soda-Fabrik" or BASF. *The Farben Case, supra* note 12, VIII at 1085. Its rapid growth was based on the close connection of scientific knowledge and practical industrial application. The names "Aspirin" or "Agfa" constituted part of the I.G. Farben product palette still well-known today. Three I.G. Farben scientists won the Nobel prize and I.G. Farben held more than 40,000 patent

average worker survived no longer than four months at the plant before being selected for extermination in the gas chambers as the individual performance diminished over time.[17] Therefore, workers would labor there until their final collapse because they knew that anyone who is not capable of performing his work would be sent immediately to the adjacent gas chambers.[18]

While all of the ATS actions were ultimately dismissed for various reasons, e.g., barred by the applicable statute of limitations or held non-justiciable under the political question doctrine, not a single court doubted the fact that the use of forced or slave labor violates international law. In *Iwanowa v. Ford Motor Co.* involving the use of forced labor by the Ford Group, the court stated that "[t]he use of unpaid, forced labor during World War II violated clearly established norms of customary international law".[19] As evidence of the prohibition, the court relied on the Nuremberg Charter including enslavement and the convictions of the Nazi defendants in the Nazi War Criminal Trials.[20] The Nuremberg principles and the opinions of various American and German courts unanimously agree on the illegal character of the system of forced labor.[21] With regard to Ford Motor Co., the court determined that the claims under ATS for violation of international law are barred by the statute of limitation applying the ten-year limitation period under the

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rights worldwide. *Id.* at 1086. One of the Nobel Prize winners, Heinrich Hoerlein, was one of the accused. *See* DuBois, *supra* note 16, at 122.

The successful conquests of the German *Wehrmacht* (Army) during World War II enabled I.G. Farben to deepen its empire in the occupied countries. At the height of its power and economic success, it reached a yearly turnover of more than three billion Reichsmark and employed more than 187,000 persons. *The Farben Case, supra* note 12, VIII at 1085. DuBois states that I.G. Farben had, during one year, more employees than three of the world's largest corporations combined, namely DuPont de Nemours, Standard Oil Company, and Imperial Chemical Industries. DuBois, *supra* note 16, at 11. I.G. Farben owned or held interests in 400 firms within the German territory and around 500 firms in other countries. *The Farben Case, supra* note 12, VIII at 1086. The company plants produced mineral oil, explosives, gunpowder, gasoline, rubber, and gases (Chlorine, Yperite, and mustard gas), self-sufficiency in the production of which were essential to wage an aggressive war. It was the major supplier of the German Army. German *Reichsminister* (Secretary of State) Walther Funk stated in 1942 "without the German I.G. and its achievements, it would not have been possible to wage the war." Letter from Defendant Kuehne to Defendant Schmitz, 18 October 1941, *The Farben Case, supra* note 12, VII at 597, 599.

[17] *The Farben Case, supra* note 12, at 53–54.

[18] *Id.*

[19] *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999).

[20] *See* Charter of the International Military Tribunal, 59 Stat. 1546, 1547, 82 U.N.T.S. 279 (1945), art. 6(b).

[21] 67 F. Supp. 2d at 440.

TVPA by analogy.[22] As to Ford Werke, the court took the view that the London Debt Agreement exclusively contemplated government-to-government negotiations.[23] Furthermore, Judge Greenway held that claims grounded in common law and German law are barred by the applicable statute of limitations.[24] Finally, the court dismissed the case based on non-justiciability and international comity.[25] Similarly, in other actions against German TNCs including Siemens and Degussa, the court had no difficulty in finding that "[t]here can be little doubt that the acts in which the defendant corporations alleged to have engaged were and are proscribed by customary international law…[and] defendants' alleged conduct violated civil law in effect at the time they engaged in that conduct."[26] In the actions against German banks, insurance companies, and industries, the overwhelming majority of actions were voluntarily dismissed with prejudice after the erection of the German Foundation "Remembrance, Responsibility and the Future" resulting out of a compromise between American plaintiffs and the German Industry. The purpose of the foundation is to compensate the victims of the Nazi Era. It receives funds from the German Government and Industry. The German side had promised voluntary compensation if the actions against German companies are ended.[27] In the case of Simon Frumkin, one of the plaintiffs who opposed dismissal, Judge Bassler granted defendant's motion to dismiss on the grounds that plaintiff's claims constitute non-justiciable political questions and that in the interests of international comity, the court should refuse to exercise jurisdiction.[28] Prior to these events, in *Fishel v. BASF Group*,[29] the plaintiff, for himself and the purported class of holocaust survivors, sought compensation for forced labor he was compelled to perform in German labor camps from 1942 to 1945 during World War II.[30] The defendants were BASF AG, Bayer AG, Daimler-Benz AG, and Fried Krupp GMBH. Judge Longstaff granted the motion to dismiss for lack of personal jurisdiction over any of the German corporations.[31] Determining that all the companies were doing business in the United States by virtue of subsidiaries, the court found no

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[22] *Id*. at 461–66.
[23] *Id*. at 459–61.
[24] *Id*. at 469–82.
[25] *Id*. at 483–91.
[26] *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).
[27] *See In re Nazi Era Cases against German Defendants Litigation*, 198 F.R.D. 429, 430, 447 (D.N.J. 2000).
[28] *In re Nazi Era Cases against German Defendants Litigation*, 129 F. Supp. 2d. 370 (D.N.J. 2001).
[29] 175 F.R.D. 525 (S.D. Iowa 1997); 1998 U.S. Dist. LEXIS 21230 (S.D. Iowa 1998).
[30] *Id*.
[31] *Id*.

requisite minimum contacts to the State of Iowa or the United States as a whole to establish general jurisdiction over the foreign companies.[32] The claims would have been successful though if they had not been precluded by other legal grounds such as international treaties regulating reparation and statutes of limitations. In essence, a long array of cases declares forced labor in the promotion of economic growth of corporate entities an international tort under ATS although the individual plaintiffs were not successful for various reasons or were stalled due to the pledge of the Federal Republic of Germany and big German TNCs which profited from forced labor to establish a forced labor fund before a final judgment could be rendered, which they did, not because of lack of actionability under ATS but based on the political question doctrine. In *In re World War II Era Japanese Forced Labor Litigation*, the claim of the Filipino plaintiffs were dismissed based on the determination that the Treaty of Peace with Japan ("Peace Treaty") which was signed and ratified by the Philippines and mentions the Philippines in article 23 thereof bars the claims of the Filipino plaintiffs.[33] Article 14(b) of the Peace Treaty waives all reparations and other claims "arising out of any actions taken by Japan and its nationals during the course of the prosecution of war".[34] Likewise, all complaints of U.S. and Allied veterans were previously dismissed as barred by the Peace Treaty.[35] Since neither China nor Korea signed and ratified the Peace Treaty, the actions of Chinese and Korean claimants had to be decided on the merits.[36] With regard to the ATS, the court applied the TVPA ten-year limitation period to the ATS forced labor claim by analogy.[37] Thus, the motion to dismiss was granted.[38] Again, like the claims related to Nazi Germany business, despite the general recognition and willingness of courts to enforce the prohibition on forced labor, the plaintiffs (forced laborers during World War II) were nonetheless unsuccessful for various other reasons. Accordingly, every single court confronted with the issue found without any

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[32] *Id*.

[33] *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d. 1153, 1157–1160 (N.D. Cal. 2001).

[34] *Id*. at 1156–57.

[35] *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d. 939, 942 (N.D. Cal. 2000).

[36] *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d at 1160.

[37] *Id*. at 1181–82. The court further decided that Cal CCP § 354.6(a) and (c), which provides a cause of action for any World War II forced labor victim against entities and their successors for whom that labor was performed, although not in contradiction to the Peace Treaty, is violative of the Constitution as an intrusion into the exclusive foreign affairs power of the United States. *Id.* at 1168, 1178.

[38] *Id*.

doubt that forced labor constitutes a clear violation of international law and thus, is an actionable wrong under ATS.

This does not come as a surprise.[39] Customary international law outlaws slavery, slavery-like practices, and the use of forced labor whether in peacetime or in wartime as contravening the core values of humanity.[40] Likewise, the 1998 Declaration on Fundamental Principles and Rights at Work reiterates the prohibition of all forms of forced or compulsory labor.[41] As a consequence, the condemnation of forced labor is thus universal and in its core, is definite enough to meet the standard of elevated degree of specificity and acceptance among nations as announced by the Supreme Court in *Sosa*.

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[39] *See generally* Arjuna Naidu, "The Right to Be Free from Slavery, Servitude and Forced Labor", 20 *Comp. & Int'l L.J. S. Afr.* 108, 108–13 (1987).

[40] *Id*. *See also* M. Cherif Bassiouni, "Enslavement as an International Crime", 23 *N.Y.U. J. Int'l L. & Pol*. 445, 447 (1991).

In addition, numerous international agreements confirm this view by prohibiting slavery and slavery-like practices. Within the legal framework of the ILO, two major instruments specifically prohibit the use of forced labor. The first one is the 1930 Convention concerning Forced or Compulsory Labor (the "1930 ILO Convention"), which is the first international agreement exclusively dealing with forced labor. C29, 28 June 1930, *available at* http://ilolex.ilo.ch:1567/english/convdisp2.htm (accessed 4 April 2006). It arose from the experience that after the abolition of slavery, more subtle forms of exploitation of labor emerged. The second is the 1957 Convention concerning the Abolition of Forced Labour. No. 105, 25 June 1957, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105 (accessed 18 September 2006).

Outside the ILO, the International Covenant on Civil and Political Rights ("ICCPR"), which, at present, has 148 States parties, states in article 8: "1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labor." U.N.G.A. Res. 2200, 21 U.N. G.A.O.R. Supp. No. 16, 52 U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. Similarly, article 6 of the American Convention on Human Rights, 27 June 1981, 21 I.L.M. 59 (1981); article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950); article 1 of the European Social Charter, 529 U.N.T.S. 89 (1961); article 5 of the African Charter on Human and People's Rights, 21 I.L.M. 59 (1981); and the U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation or the Prostitution of Others, 96 U.N.T.S. 271 (1950), contain prohibitions on slavery and slavery-like practices such as debt bondage and forced labor. The Universal Declaration of Human Rights mentions only slavery and servitude in article 4. Similarly, the Charter of the Nuremberg Trials included enslavement as one of the crimes against humanity under which the Nazi defendants were thereafter convicted. *See* Charter of the International Military Tribunal, 59 Stat. 1546, 1547, 82 U.N.T.S. 279 (1945), art. 6(b). Finally, the prohibition is definable.

[41] *See* Declaration, *supra* note 8, art. 2(b).

(b) Unocal Case

This is confirmed by a case based on more recent facts. In this case, a California-based TNC, Unocal Corporation ("Unocal"), found itself confronted with the allegation of using forced laborers in furtherance of its gas pipeline project in Myanmar. A military dictatorship has ruled Myanmar for several decades turning the country into an international pariah by being one of the worst human and labor rights offenders in the world. Year after year, both the Country Report on Human Rights Practices of the United States Department of State[42] and the Annual Report of Amnesty International[43] are replete with reports of political prisoners, torture, ill treatment, forced labor, and extrajudicial executions.[44] It is common for the government to seize members of the minority groups Shan, Karen, and Karenni for forced labor to pursue infrastructure projects such as building roads and bridges.[45] Members of minority groups are also forced to carry equipment used by military troops on their missions throughout the countryside, and in places where there are armed minority groups, they face ill treatment and extrajudicial executions.[46] In sum, there are forced labor and other serious human and trade union rights abuses on a large scale, there is no freedom of association, and no democracy. Given this background, Unocal, together with the French TNC Total, S.A., and in cooperation with the military of Myanmar, which provided security for the progress of the project, decided to go ahead with the gas pipeline project in the Tenasserim region, an area predominantly inhabited by minorities.[47] Not surprisingly and consistent with Myanmar's reputation, allegations of severe human rights violations in the area increased with the presence of the military in the region including the use of forced labor for the construction of the project itself and the clearance of roads and the jungle along the pipeline route.[48] This was facilitated by the fact that it was the army which allegedly hired the unskilled workers to provide manual labor for the construction of the pipeline.[49] In addition, the military allegedly

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[42] *E.g.*, U.S. Department of State, *Country Reports on Human Rights Practices 2005 Burma*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61603.htm (accessed 29 August 2006).

[43] *E.g.*, Amnesty International, *Report 2005 Myanmar*, *available at* http://web.amnesty.org/report2005/mmr-summary-eng (accessed 29 August 2006).

[44] According to Amnesty International, more than 1500 political prisoners continue to suffer in the various prisons under poor conditions such as lack of food and water, sanitation, and adequate medical treatment. *Id.*

[45] U.S. Department of State, *Country Reports on Human Rights Practices 2005 Burma, supra* note 42.

[46] *Id.*; Amnesty International, *Report 2005 Myanmar, supra* note 43.

[47] *Doe I v. Unocal*, 110 F. Supp. 2d 1294, 1298–99 (C.D. Cal. 2000).

[48] *Id.* at 1300–01.

[49] *See id.* at 1301.

used forced laborers as military porters and to build their camps.[50] At first instance, Judge Lew simply concluded that the prohibition on forced labor amounts to *jus cogens* and is thus actionable under ATS.[51] The district court as well as the Court of Appeals for the Ninth Circuit on appeal found the prohibition on forced labor to be actionable under ATS against TNC Unocal.[52] Pointing to the above-mentioned World War II litigation, the Ninth Circuit held that forced labor is a modern variant of slavery.[53] This result seemed so obvious to the court that it did not deem the issue worth a deeper discussion. Unfortunately for academic and for precedent purposes, the *Unocal* case was extrajudicially settled after the *Sosa* decision of the Supreme Court but before a binding decision could be rendered.[54] More recently, in *Roe v. Bridgestone*, the district court for the Southern District of Indiana confirmed that forced labor is actionable under ATS after *Sosa*.[55] The case concerned workers at a Bridgestone factory in Liberia. The claim with respect to the adult plaintiffs was dismissed for factual reasons only since the plaintiff's poverty, fear, and ignorance did not transform the workers into "forced laborers" but the forced labor claim of the children plaintiffs is still pending.[56]

2. *Enforceable Scope of Definition*

The factual allegations in the above-presented cases were so clear-cut, in particular those relating to World War II, that no court was ever forced to elaborate on what kind of alleged misconduct would exactly fall within the well-recognized prohibition on forced labor. The 1930 ILO Convention defines forced or compulsory labor as "any work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[57] Thus, whereas slavery is premised on the legal claim over a property, albeit over another person, the concept of forced

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[50] *Id*. at 1302, 1304 *citing* Richardson Decl., Ex. 52 at 29722.

[51] *Id*.

[52] *Id*. at 1304.

[53] *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002). *See* Anja Seibert-Fohr: "Die Deliktshaftung von Unternehmen für die Beteiligung an im Ausland Begangenen Völkerrechtsverletzungen, Anmerkungen zum Urteil Doe I v. Unocal Corp. des US Court of Appeal (9th Circuit)", 63 *ZaöRV* 195 (2003).

[54] The case was ultimately settled by the parties. *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. Times, *available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm (accessed 11 September 2006).

[55] 492 F.2d 988, 1010–15 (S.D. Ind. 2007).

[56] *Id*. at 1015–19.

[57] 1930 ILO Convention, *supra* note 40, art. 2.

labor stresses the factual compelling circumstances overcoming the will of a person not to do something for the perpetrator.[58]

B. *Prohibition on Discrimination*

As of date, no work-related ATS case dealing with discrimination has been filed.

1. *Actionability*

However, ATS decisions exist which relate generally to discrimination. In *Kadic v. Karadzic*, involving the policy of ethnic cleansing in the process of the disintegration of the former Yugoslavia, the Second Circuit similarly announced that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . systematic racial discrimination".[59]

The Restatement (Third) of the Law on Foreign Relations of the United States (the "Restatement") states that systematic religious discrimination may equally amount to a violation of international law as is the case for systematic racial discrimination.[60] Referring thereto, the Second Circuit in *Bigio v. Coca-Cola*, involving the expropriation of Jewish property by the Egyptian State, noted that the Restatement describes religious discrimination as a conduct in violation of international law (when undertaken by a State actor).[61]

Textually, the prohibition on work-related discrimination as enshrined in the ILO Declaration enjoys wide support in terms of numbers of ratification of the relevant ILO conventions. The ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 pronounces "the application to all workers of the principle of equal remuneration for men and women workers for work of equal value" and was ratified by 160 States.[62] The ILO Convention concerning Discrimination in Respect of Employment and Occupation of 1958 which prohibits "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" was ratified by 161 States.[63] In addition, two extremely

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[58] *See* International Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S. 253, (1926), art. 1, which defines the practice "as the status or condition of a person over whom any or all of the powers of the right of ownership are exercised." *Id.* at 263.

[59] *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

[60] Comments J and M.

[61] 239 F.3d 440 (2nd Cir. 2000).

[62] Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *supra* note 9, art. 2(1).

[63] *Supra* note 9, art. 1(1)(a).

prominent although technically non-binding human rights documents back the prohibition: the United Nations Universal Declaration of Human Rights prescribes that "everyone, without discrimination, has the right to equal pay for equal work"[64] and the ILO Declaration of Philadelphia affirms that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[65]

2. *Enforceable Scope of Definition*

However, while the actionability of racial and religious discrimination may not be doubted, actual under-enforcement in respect of gender discrimination may render actionability under ATS difficult. In many societies throughout the world, especially in countries with a Muslim majority population, women still do not enjoy the same rights as men or are even excluded from the work force.[66] Thus, universal consensus exemplified by actual State practice as opposed to rhetorical assertions may not reach the level required by *Sosa* to make at least gender discrimination in the workplace actionable under ATS.

C. *Prohibition on Child Labor*

Doe v. Nestle, S.A. (the "*Chocolate Case*") was filed in the federal district court for the central district of California in July 2005 by three children (who are now of age) acting as class representatives, who were allegedly trafficked from Mali to Ivory Coast.[67]

The defendants are all major chocolate manufacturing giants present in the U.S. market and some of their subsidiaries, including Nestlé S.A., Nestlé USA, Nestlé Ivory Coast, Archer Daniels Midland Co., Cargill Inc. Co., Cargill Cocoa, Cargill West Africa, S.A., ADM, and Cargill.[68] Plaintiff John Doe I was allegedly trafficked into Ivory Coast at the age of 14 to work in a large cocoa plantation in Abobogou and was forced to work there until he was 19

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[64] U.N.G.A. Res. 217A (11), U.N. GAOR, 3d Sess., at 71, U.N. Doc/A (1948), art. 23(2).

[65] Declaration concerning the Aims and Purposes of the International Labour Organization, 10 May 1944, 15 U.N.T.S. 35.

[66] Amnesty International, *Report 2006, Women Continued to Suffer from Legal and Other Forms of Discrimination throughout the Region, Regional Overview, Middle East/North Africa*, summary *available at* http://web.amnesty.org/report2006/2md-summary-eng#4 (accessed 4 August 2006).

[67] *Doe v. Nestlé, S.A., Class Action Complaint for Injunctive Relief and Damages, available at* http://www.laborrights.org/projects/childlab/FinalCocoa-Complaint_Jul05.pdf (accessed 29 August 2006).

[68] *Id.* at 1.

when he finally managed to escape in 2000.[69] During the time of his enslavement, he was forced to work harvesting and cultivating cocoa beans for up to 12, sometimes 14, hours a day up to six times a week by "cutting, gathering and drying the beans for processing".[70] He received no pay and inadequate food.[71] Along with other children on the plantation, he was allegedly locked up overnight and was heavily guarded at all times to prevent escape.[72] He was beaten by guards when they had the impression that he did not work hard enough. He suffered cuts on his hands and legs.[73] Plaintiff John Doe II was also allegedly forced to work for two and a half years in a cocoa plantation in the Region of Man when he was between 12 and 14 years old, which is below the legal working age in Ivory Coast.[74] Plaintiff John Doe III worked for four years until he was 18 years old.[75] They brought the case on their behalf and on behalf of all other similarly-situated former child slaves in Mali.[76]

The case is a direct result of the expiration of the 1 July 2005 deadline set by a voluntary chocolate industry initiative which became known as the Harkin-Engel Protocol.[77] In 2000, reports that children were being trafficked and forced to work in dangerous conditions on African cocoa plantations prompted two members of the U.S. Congress, Senator Tom Harkin of Iowa[78] and Representative Eliot Engel of New York,[79] to negotiate a 2001 agreement with the chocolate industry to bring the practice to an end under the threat of mandatory legislation which would have provided for the establishment of a certification and labelling system for chocolate products as "slave free".[80] Thus, the so-called protocol was endorsed by Ivory Coast and signed by chocolate industry giants, including the U.S.-based Chocolate Manufacturers Association,

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[69] *Id.* at 11. All plaintiffs remain under pseudonyms due to fear of retaliation against themselves and their families by those persons who allegedly trafficked them. *Id.* at 2.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 11–12.

[75] *Id.* at 12.

[76] *Id.*

[77] Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, *available at* http://harkin.senate.gov/specials/20011001-chocolate-text.cfm (accessed 4 August 2005).

[78] Senator Harkin is the ranking Democrat on the Senate Appropriations subcommittee on labor, health and human services, and education.

[79] Representative Engel is a member of the House International Relations Committee.

[80] *Cf.* Jim Lobe, *Labor: Chocolate Firms Agree to Fight Cocoa Child Slavery*, IPS-Inter Press Service/Global Information Network (4 October 2001).

the members of which represent more than 90 percent of the chocolate processed in the United States.[81] Although the protocol was not binding, it set the deadline of 1 July 2005 to "develop and implement credible, mutually acceptable, voluntary, industrywide standards" to certify that cocoa beans are produced without any of the worst forms of child labor, such as children cutting with large machetes, spraying poisonous pesticides, and carrying heavy loads.[82] Critics argue that the chocolate industry failed to meet the deadline because although standards have been established, they have not been widely implemented.[83]

Ivory Coast is the world's top exporter of cocoa with a market share of 40 percent.[84] A majority of this supply is exported to the U.S.[85] The widespread use of child labor in cocoa plantations is well documented by the U.S. State Department, the ILO, the United Nations Children's Fund, and non-governmental organizations.[86] According to a survey conducted by the International Institute for Tropical Agriculture, more than 280,000 children were working under dangerous conditions in cocoa plantations across West Africa.[87] Cocoa plantation work is on the ILO's list of the worst forms of child labor because children in cocoa plantations spray pesticides, carry heavy loads, do dangerous work with machetes, and are under a constant threat of being bitten by venomous snakes and insects.[88] Child trafficking is also documented although it is not totally clear how widespread is the practice.[89] In 2001, the U.S. State Department estimated that some 15,000 children between the ages of 9 and 12 work as forced laborers in cocoa, coffee, and cotton farms in northern Ivory Coast.[90]

The ILO has been attempting to tackle the problem of child labor with insufficient results since its creation in 1919. The first project was the 1919 Minimum Age Convention which provided for the age of 14 as the minimum employment age in industrial settings.[91] Similarly, the project of the Mini-

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[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] Joe Bavier, *Ivory Coast/Child Workers*, Federal Information and News Dispatch, Inc., Voice of America News (4 July 2005).

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id.* at 1 *citing* Nadine Assemien, Spokeswoman for the Abidjan Bureau of the U.N. International Labor Organization.

[89] Todd Pitmann, *Ivory Coast to Monitor Cocoa Industry*, Associated Press (3 July 2005).

[90] *Cf*. Lobe, *supra* note 80.

[91] *See supra* note 9. This convention set a minimum age of 12 years in India and Japan and 14 years in other countries. *Id*. arts. 2, 5, 6. The convention was revised in 1937 by Minimum

mum Age Convention of 1973[92] which obliges States to ensure the effective abolition of all forms of child labor has failed. It was meant to combine and update all the previous conventions relating to minimum age in manufacturing, mining, agriculture, and fishing. It took over 25 years to convince 114 countries to ratify the convention.[93] Yet, the United Nations Convention on the Rights of the Child of 1989, established outside the ILO under the auspices of the High Commissioner for Human Rights, is the most universally accepted human rights treaty ever with almost all States ratifying and only two exceptions[94] and is an instrument which aims to protect children from danger or risk of any kind, therefore encompassing civil and political, as well as economic, social, and cultural rights.[95] And even if child labor does not endanger the health, safety, and morality of a child, it is generally recognized that child labor hinders the intellectual development of children by preventing regular school attendance, thereby further perpetuating poverty of the regions concerned.[96]

Nonetheless, throughout the 20th century, tens of millions of children worked under unsafe and inhuman conditions forming in many developing countries a structural and important part of the economy.[97] Today, globalization and international competition have even increased the pressure on producers to provide cheap products and favor the employment of cheap children workers who are removed from their parents and families and thus, from their sphere of protection. These children make clothes, shoes, socks, locks, dolls, toys, piggy banks, soccer balls, and countless other products[98] because employers find it easier to exploit children than adults since they

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Age (Industry) Convention, 1937 No. 59, available at http://www.ilo.org/ilolex/english/convdisp1.htm (accessed Aug. 29, 2006).

[92] *See supra* note 9.

[93] Mary Gray Davidson, "The International Labor Organization's Latest Campaign to End Child Labor: Will It Succeed Where Others Have Failed?", 11 *Transnat'l L. & Contemp. Probs.* 203, 213 (2001).

[94] Madeleine Grey Bullar, "Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law concerning the Empowered Child Laborer", 24 *Hous. J. Int'l L.* 139, 162–63 (2001).

[95] *Id.*

[96] Therefore, in order to escape this vicious circle of affliction and poverty, advocacy for these workers is essential to ensuring their protection, strengthening their voice, and ending abuses that violate their rights and dignity.

[97] *See* Anjli Garg, "A Child Labor Social Clause: Analysis and Proposal for Action", 31 *N.Y.U. J. Int'l L. & Pol.* 473, 481 (1999).

[98] Robert A. Senser, "Meet Ali – And Others Just Like Him: Countries Like the US Should Ban Imports Produced by Child Labor", *Christian Sci. Monitor* 19 (16 June 1995).

are cheaper and can be manipulated through scaring tactics and discipline.[99] According to recent estimates of the ILO, out of approximately 352 million economically active children aged 5 to 17, around 171 million are working in hazardous conditions.[100] In other words, an astonishingly more than two-thirds of economically active children are in child labor with approximately half of them doing so in hazardous conditions.[101] In the worst cases, children work as miners, prostitutes, child soldiers, drug smugglers, or bonded laborers.[102] In addition, it is typical in these countries that statutes protecting children are either not in place or not effectively enforced. As a consequence, the ILO launched in 1991 a less dogmatic but more practical approach, the International Program on the Elimination of Child Labor which aims to provide assistance and know-how to countries willing to reduce child labor as part of their economies.[103]

As a consequence, the question is whether the prohibition on child labor meets the standard of elevated degree of specificity and consensus among nations as proclaimed by the Supreme Court in *Sosa*. This is doubtful given the courts' heavy emphasis on actual State practice as opposed to rhetorical assertions. The reality is that child labor in many countries still forms a structural part of their economies and in many cultures, particularly in agricultural societies, child labor is a traditional form of contributing to the family income.[104] It is also difficult to overlook the reality that the need to survive may justify

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[99] *Id.*

[100] International Programme on the Elimination of Child Labour, "Statistical Information and Monitoring Programme on Child Labour (SIMPOC), Every Child Counts – New Global Estimates on Child Labour", *Int'l Labour Office* 6 (April 2002).

[101] *Id.*

[102] The ILO divides the worst forms of child labor into these categories: trafficking; forced and bonded labor; armed conflict; prostitution and pornography; and illicit activities. *Id.* at 25–27. *See also U.S. Department of Labor, Bureau of International Labor Affairs, The U.S. Department of Labor's 2003 Findings on the Worst Forms of Child Labor, Report Required by the Trade and Development Act of 2000* xxix (2004). Section 504 of the Trade Act of 1974 prescribes a yearly report on the status of internationally recognized labor rights within each beneficiary country. Section 412(c) of the Trade and Development Act of 2000, Pub. L. 106–200, requires the report to include findings of the Secretary of Labor on each country's implementation of its international commitments to eliminate the worst forms of child labor. The countries covered in the report are those which may be designated under the U.S. Generalized System of Preferences. *Id.* at xiii. Currently, 144 countries and territories are covered. *Id.* at iii.

[103] *See* http://www.ilo.org/public/english/standards/ipec/ratification/map/index.htm (accessed 30 August 2006).

[104] While work under a parent's direct supervision cannot be generally labelled as harmful, it nonetheless stops the child from school attendance and further education which is the precondition for a better future.

child labor even if it is exploitative, and education is the only alternative, if it is available at all. Thus, it appears too optimistic to label the prohibition on child labor in general as universally condemned and specific enough to meet the Supreme Court's *Sosa* test. With these economic and political realities in mind, it seems advisable to draw a distinction between the prohibition on child labor in general which, most probably, will not meet the *Sosa* standard and the prohibition on the worst forms of child labor which may suffice the *Sosa* standard. On 17 June 1999, in a new attempt to combat child labor, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour was unanimously adopted by all member States of the ILO.[105] As of today, more than 132 States, inter alia, the United States of America, have ratified the convention[106] rendering it the fastest-ratified in the history of ILO and confirming the growing consensus against child exploitation. As a consequence, there is a strong case for the actionability of the worst forms of child labor under ATS. Article 1 of the convention defines a child as any person below the age of 18 years. In article 3, the convention defines the covered forms of child labor:

> (a) all forms of slavery and practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced and compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
> (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
> (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
> (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[107]

Interpreted narrowly, the prohibition is sufficiently definable at least with regard to sub-provisions (a) to (c), i.e., it gives enough guidance to a federal court in an ATS case as to what the current consensus in international law is. In respect of sub-provision (d), the elevated level of specificity required by *Sosa* makes it questionable. Notions of health, safety, or morals are open to an array of differing interpretations. Such judgments are, by their very nature, value-based. Article 4 of the convention acknowledges this and states that:

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[105] 17 June 1999, 2133 U.N.T.S. 161.

[106] See the ratification status, *available at* http://www.ilo.org/public/english/standards/ipec/ratification/map/index.htm (accessed 20 July 2006).

[107] *Supra* note 105.

> The types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation, 1999.[108]

Accordingly, although global safety, health, and moral standards are covered, the convention, to a certain degree, leaves it to the discretion of the individual country to determine the exact adequate level of protection although relevant international standards have to be taken into account. Such discretion could possibly rebut claims of sufficient specificity for ATS purposes because it puts the ultimate definition of this worst form of child labor into the hands of each State, and the courts may not agree with the conclusion that nonetheless, an absolute minimum standard is implicit in such formulation. Unfortunately, in the above-mentioned *Chocolate Case*, plaintiffs chose to rely on non-work-related classic human rights law and not on the prohibition on child labor.[109] Nonetheless, given the above-mentioned developments, at the very least, the very worst forms of child labor could possibly be recognized by courts as actionable under ATS following the *Sosa* standard.[110]

This cautious approach finds support in a recent ATS case against Bridgestone regarding child labor in its Liberian plant.[111] In this case, plaintiffs alleged that Bridgestone employed young children between six and ten years old, that these children had to perform "back-breaking" work that exposed them to dangerous chemicals and tools.[112] The district court held that working conditions which are likely to harm the health and safety of at least the very youngest children could fall within the "worst forms of child labor" and satisfy the standard announced in *Sosa* even though some countries may not fully enforce the prohibitions against these worst forms.[113] Accordingly, the motion to dismiss as to child labor claims was rejected.[114]

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[108] *See id.*

[109] *See Doe v. Nestlé, S.A., Class Action Complaint for Injunctive Relief and Damages, supra* note 67, at 14–17, such as the recognized prohibition on forced labor; cruel, inhuman, and degrading treatment; and torture. Plaintiffs further rely on other federal and Californian statutes in addition to ATS. *See id.* at 18–22.

[110] *See* Pagnattaro, *supra* note 5, at 250.

[111] *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988.

[112] *Id.* at 1021.

[113] *Id.* at 1022.

[114] *Id.*

D. *Freedom of Association*

The first ATS case explicitly addressing labor issues was *Estate of Rodriguez v. Drummond Co*.[115] The facts of the case have to be viewed within the context of the longstanding civil unrest in Colombia in which left-wing guerrillas, right-wing paramilitary units, and the Columbian Armed Forces are harshly battling for power and in which unions are, from time to time, perceived as related to the left-wing guerrillas.

1. *Reluctance towards Recognition as Actionable*

The defendants were Drummond Ltd., an Alabama company that manages the daily coal-operations in Colombia, and its holding company, Drummond Co.[116] The plaintiffs in the lawsuit were unnamed relatives and heirs of Valmore Locarno Rodriquez ("Locarno"), Victor Hugo Orcasita Amaya ("Orcasita"), and Gustavo Soler Mora ("Soler"), who were leaders of Sintramienergetica, a Colombian trade union, which was also a plaintiff itself.[117] Locarno and Orcasita were killed in the midst of bargaining negotiations on behalf of Drummond employees with Drummond Ltd. after being taken by paramilitary forces from the bus that brought Drummond workers from home to work in the Drummond mine.[118] After their deaths, Soler, who had assumed the position of president of Sintramienergetica was likewise killed.[119] In the complaint, plaintiffs alleged that paramilitary forces acted as corporate defendants' agents.[120]

In particular, plaintiffs contended that "Drummond managers knowingly sought to use the cover of the violence and lawlessness of the civil conflict to have Locarno, Orcasita and Soler 'taken care of'"[121] and that by these actions, the defendants denied the union's and its leaders' fundamental rights to associate and organize.[122] The union plaintiff argued that the rights to associate and organize are well-established under international law and therefore, are actionable under ATS.[123] In support, they pointed to several universal human

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[115] 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

[116] *Id*. at 1254. The third, non-corporate defendant is Garry N. Drummond, the Chief Executive Officer. *Id*.

[117] *Id*. at 1253.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*. at 1260.

[122] *Id*. at 1261.

[123] *Id*. at 1265. Because the unnamed individual plaintiffs failed to file a Motion to Proceed Anonymously (in order to avoid further intimidation and violence in their home country) in time, the federal district court of the Northern District of Alabama had to declare that

rights documents and labor conventions which can be deemed as expressions of customary international law. Article 22 of the ICCPR which is one, if not the most prominent, of international human rights treaties provides that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest."[124] The International Covenant on Economic, Social and Cultural Rights guarantees in article 8 the "right of trade unions to function freely".[125] Two core ILO conventions, the Freedom of Association and Protection of the Right to Organise Convention of 1948[126] and the Right to Organise and Collective Bargaining Convention of 1949[127] embraced by the 1998 Declaration on Fundamental Principles and Rights at Work further guarantee the right. Article 2 of the former convention provides that:

> Workers and employers, without distinction whatsoever…shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.[128]

Defendants argued that the rights to associate and organize are not "well-established, universally recognized" norms of international law.[129] In support, they pointed out that the United States, China, and India have refused to ratify ILO Conventions 87 and 98 and that these countries represent approximately 2.3 billion of the world's inhabitants.[130] In the absence of any specific precedent, the court, in reaching its holding, relied on the practice of earlier ATS decisions which looked at international treaties as one source for determining customary international law.[131] In this context, Judge Bowdre noted that the United States had ratified the International Covenant on Civil and Political

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it had no jurisdiction over the individual plaintiffs. *Id.* at 1257. In respect of the union plaintiff, Sintramienergetica, the court held that it enjoyed standing to pursue ATS claims as it had alleged a cognizable injury, a ruling which opened the possibility for the court to address the issue of enforcing the right to organize and associate. *Id.* at 1259.

[124] *Supra* note 40.

[125] International Covenant on Economic, Social and Cultural Rights, U.N.G.A. Res. 2200, 993 U.N.T.S. 3 (1966).

[126] ILO Convention No. 87, ILO Doc. 87, 68 U.N.T.S. 17 (1948), *available at* http://www.ilo.org/ilolex/english/convdisp1.htm (accessed 30 August 2006).

[127] ILO Convention No. 98, *available at* http://www.ilo.org/ilolex/english/convdisp1.htm (accessed 30 August 2006).

[128] *Supra* note 126, art. 2. More than 150 member States have ratified ILO Convention No. 87. ILO Convention No. 98 was ratified by 153 States.

[129] 256 F. Supp. 2d at 1262.

[130] *Id.*

[131] *Id.* The court points in this regard only to *Estate of Winston Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1359 (S.D. Fla. 2001). However, this decision did not address labor rights.

Rights which enshrines the right of association.[132] Accordingly, although he stated that he was aware that no federal court before has specifically found that the rights to associate and organize are norms of international law for purposes of ATS, he held without ultimately deciding the legal issue that "at this preliminary stage in the proceedings", said rights are generally recognized in international law so as to survive the motion to dismiss.[133] Judge Bowdre did not elaborate on the lack of ratification of the two core conventions on the part of the U.S., probably because non-ratification has always been justified on the ground that the domestic laws already suffice the standards imposed by the two conventions. As of today, the case is still pending.[134]

In the same year, the district court for the Southern District of Florida rendered its decision in the second ATS case involving a labor standard dispute, *Aldana v. Fresh Del Monte Produce, Inc.*[135] In this proceeding, the plaintiffs were officers of the trade union Sindicato de Trabajadores del Banano de Izable ("SITRABI"), the Guatemalan union representing workers at the Bopos banana plantation which was operated by the Del Monte Group in Guatemala.[136] In September 1999, SITRABI was involved in negotiations with the Del Monte Group and was about to call a strike due to infringements of the collective bargaining agreement at the Bopos plantation.[137] In the early evening of 13 October 1999, an armed private security force stormed and seized SITRABI's headquarters and detained the plaintiffs at gunpoint.[138] One was forced into a car to show where other leaders reside who were then kidnapped and brought to the headquarters.[139] Again, under the threat of immediate death, another plaintiff was forced to call another leader to the office under a pretext, who, upon arrival, was similarly detained.[140] In the late evening, the armed gang had gathered all union leaders who were repeatedly threatened with death as multiple weapons were pointed at them.[141] Later that night, accompanied by the mayor of the city, two of the plaintiffs were transported to the local radio station where they were forced under the threat of death to make an on-air

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[132] *Id.* at 1263.

[133] *Id.*

[134] *Id.*

[135] 305 F. Supp. 2d 1285 (S.D. Fla. 2003).

[136] *Id.* at 1288–89.

[137] *Id.* at 1289. Compania de Desarollo Bananero de Guatemala, S.A., a Guatemalan corporation and allegedly a wholly-owned subsidiary of Del Monte Inc., announced that it was terminating the production at Bopos and laying off all 918 workers, all of whom are SITRABI members.

[138] *Id.*

[139] *Id.* at 1290.

[140] *Id.*

[141] *Id.*

public announcement that the labor dispute with Del Monte was over and that workers should return to work.[142] After the announcement, plaintiffs were taken back to the headquarters, forced to sign a resignation fax to Del Monte, again at gunpoint, and relieved in the early morning.[143] Plaintiffs alleged that they were threatened with death if they did not leave the plantation area. Shortly after these events, plaintiffs left Guatemala and were granted asylum status in the United States.[144] In respect of the defendant, they contend in their complaint that Del Monte's American parent company Del Monte, Inc. was directly involved in the events which took place.[145]

Again, like in *Estate of Rodriguez*, the plaintiffs advanced the theory that the defendants' participation in the unlawful events had deprived them of their "fundamental rights to associate and organize".[146] Defendants, on the other hand, argued that there is a lack of consistent State practice to determine customary international law and pointed to a wide variety of countries where the rights appear to be generally limited, including China, Brazil, Egypt, and Russia.[147] They claimed that a lack of State practice confirms a lack of universal consensus on the issue.[148] Plaintiffs on the other hand, pointed out that the *opinio juris*, not general practice, is the critical element as to whether the rights to associate and to organize has matured into international customary law and that in this regard, not even the Chinese government in respect of the Tiananmen Square massacres in response to protests thereafter did not question its obligation to guarantee the freedom of association.[149] Parallel to the reasoning in *Estate of Rodriguez*, Judge Moreno announced that even those States which refused to ratify, such as the United States, did not object to the norm and its binding nature as such.[150] He explained that China, for example, which is another major power which did not ratify the convention, defended itself with regard to violations in China within the context of the rule confirming rather than weakening the rule in stating with regard to the Tiananmen Square massacre that China "has at all times upheld the principle of freedom of association".[151]

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[142] *Id*.

[143] *Id*.

[144] *Id*. at 1290–91.

[145] *Id*. at 1290. Further defendants were Del Monte Fresh Produce Company and Compania de Desarollo Bananero de Guatemala, S.A. *Id*. at 1288.

[146] *Id*. at 1296.

[147] *Id*. at 1297.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] *Id*. *See also* Virginia A. Leary, "The Paradox of Workers' Rights as Human Rights", in *Human Rights, Labor Rights and International Trade* 30 (Lance A. Compa ed., 1996) *quoting* Com-

Nonetheless, the court declined to follow the reasoning in *Estate of Rodriguez* and concluded that the mere absence of explicit protestations would not suffice as evidence of international customary law so as to be actionable under ATS.[152] The court rebuffed the plaintiffs' proposed reliance on the international documents upon which the plaintiffs in *Estate of Rodriguez* relied upon, such as the ICCPR, the Universal Declaration of Human Rights and ILO core Conventions 87 and 98.[153] The court explained that codified international law does not reflect the developments of international customary law on the issue.[154] In addition, it proclaimed that not only do the ILO conventions themselves contain highly restrictive language such that their application is limited to members who have ratified and notified them[155] but that their acceptance within ILO requires a two-thirds majority instead of unanimity, which, in the court's view, implies that the universal standard necessary for ATS purposes is not met.[156] In addition and equally important, the judgment pointed out that the plaintiffs were unable to point to a specific and definable prohibition which could give guidance to the court in respect of the rights to associate and organize.[157] Instead, the court declared that the alleged norm "has no legally discernable shape", locating the norm in a rather political-ideological struggle than in a legal debate within international law.[158] In justifying its decision, the court explained that it is not duty-bound to accept plaintiffs' version of international law and referred to a series of ATS decisions wherein courts disagreed as to the validity of the norm under international law and ATS.[159] Lastly and more closely related to labor standards, the court pointed to two ATS precedents which held that the First Amendment Right to Free Speech does not rise to the level of universality required by ATS.[160] Accordingly, the complaint was dismissed in toto.[161] The decision was reversed on appeal on another ground, State action, and remanded for

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mittee on Freedom of Association, "Report of the Committee on Freedom of Association (275th and 276th Reports)", *ILO Official Bulletins*, 73 Ser. B. no. 3. para. 344 (1990).

[152] 305 F. Supp. 2d at 1297.

[153] *Id.* at 1297–98.

[154] *Id.*

[155] *Id.* at 1298 referring to ILO Convention No. 87, *supra* note 126, art. 15; ILO Convention No. 98, *supra* note 127, art. 8.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

further proceedings as to whether the claim of torture, which was also alleged, could be established.[162]

These pre-*Sosa* developments exemplify that instead of direct enforcement of labor standards, it might be more promising to rely on indirect enforcement by relying on non-labor rights such as the prohibition on torture or summary execution. The Supreme Court's decision in *Sosa v. Alvarez-Machain* has possibly strengthened rather than lessened the reluctance of federal judges towards recognizing the actionability under ATS of violations of the freedom of association since the Supreme Court urged lower courts to exercise the "most vigilant door keeping."[163] Under the standard of elevated degree of specificity and acceptance among nations, the poor rank of labor law and the lack of actual enforcement of labor standards worldwide, particularly in Asia, including China, may inhibit direct enforcement through ATS.

2. *Indirect Enforcement of Freedom of Association*

The strategy chosen by the plaintiffs in the third labor standards-related ATS case accords with the general scepticism visible in this field. *Sinaltrainal v. Coca-Cola Co*.[164] was decided in the same year as the two foregoing ATS-labor cases and was brought by the relatives and heirs of Isidro Segundo Gil ("Gil").[165] Gil was an employee of one of Coca-Cola's bottling plants in Colombia, Bebidas, and a local leader of the Colombian union, Sinaltrainal.[166] In 1995, with the hiring of a new manager, his employer started to pursue a more aggressive strategy towards unions.[167] The new manager allowed paramilitary units access to the plant and allegedly reached an agreement with them to de-unionize the plant.[168] In 1996, Sinaltrainal entered into labor negotiations with Bebidas to increase security for workers and to stop the terrorizing of workers by the paramilitary forces.[169] During the negotiations, Gil was shot and

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[162] 2005 WL 1587302 (11th Cir. 2005).

[163] 124 S. Ct. 2739, 2764 (2004). The court further stressed "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by [ATS]". *Id.* at 2762. *See infra* Chapter One: Actionability Standards. See the post-Sosa ATS case *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, where the district court rejected the general claim for violations of the "rights to life, liberty, security and association" accepting the defendants' position that there is no universal understanding of the right. *Id.* at 467.

[164] 256 F. Supp. 2d 1345 (S.D. Fla. 2003). *See also Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006), a labor-related ATS case which was dismissed based on the doctrine of forum non conveniens. *See infra* Chapter Eleven: Forum Non Conveniens.

[165] *Id.* at 1347.

[166] *Id.* at 1350.

[167] *Id.*

[168] *Id.*

[169] *Id.*

killed by the paramilitary forces when he arrived at work.[170] In this proceeding, the plaintiffs did not even attempt to rely on labor standards.[171] Instead, they raised claims of torture and extrajudicial killing under ATS and TVPA and survived an early motion to dismiss on that basis.[172]

III. *Other Labor Standards*

The next issues relate to whether labor standards other than the core ones have a potential for actionability under ATS, such as a global minimum wage and maternity protection safety regulations.[173] As previously mentioned, ILO has adopted more than 180 conventions and 185 recommendations covering a wide range of labor issues.[174] These could also be subject to enforcement via ATS.

Yet, in actual State practice, actual implementation of the labor standards promulgated by the ILO even compared with other vulnerable parts of international law is, in almost all developing countries, dramatically poor.[175] Moreover, with the fall of the Berlin Wall in 1989 marking the end of Cold

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[170] *Id.*

[171] *Id.*

[172] *Id.* at 1356–57. The case was dismissed with respect to Coca-Cola only because its involvement in the wrongdoing was not sufficiently alleged. *Id.* The dismissal was confirmed in *In re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006).

[173] See a list of international labor standards, *available at* http://www.ilo.org/ilolex/english/subjectE.htm (accessed 16 September 2006).

[174] *See* ILOLEX Database, *supra* note 4.

[175] The ILO legal framework provides merely for a fragile supervisory system without any ability to impose sanctions on an ILO member which does not abide by its obligations under the ILO Constitution or the ILO ratified conventions. *See* ILO, *How Are International Labor Standards Enforced?, available at* http://www.ilo.org/public/english/standards/norm/enforced/index.htm (accessed 30 August 2006). At least until very recently, this has marginalized the effects of ILO's output in comparison to other international organizations which arguably have a real clout such as the World Bank, the International Monetary Fund, or the World Trade Organization ("WTO"). *Cf.* Brian Langille, "The ILO and the New Economy: Recent Developments", 15 *Int'l J. Comp. Lab. L. & Indus. Rel.* 229, 233 (1999), a labor rights scholar who has been following the development of the ILO for decades, went so far as to speak of an "identity crisis" as a consequence of these political events. *Id.* at 231. When the WTO decided to totally delete ILO and international labor standards from its agenda (WTO members could only agree upon a public reaffirmation of respect for core labor standards and the competence of ILO to address those issues) at the controversial Ministerial Meeting in Singapore in 1996, such incident was perceived by many labor rights activists as a further confirmation of international labor law's irrelevance. *See* WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC/W, 13 December 1996, *available at* the WTO web site, www.wto.org (accessed 30 August 2006); Langille, *infra* at 240.

War and communism, ILO, according to many commentators, lost one important reason for its existence, i.e., to provide an alternative to full-fledged, brutally market-driven and unchecked capitalism without resorting to the communist State and society model.[176] It was in response to this constant under-enforcement and under-relevance of its international labor law which marginalizes the organization's output that ILO itself has identified four core labor standards in its 1998 Declaration on Fundamental Principles and Rights at Work.[177] This diagnosis suggests that while in *abstracto*, universal consensus can still be found as to the existence of a given labor standard as a matter of principle, when it comes to concrete cases, a similar consensus as to the exact definitional content of the right may simply be non-existent. In other words, beyond the core labor standards, the standard of elevated specificity and acceptance among nations required in *Sosa* cannot be met.[178]

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[176] Langille, *supra* note 175, at 232.

[177] *See supra* note 8.

[178] Such result (the non-actionability of labor standards other than the core ones) also accords with current economic theory. Economic theory suggests that the immediate imposition of the substantially high and extensively sophisticated labor standard regime of the western world on other countries would result in a reduction of total economic welfare and deprive developing countries largely of their comparative advantage of a cheap labor force. *See* Drusilla K. Brown *et al*., "International Labor Standards and Trade: A Theoretical Analysis", *in* 1 *Fair Trade and Harmonization: Prerequisites for Free Trade* 227 (Jagdish Bhagwati & Robert Hudec eds., 1996) stating that "[i]f the standard is imposed in the labor-intensive sector, then workers in all sectors of the economy are made worse off." *Id*. at 255; Drusilla K. Brown, *International Trade and Core Labor Standards: A Survey of the Recent Literature*, OECD Occasional Papers No. 43, 41–42, *available at* http://ideas.repec.org/p/tuf/tuftec/0005.html (accessed 30 August 2006); Keith Markus, *Should Core Labor Standards Be Imposed through International Trade Policy?*, World Bank Policy Research Working Papers No. 187, 14, *available at* http://ideas.repec.org/p/wbk/wbrwps/1817.html (accessed 30 August 2006). With respect to core labor standards as such, the welfare effects in exporting developing countries would probably be positive where negative price effects in importing developed countries constitute a *quantité negligible*. Indeed, a study undertaken by the Organization for Economic Co-operation and Development ("OECD") concluded that compliance with core labor standards which could put the workers on an equal footing with their employers in order to overcome the current situation is likely to have no welfare losses for the exporting countries in terms of export and growth performance. *OECD, Trade, Employment and Labor Standards: A Study of Workers' Rights and International Trade* 98 (1996). See also the study of the ILO which predicts substantial welfare gains from the effective abolition of child labor and vastly outweighs the required investments in school and education, ILO, *An Economic Study of the Costs and Benefits of Eliminating Child Labor*, *available at* http://www.ilo.org/public/english/standards/ipec/publ/download/2003_12_investingchild.pdf (accessed 30 August 2006). Although labor costs tend to increase as a result of the stringent application of labor law, low labor law regimes do not necessarily create comparative advantages nor do they encourage foreign investment. Dani Rodrik, "Labor Standards in International Trade: Do They Matter and What We Do about Them", *in Emerging Agenda*

IV. *Conclusions*

Given the merciless conditions under which many workers toil in developing countries and the frequent prevention of workers from forming and joining unions and defending their labor rights in these countries, ATS litigation relying on labor standards in international labor law as one field of international law is essential. At the very least, the four core labor standards identified by the ILO Declaration on Fundamental Rights and Principles at Work can serve as a starting point for the regulation of labor issues involving TNCs as these norms belong to the most recognized among States in international law.

With respect to the prohibition on forced labor, courts have unanimously held that it is actionable under ATS.

With respect to the three other freedoms: the freedom to associate, the freedom from work-related discrimination, and freedom from the worst forms of child labor, the situation is less clear.

The prohibition on child labor and work-related discrimination may prove similarly difficult to be recognized as actionable under ATS although it can be argued that at the very least, the worst forms of child labor and racial and religious discrimination at the workplace meet the standard of elevated degree of acceptance among nations and specificity announced by the Supreme Court in *Sosa v. Alvarez-Machain*.

In respect of freedom to associate, plaintiffs have been largely unsuccessful on the ground that there is a lack of definitional clarity or universal consensus. Nowadays, as a matter of litigation strategy, an indirect enforcement of such standards should be sought through reliance on other, more recognized, human rights violations, such as the prohibition against torture or the right to life.

The perceived general reluctance of federal judges towards labor standards may be due to the perception that ATS should not be used to impose the higher labor standards of the western world on developing countries, depriving the latter of their most prominent comparative advantage, a perception which, according to current economic theory, is economically unsound in respect of the core labor standards and sound, if at all, only in respect of non-core labor standards. The latter are not enforceable through ATS for a long time to come given the strictness of the *Sosa* standard and their actual under-enforcement in many regions of the world.

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for Global Trade: High Stakes for Developing Countries 52–59 (Robert Z. Lawrence *et al.*, eds., 1996).

To the degree markets and consumers demand control and regulation of TNC business activities as employers in developing countries beyond the classic core standards, non-binding, voluntary systems such as independent third-party accreditation may offer a solution.

Chapter Five

Environmental Destruction

I. *Introduction*

International environmental law is frequently referred to as the body of substantive, procedural, and institutional rules of international law which have environmental protection as their primary objective.[1] Its origins date back to the 19th century with the conclusion of bilateral fishing treaties when States, in the process of industrialization, began to realize that limitations on the exploitation of natural resources are unavoidable.[2] Although public support for environmental concerns slowly gained more and more momentum since World War II, in the last 25 years, international environmental law has substantially expanded, and an array of instruments were adopted at the global level to deal with environmental matters.[3]

This chapter addresses the issue of whether ATS can serve as an instrument to achieve a minimum ecological business conduct of TNCs regardless of where they are doing business.[4] The separate issue of whether public international

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[1] *See* Philippe Sands, *Principles of International Environmental Law* 15–18 (2003), where the notion of environment is extensively discussed.

[2] *See id*. at 26–30.

[3] Ulrich Beyerlin, *Umweltvölkerrecht* 3 (2000).

[4] *See* the extensive literature on ATS and the environment: Elise Catera, "ATCA – Closing the Gap in Corporate Liability for Environmental War Crimes", 33 *Brook. J. Int'l L.* 629 (2007/2008); Luis Enrique Cuervo, "The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea", 19 *Tul. Envtl. L.J.* 151 (2006); Pauline Abadie, "A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim against Multinational Corporations", 34 *Golden Gate U.L. Rev.* 745 (2004); Natalie L. Bridgeman, "Human Rights Litigation under the ATS as a Proxy for Environmental Claims", 6 *Yale Hum. Rts. & Dev. L.J.* 1 (2003); Peggy Rodgers Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", 12 *Colo. J. Int'l L. & Pol'y* 191 (2001); Russel Unger, "Brandishing the Precautionary Principle through the Alien Tort Claims Act", 9 *N.Y.U. Envtl. L.J.* 638 (2001); Jean Wu, "Pursuing International Environmental Tort Claims under the ATS: Beanal v. Freeport-McMoran", 28 *Ecology L.Q.* 487 (2001); Richard Herz, "Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment", 40 *Va. J. Int'l L.* 545 (2000); Armin Rosencranz & Richard Campbell, "Foreign Environmental and Human Rights

environmental law can be applied to private actors such as TNCs will be dealt with in a separate chapter.[5]

Part II discusses the direct actionability of international environmental law under ATS. Part III analyzes claims based on environment-related international human rights law as a vehicle for enforcement. Part IV examines the potential of international humanitarian law protecting the environment. Too frequently, TNCs escape the strict anti-pollution regimes and the high environmental standards of the western world by establishing and operating in relatively underdeveloped regions in Asia, Africa, and South America.[6] While the topos of a "race to the bottom" might be an overstatement, it seems realistic to presume that developing countries are especially reluctant in adopting the necessary environmental standards which allow a long-term sustainable economic development or even merely enforcing existing environmental law in the drive for more foreign direct investment for which developing countries are competing among each other.[7]

II. *International Environmental Law*

From the early times of modern ATS litigation, plaintiffs in various cases have resorted to various instruments and documents in international environmen-

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Suits against U.S. Corporations in U.S. Courts", 18 *Stan. Envtl. L.J.* 145 (1999); Anastasia Khokhryakova, "Beanal v. Freeport-McMoran, Inc: The Liability of Private Actor for an International Environmental Tort under the Alien Tort Claims Act", 9 *Colo. J. Int'l Envtl. L. & Pol'y* 463 (1998); Hari M. Osofski, "Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations", 20 *Suffolk Transnat'l L. Rev.* 335 (1998); Elizabeth Pinchard, "Human Rights and Environment: Indonesian Tribe Loses in Its Latest Battle against Freeport-McMoran", *Colo. J. Int'l Envtl. L. Y.B.* 141 (1997); Judith Kimerling, "The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice of Business as Usual?", 7 *Harv. Hum. Rts. J.* 199 (1994); Michelle Leighton Schwarz, "International Legal Protection for Victims of Environmental Abuse", 18 *Yale J. Int'l L.* 355 (1993).

[5] *See infra* Chapter Six: Application to TNCs.

[6] A well-known example relates to the decision of the British enterprise Thor Chemicals Co. to export its processes and machinery to South Africa for purposes of continuing its hazardous production after the enterprise came under public pressure from the U.K. Health and Safety Executive for exposing workers to mercury. *See* Michael Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?", 41 *Washburn L.J.* 399, 403, n. 12 (2000–2001).

[7] *See* Khokhryakova, *supra* note 4. On sustainability, *see* Ulrich Beyerlin, "The Concept of Sustainable Development", in *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* 95 *passim* (Rüdiger Wolfrum ed., 1996).

tal law to recover damages caused by business conduct with a tremendous impact on the environment.

A. Amlon Metals *and Stockholm Principle 21*

The first reference to environmental law under ATS occurred in the case *Amlon Metals, Inc. v. FMC Corp.*[8] the facts of which arose out of a commercial business relationship between two companies in the late 1980s.[9] The British plaintiffs, who were engaged in the business of reclamation of metal residues, entered into an agreement with defendant FMC, a U.S. corporation, in respect of the reclamation of copper residue produced by a pesticide plant operated by the defendant.[10] After the arrival of the material in England, Amlon discovered that it contained huge concentrations of highly toxic substances in violation of their contract.[11] Upon learning of the situation, the Health and Safety Executive of the U.K. required British plaintiffs to drum the material in steel drums to avoid any risk to human, animal, or plant health.[12] The U.S. complaint, filed in the district court for the Southern District of New York,[13] alleged – in addition to misrepresentation, fraud, strict liability, breach of express and implied warranties, and negligence – substantial danger to human health and to the environment and attempted to rely on ATS in this respect.[14]

In particular, the plaintiffs contended that FMC's conduct amounted to a breach of Principle 21 of the Stockholm Declaration.[15] The Stockholm Declaration is a product of the 1972 United Nations ("UN") Conference on the Human Environment which was held in 1972 in Stockholm and attended by 114 States and a significant number of international institutions and non-governmental organizations.[16] While earlier developments are significant and

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[8] 775 F. Supp. 668 (S.D.N.Y. 1991).

[9] *Id.* at 669.

[10] *Id.*

[11] *Id.* at 669–70.

[12] *Id.* at 670.

[13] *Id.* The Commercial Court of the Queen's Bench Division of the British High Court of Justice, to which the case was originally filed, dismissed the case on the ground that all claims related to actions of FMC in the U.S. and thus, U.S. law would apply. As a consequence, Amlon was forced to refile the action in the U.S. District Court for the Southern District of New York. *Id.*

[14] *Id.*

[15] United Nations General Assembly, *Report of the United Nations on the Human Environment, Principle 21*, U.N. Doc. A/CONF.48/14/Rev.1 (1973), *available at* http://www.unon.org/css/doc/unep_gcss/gcss_viii/bg/Stockholm_Declaration/Stockholm_Declaration.pdf (accessed 27 February 2005).

[16] *See* W. Kennett, "The Stockholm Conference on the Human Environment", 48 *Int'l Aff.* 33 (1972), Alexandre C. Kiss & J.D. Sciault, "La Conference des Nations Unies sur

noteworthy,[17] the conference constituted the birth of modern international environmental law as it is understood today and the first time environmental protection became a top priority of the international community.[18] Its results, although non-binding in a strict legal sense,[19] provided a "normative program for the world community in this field"[20] and had a tremendous, enduring, and promotional impact on the expansion of international environmental law in the following decades.[21] From a legal point of view, significant outputs were the recommendations for the establishment of new institutions and the creation of a co-coordinating network among such institutions, the definition of a framework for future action to be taken by the international community, and a set of general guiding principles applicable to States in matters of the environment.[22] These principles, officially referred to as the Declaration of Principles for the Preservation and Enhancement of the Human Environment,[23] came to be known as the so-called Stockholm Declaration and were based on a draft prepared by the Preparatory Committee. It was designed to offer "a common outlook and…common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."[24] What became the cornerstone of international environmental

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l'Environnement", 18 *A.F.D.I.* 603 (1972); Louis B. Sohn, "The Stockholm Declaration on the Human Environment", 14 *Harv. Int'l L.J.* 423 (1973); Alexandre C. Kiss, "Dix Ans Après Stockholm, Une Decénnie de Droit International de l'Environnement", 28 *A.F.D.I.* 784 (1982).

[17] *See* Beyerlin, *supra* note 3, at § 2.

[18] *See* Sands, *supra* note 1, at 35–39. International environmental law in its modern appearance is a product of the development in the 1970s and 1980s. *Id.* at 25.

[19] *See* Michael Bothe, ",Soft law' in den Europäischen Gemeinschaften", in *Staatsrecht – Europarecht – Völkerrecht, Festschrift für Schlochauer* 769 (Ingo v. Muench ed., 1981), who qualifies soft law as non-legal social norms which, depending on their political context, create certain expectations as to participants' behavior in the future.

[20] Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment", 12 *Mich. J. Int'l L.* 420, 422 (1990–1991).

[21] An initial visible result was the establishment of a UN Environmental Programme by virtue of U.N.G.A. Res. 2997 (XXVII), 15 December 1972.

[22] *See id.* at 37.

[23] Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, U.N. Doc. A/CONF.4hg8/14, *reprinted in* 11 I.L.M. 1416 (1972); United Nations Conference on Environment and Development, Rio de Janeiro Declaration on Environment and Development ("Rio Declaration"), 14 June 1992, UN Doc. A/CNF.151/5, *reprinted in* 31 I.L.M. 874, 876 (1992).

[24] U.N. Doc. At/CONF.48/PC.17. Principle 24 which called for deeper international cooperation and Principle 23 which envisaged a limited role for international law and suggested standard-setting at the national level in order to allow flexibility in taking the value system, the social costs and benefits, and the socio-economic development of a country adequately into consideration belong to the more important principles. *Id.* According to Principle 22,

law is Principle 21 of the Stockholm Declaration on which the plaintiffs in *Amlon* relied upon. It was drafted in view of two contradictive objectives: the sovereign right of any State, in particular developing countries, to use and exploit their natural resources, and that States must not cause or allow damage to the environment. In this sense, Principle 21 declares that:

> 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 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.[25]

The substance of the renowned Principle 21 of the Stockholm Declaration which stresses the responsibility of States "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" forms a classic part of customary international environmental law.[26] Accordingly, the plaintiffs in *Amlon* argued that Principle 21 is evidence of customary international law.[27]

States shall cooperate to develop further the international law regarding liability 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*. Its wording was much softened in comparison to the earlier draft which would have required States to provide compensation for any kind of environmental destruction occurring on their territories.

[25] *Id*.

[26] The wording resembles the award in the *Trail Smelter Arbitration Case between the U.S.A. and Canada concerning Transborder Pollution from Canada into the State of Washington*, 3 R.I.A.A. 1903 (1949). The arbitrators in this case concluded that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence." *Id*. at 1965. *See also I Principles of International Environmental Law: Frameworks, Standards, and Implementation* 191 (Phillip Sands ed., 1995). *See also Restatement of the Law of Foreign Relations* ("*Restatement*"), § 601(1), which states:

> A state is responsible to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
> conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
> are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

In fact, every country's law is based on the principle that one should not use his property to harm others.

[27] 775 F. Supp. at 671.

Judge Connor discarded the plaintiffs' arguments based on Principle 21.[28] Judge Connor held that:

> Plaintiffs' reliance on the Stockholm Principles is misplaced, since those Principles do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to ensure that activities within their jurisdiction do not cause damage to the environment beyond their borders[.][29]

He cited the *Filártiga v. Peña-Irala* decision of the Second Circuit which declared that wrongs of mutual concern, instead of merely several concern, are actionable. In other words, given the inherent compromise between two opposing objectives and the emphasis on each country's sovereignty, Judge Connor deemed Principle 21 too indeterminate for purposes of ATS enforcement.[30]

B. Aguinda *and Rio Principle 2*

In *Aguinda v. Texaco, Inc.*, Judge Broderick of the Federal District Court for the Southern District of New York took a more positive attitude in dealing with environmental cases under ATS in a case initiated by virtue of American oil giant Texaco's infamous engagement in the Ecuadorian Amazon.[31] In 1967, Texaco discovered the first commercial quantity of oil in the Ecuadorian Amazon when it held, together with the Gulf Oil Co., a five million acre concession.[32] Over the following decade, the Ecuadorian government became the major financial partner of the operation while Texaco continued to serve as an operator.[33] Texaco was in charge of the construction and maintenance of all oil exploration and transportation facilities.[34] Reportedly, the lack of environmental standards and disregard of the interests of local people resulted in a severe, massive, and enduring deforestation and the pollution and contamination of land, streams, and rivers.[35] Between 235 and 300 oil wells built by Texaco spill approximately 3.2 million gallons of toxic waste per

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[28] *Id.*

[29] *Id.* Using similar arguments, the court also did not accept plaintiff's reliance on the Restatement.

[30] *Id.* Judge Connor's decision can also be understood as an expression of a general reluctance to enforce mere declarations as representative of customary international environmental law. In sum, the first ATS decision concerning environmental claims already revealed the difficulties of enforcing environmental claims through ATS.

[31] 1994 WL 142006 (S.D.N.Y. 1994).

[32] Kimerling, *supra* note 4, at 204.

[33] *Id.*

[34] *Id.*

[35] *Id.*

day which are discharged unchecked into the surrounding nature contrary to good practices at the time.[36] Colonization in the form of constructing roads, cutting of 18,000 miles of trail land, and spreading boom towns further deepened the loss of land usable for the subsistence of the indigenous people.[37] A water study determined that hydrocarbons and other dangerous chemicals have reached a degree which creates serious risks of cancer, neurological dysfunctions, and non-reproduction.[38] Accordingly, the major reason for the reduction of subsistence activities of the indigenous people was that their land was contaminated or depleted. [39]

In the case brought against Texaco, the Ecuadorian indigenous people affected by Texaco's unhampered activities sought to gain redress for the devastating mass-scale environmental pollution in U.S. courts by seeking classification of a class of 30,000 Ecuadorians as plaintiffs. Like in *Amlon Metals Inc.*, plaintiffs relied on Principle 21 of the Stockholm Declaration and its more recent restatement in Principle 2 of the Rio Declaration of 1992[40] which was a result of the second major environmental conference, the UN Conference on Environment and Development held in 1992 in Rio De Janeiro (the "Rio Conference"), the follow-up conference to the Stockholm Conference 20 years earlier.[41] The conference was not only the culmination of several negotiation undertakings which were started in the aftermath of the Stockholm Conference but also provided a forum to translate developments which had been initiated and have deepened in regional and global institutions,

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[36] *Id.*

[37] Herz, *supra* note 4, at 547.

[38] *Center for Economic and Social Rights Violations in the Ecuadorian Amazon, The Human Consequences of Oil Development* 13–18 (1994).

[39] Kimerling, *supra* note 4, at 207. Nonetheless, some groups have managed to keep their rich culture and their own identity. *Id.* In 1992, Ecuador's national oil company took over the consortium completely. *Id.* These well-known and in general, not disputed facts of the case demonstrate once again that the extraction of natural resources is particularly prone to disregard of flora and habitat on which the existence of indigenous people depend. This is mainly due to lack of governmental accountability and meaningful participation by local communities, especially minorities such as indigenous peoples, and due to enforcement deficiencies in developing countries. This diagnosis makes a strong case for the urgent demand for the international regulation of TNCs in respect of the environmental impacts of their investments. See citation in Herz, *supra* note 4, *passim.*

[40] United Nations Conference on Environment and Development, Rio Declaration, *supra* note 23.

[41] 1994 WL 142006, at 6; Sands, *supra* note 1, at 53. The Rio Declaration itself was one of three non-binding instruments which were concluded in the Rio Conference. The Rio Declaration reaffirmed Principle 21 with one addition. It spoke of "environmental and developmental policies" instead of "environmental policies" alone. This addition can be claimed as presenting a step backward compared to what was achieved before. Sands, *supra* note 1, at 53.

in public and private organizations, and in bilateral agreements and regional and international conventions into a coherent international environmental law and policy strategy.[42] Interestingly enough, Judge Broderick did not exclude the possibility of TNCs overstepping international law through devastating environmental harms in developing countries:

> [The] Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence. Plaintiffs may or may not be able to establish international recognition of the worldwide impact from effects on tropical rain forests as a result of any conduct alleged in their papers which may have been initiated in the United States.[43]

He distinguished *Aguinda* from *Amlon Metals Inc.* on the fact that the plaintiffs claimed "a massive industrial undertaking extending over a substantial period of time and with major consequences."[44] At the same time, he observed the particular difficulty of ATS jurisprudence based on environmental torts:

> Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations. . . . Otherwise more detailed statutes and regulations would be effectively superseded, contrary to the intention of the legislatures involved. Moreover, were conduct to occur exclusively in a foreign country, caution would be necessary to assure that decisionmaking by other countries is not interfered with by adjudication in the United States under necessarily highly general concepts.[45]

He denied the motion to dismiss filed by defendants and allowed discovery to proceed to obtain additional information.[46] This case already shows all features of a paradigm factual background which ends up in a federal court relying on environmental claims under ATS. In instances in which TNC operations, particularly in the field of exploitation of natural resources where the costs of environmental protection are significant, do not only pollute more than they would under regulations in the developed world but also have a devastating impact on local, especially indigenous, communities in develop-

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[42] 1994 WL 142006, at 6.

[43] *Id.* at 7. Judge Broderick also found persuasive the fact that U.S. domestic environmental law would have prohibited Texaco's conduct had it occurred in the United States. He ruled that U.S. laws are

> relevant as confirming United States adherence to international commitments to control such wastes. This tends to support the appropriateness of permitting suit under 28 U.S.C. § 1350 if there were established misuse of hazardous waste of sufficient magnitude to constitute a violation of international law.
> *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

ing countries with governments which do not enforce environmental laws and standards due to lack of resources and/or political will or because they are afraid of losing foreign investment, the generally accepted argument that "dirty industries" should be transferred to under-polluted and under-populated developing countries where the costs of environmental destruction are less fails since the costs are merely externalized on defenseless individuals.[47] With no meaningful participation, expression, almost no local control, and no or limited access to judicial process, a project can be imposed on local communities, destroying the environment the local people depend on for their subsistence without any substantial offset.[48] At the same time, due to the longer history of environmental degradation, the higher standard of living, the greater freedom to adjust legal principles to newly arising challenges, and with a body of substantive torts law, judges in the home country of the TNCs tend to be more suitably-equipped in resolving environmental disputes which often raises complex questions relating to science and causation.[49] In most cases, torts law principles in developing countries have not been as fully elaborated through judicial decisions as the torts law in developed countries, at least at the time when the environmental degradation occurred.

Nonetheless, in *Aguinda*, after Broderick's death, his successor took a less favorable view and the dicta was not taken up and further developed by other courts. In May 2001, avoiding a final decision on the merits, the district court dismissed the case on the ground of forum non conveniens,[50] a dismissal which was upheld on appeal.[51]

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[47] *E.g.*, Laurence Summer, *The Memo*, 12 December 1991, *available at* www.whirledbank.org/ourwords/summers.html (accessed 31 August 2006).

[48] *Cf.* Richard L. Herz, "Making Development Accountable to Human Rights and Environmental Protection", *American Society of International Law*, Proceedings of the 94th Annual Meeting 216, 217, *cited in* David Hunter et al., *International Environmental Law and Policy* 1406 (2002). Herz observes that "[o]nly meaningful political participation can break this vicious circle, under which repression, environmental degradation and destructive 'development' persist ad infinitum." *Id*.

[49] Anderson, *supra* note 6, at 418.

[50] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

[51] Shortly thereafter, *Jota v. Texaco* was filed and on first appeal, the Court of Appeals reversed and directed the first instance to, inter alia, obtain Texaco's consent to jurisdiction in Ecuador. *See Jota v. Texaco*, 157 F.3d 153 (2d Cir. 1998). Following the denial of a motion to disqualify Judge Rakoff for conflict of interest, *Aguinda v. Texaco, Inc.*, 139 F. Supp. 2d 438 (S.D.N.Y. 2000), and affirmation of the denial on appeal, *Aguinda v. Texaco, Inc.*, 241 F.3d 194 (2d Cir. 2001), the district court dismissed the case again based on forum non conveniens. *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). This decision was finally affirmed subject to the modification that the judgment be conditioned on Texaco's agreement to waive defenses based on statutes of limitation for limitation periods expiring between the institution of these actions and a date one year subsequent to the final

C. Beanal *and General Principles of Law*

The next environmental case under ATS, *Beanal v. Freeport McMoran, Inc.*,[52] was filed in the Fifth Circuit. Once again, the case arose from the exploitation of natural resources and the environmental destruction caused thereby. The defendants, the U.S. corporations Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. (together, "Freeport") owned a subsidiary in Indonesia incorporated under the name P.T. Freeport Indonesia which operated the open pit copper, gold, and silver "Grasberg" mine located in the Jayawijaya Mountain in Irian Jaya, Indonesia, covering an area of 2980 square kilometers rendering it the biggest copper, gold and silver mine in the world.[53] The plaintiff Tom Beanal was a resident of Indonesia and a leader of the Amungme Tribal Council of Lambaga Adat Suku Amungme.[54]

Beanal alleged, inter alia,[55] that Freeport's mining operation and drainage practices have resulted in dramatic environmental harm.[56] He claimed ecological destruction in the form of "hollowing mountains, re-routed rivers, stripped forest and increased toxic and non-toxic materials and metals in the river system."[57] He further stressed the huge impact of discharged water containing tailings from the operations causing "pollution, disruption and alteration of natural waterways leading to deforestation,… health safety hazards and starvation, degradation of surface and ground water from tailings and solid hazardous waste".[58] Finally, Beanal asserted that Freeport failed to establish a waste management system which would minimize the negative effects of the operation and "have disregarded and breached its international duty to protect one of the last great natural rain forests and alpine areas in the world."[59] In the absence of any concrete norm on this point incorporated in international environmental law, Beanal was forced to retreat to a violation of rather general environmental principles: the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle.[60]

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judgment of dismissal. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). *See infra* Chapter Eleven: Forum non Conveniens.

[52] 969 F. Supp. 362 (E.D. La. 1997). *See also* Khokhryakova, *supra* note 4, *passim*; Wu, *supra* note 4, *passim*.

[53] Wu, *supra* note 4, at 496.

[54] 969 F. Supp. at 366.

[55] Beanal further claimed human rights violations and cultural genocide. *Id.* at 365.

[56] *Id.* at 383.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

All these principles form part of the discourse in international environmental law. The basic idea of the precautionary principle is laid down in Principle 15 of the Rio Declaration:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[61]

Whether the Precautionary Principle has already emerged into international customary law is a matter of great contention.[62] It can be found in virtually every document related to environmental protection published in recent years.[63] The Appellate Body of the World Trade Organization in the *Beef Hormones* case refused to rule that the principle overrides existing obligations under the Sanitary and Phytosanitary Agreement and explained that whether members have widely accepted it as a general principle of customary international law is "less than clear".[64] The International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project* avoided integrating the Precautionary Principle in its discussion.[65] It can be argued that the court was unwilling to rule that the precautionary principle already amounts to

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[61] UN Conference on Environment and Development, Rio Declaration, *supra* note 23.

[62] *See* Unger, *supra* note 4; Beyerlin, *supra* note 3, at 60; Sands, *supra* note 1, at 266–69; L. Grundling, "The Status in International Law of the Principle of Precautionary Action", 5 *Int'l J. Estuarine & Coastal L.* 23 (1990). Some scholars in international environmental law proclaim a lower standard for the determination of customary law. From this perspective, the proof of practice is negligible since the fast development of scientific knowledge corresponding to environmental problems caused by modern industrial applications forbids the old approach of requiring State practice. Thus, Harald Hohmann claims that the precautionary principle is now "finally accepted" as part of international environmental law. Harald Hohmann, *Ergebnisse des Erdgipfels von Rio*, 12 NVwZ 311–19 (1994). *See also* Harald Hohmann, "*Precautionary Legal Duties and Principles of Modern International Environmental Law*" 166–72 (1994).

[63] David Freestone & Hellen Hey, "Origins and Development of the Precautionary Principle", in *The Precautionary Principle and International Law: The Challenge of Implementation* 3 (David Freestone & Hellen Hey eds., 1996).

[64] *EC – Measures concerning Meat and Meat Products*, Report of the Appellate Body, WT/DS26/AB/R (16 January 1998), para. 123. *See* Markus Gehring, "The Precautionary Principle in the Recent World Trade Organization (WTO) Practice", in *Protection of the Environment for the New Millennium* 583–99 (Koufa Kaliopi ed., 2002).

[65] Although Hungary put it forward. *See Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 40–41, 62, 78.

international law but did not do so in order not to interfere with the fast development of international environmental law.[66]

According to the "polluter pays principle", the costs of pollution should be borne by the entity responsible for the environmental harm done.[67] It is aimed at preventing the externalization of costs and the adequate allocation of obligations.[68] Under this principle, polluters should not be able to circumvent the financial consequences of their actions by transferring the price on society in general. At the same time, it creates incentives to reduce environmental harm.[69] The polluter-pays principle is reflected in Principle 16 of the aforementioned Rio Declaration which provides that:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[70]

The carefully drafted wording reveals the scepticism and objections of a number of countries against the polluter-pays principle. In accordance with these restrictions, international environmental law scholars generally do not classify the polluter-pays principle as part of customary international law. Usually, they label it as a mere recommendation.[71] At the same time, the principle is commonly regarded as a candidate for future customary international law.[72]

The proximity principle is of extraordinary significance in European Union environmental law.[73] It requires that waste be disposed of as close to its source as much as possible and by the safest means available.[74] A policy based on the principle reduces the transportation of dangerous materials, minimizes the production of waste by creating an awareness of the environmental problem

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[66] Sceptics of the principle warn, however, of over-regulation and limiting human activity. *See* Sands, *supra* note 1, at 268.

[67] *See* Henri Smets, "A Propos d'un ventuel principe pollueur-payeur en matiére de pollution transfrontière", 8 *Envtl. Pol'y & L.* 40 (1982); Sanford E. Gaines, "The Polluter-Pays Principle: From Economic Equity to Environmental Ethos", 26 *Tex. Int'l L.J.* 4563 (1991); Raphaël Romi, "Le Principe pollueur-payeur, ses implications et ses applications", 8 *Droit de l'environnement* 46 (1991); Hyung-Jin Kim, "Subsidy, Polluter-Pays Principle and Financial Assistance among Countries", 34 *J.W.T.* 115 (2000).

[68] See the literature listed in *supra* note 67.

[69] *Id.*

[70] UN Conference on Environment and Development, Rio Declaration, *supra* note 23, at 874.

[71] Sands, *supra* note 26, at 213.

[72] *Id.*

[73] Pinchard, *supra* note 4, at n. 11.

[74] *Id.*

of how waste is disposed of at the local level, and prevents externalization of costs by sending waste to places where standards of recycling are lower or non-existent and the price of pollution in the end has to be paid by society as a whole.[75] However, this principle has not matured into customary international law.

In addressing the issue in the *Beanal* case, Judge Stewart simply referred to prominent international environmental law scholar Philippe Sands's description of the current status of these principles in international environmental law in volume I of his treatise, Principles of International Environmental Law: Frameworks, Standards, and Implementation.[76] In the 1995 edition of his book, Sands described the three principles in a chapter on general rules and principles of international environmental law as having "broad, if not universal support and are frequently endorsed in practice." He explained however that their status and effect remain inconclusive, although he assumed that they may form part of a treaty obligation or binding in limited instances as customary law.[77] From these statements, Judge Stewart concluded that no universal consensus on their binding status has yet emerged under international law and dismissed the case.[78]

How sceptical one is of the court's reasoning depends on how one views international environmental law. If one is of the view that the preponderance of soft law, declarations, and abstract principles is mainly due to the lack of political will on the part of States to submit themselves to binding obligations[79] enshrined in international conventions, the court's reasoning seems sound. If one stresses more the practical insight that the declarations and soft law documents respond more adequately to the constant need to quick adaptation and adoption of new rules at every new stage of socio-economic and scientific development[80] in an interdependent world and do not, by themselves, contradict a will of States to play by the rules in this field, the court's attitude appears subject to criticism.

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[75] Erin A. Walter, "The Supreme Court Goes Dormant When Desperate Times Call for Desperate Measures: Looking to the European Union for a Lesson in Environmental Protection", 65 *Fordham L. Rev.* 1161, 1203 (1996).

[76] Sands, *supra* note 1, at 183–88. Furthermore, the court held that the principles apply to States. 969 F. Supp. at 384. This, of course, is a problem of State action not a question of whether the norm is actionable under § 1350.

[77] 969 F. Supp. at 384.

[78] *Id.* On appeal, the Fifth Circuit found little difficulty in similarly rebuffing the claims. 197 F.3d 161, 167 (5th Cir. 1999).

[79] *See* Winfried Lang, „Die Verrechtlichung des internationalen Umweltschutzes – Vom ‚soft law' zum ‚hard law'", 22 *ArchVR* 283, 285 (1984).

[80] *See* Dupuy, *supra* note 20, at 421.

Be that as it may, even if one wants to decide the case otherwise today (indeed, Sands himself, in the latest edition of his treatise takes a less sceptical view in this regard)[81] by arguing that international environmental law has further developed since then, the decision would not have been rendered differently because besides the lack of universality, Judge Stewart stressed at the same time that the international law the plaintiff relied on "merely refer[s] to a general sense of environmental responsibility and state abstract standards and regulations to identify practices that constitute international environmental abuses and torts."[82] In other words, like in *Amlon Metals Inc.*, the court found the principles' content too indeterminate to be actionable under ATS. Thus, under the strict standard developed in the aftermath of *Filártiga* and *Sosa*, general principles of international law cannot be implemented through ATS due to the uncertainty of their concrete meaning in a given case even though the principles as such have already reached the status of international law. The court refused to exercise the discretion it would enjoy in respect of general principles as opposed to specific prohibitions if the former were enforceable under ATS.

Admittedly, this result mirrors to a large extent the current state of international environmental law to which ATS refers.[83] With the notable exception of transboundary pollution where international law provides at least for some guidance in respect of the responsibility among States,[84] the overwhelming majority of environmental regulation and enforcement still takes place at the national level.[85] And even if States have the political will to enter into legal relations with each other through a strict international convention, very often, a "piecemeal" approach is followed which regulates only certain aspects of a phenomenon or a framework convention lays down certain general and rather vague guidelines to be concretized by protocols to be agreed upon in the future.[86] In addition and even worse for purposes of ATS litigation, special standards are oftentimes promulgated to allow developing countries to participate without imposing any substantial obligations on them.[87] In such

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[81] Sands, *supra* note 1, at 290.

[82] *Id*.

[83] On law-making in international law, *see* Beyerlin, *supra* note 3, §§ 6, 7.

[84] It is generally recognized that no State has the right to use or permit the use of its territory to cause environmental destruction and damage in the territory of its neighboring States. *See* Albrecht Randelzhofer, "Transfrontier Pollution", in *Rudolf Bernhardt, IV-2 Encyclopedia of Public International Law* 913 (2000).

[85] Anderson, *supra* note 6, at 399.

[86] Beyerlin, *supra* note 3, at 40–42.

[87] A good example is the Kyoto Protocol where India and China have incurred no obligations to reduce their carbon dioxide emissions.

cases, the result, although labelled as a binding convention, constitutes for the most part a *pactum de negotiando* which merely obligates the parties to enrol in negotiations in the future.[88] As a consequence, despite the undisputed fact that international environmental law has deepened and expanded dramatically throughout the last four decades, concrete and specific norms of international environmental law are naturally rare. Principle 23 of the Stockholm Declaration reflects this reality when it grants a limited role to international law and suggests standard-setting at the national level so that the value system, the social costs and benefits, and the socio-economic development of a country can be adequately taken into consideration.[89]

In sum, courts proceed with extreme caution when adjudicating environmental claims to prevent other countries from being forced to substitute their own environmental policies with the policies of the U.S. government. This is especially true if all environmental harm is restricted to the territory of one country and pollution does not cross any border. In other words, environmental law as a compromise between public and private interests and its focus on public goods such as water, flora, and fauna may result in a structural deficiency in its enforcement under ATS which, as torts law, centers naturally on rights of individuals. The Supreme Court's decision in *Sosa*, which requires an elevated degree of specificity and acceptance among nations as to the norm in question, further supports such attitude.[90] Under the *Sosa* standard, reliance on international environmental law in ATS cases may generally fail for lack of specificity.

D. Sarei v. Rio Tinto Plc.

Sarei v. Rio Tinto Plc. was filed in the Ninth Circuit.[91]

1. *Factual Background*

During the 1960s, Rio Tinto, a mining conglomerate, decided to build a mine in the village of Panguna on the island of Bougainville in Papua New Guinea.[92] According to the plaintiffs, within ten years of the mine's opening, the island

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[88] Beyerlin, *supra* note 3, at 43. For examples, *see id.*

[89] *See supra* note 15. It reads:

> Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

[90] *See* 124 S. Ct. 2739, 2765 (2004).

[91] *Sarei v. Rio Tinto Plc.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

[92] *Id.* at 1122.

of Bougainville had experienced serious environmental harm.[93] The copper and gold mine in Bougainville operated by the defendant was one-half kilometer deep and several kilometers wide.[94] The waste from the mining operation allegedly amounted to one billion tons.[95] Plaintiffs further contended that the tailings placed in the Jaba River were ultimately deposited into Empress Augusta Bay where they destroyed the fish on which the Bougainvilleans relied on as a major food source.[96] The plaintiffs asserted that by the mid-1980s, some 8000 hectares of Empress Augusta Bay were covered with tailings to a copper concentration greater than 500 parts per million.[97]

2. *Principle of Sustainable Development*

Plaintiffs argued that their claims are based on violations of the "principle of sustainable development".[98] They accurately explained that the principle "is generally understood to mean 'development that meets the needs of the present without compromising the ability of the future generations to meet their own needs'".[99] They asserted substantive obligations arising out of the principle, "such as the obligation to avoid serious and irreversible environmental or human health effects from development activities and the obligation to manage toxic or hazardous chemicals and wastes in an environmentally sound manner."[100] Yet, while the expression "sustainable development" has been pervading almost every international environmental law document of the past two decades, it is by its nature more of a concept than of a principle.[101] In *Sarei*, since even the plaintiff's expert confessed that it is "too broad to be legally meaningful", Judge Stewart simply rejected the concept as too indeterminate to be actionable under ATS.[102]

3. *UNCLOS*

Next, plaintiffs argued that the environmental destruction of the ocean caused by the mining tailings flowing into the bay constitutes a violation of the UN Convention on the Law of the Sea ("UNCLOS") which has been ratified by

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[93] *Id.*
[94] *Id.* 1122–23.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 1160.
[99] *Id.* relying on Professor Günter Handl.
[100] *Id.*
[101] *See* Beyerlin, *supra* note 3, at 16, which speaks openly of the concept of sustainable development.
[102] 221 F. Supp. 2d at 1160.

166 States.[103] In particular, plaintiffs relied on two provisions. One gives States a mandate to "take all measures . . . that are necessary to prevent, reduce, and control pollution of the marine environment that involve hazards to human health and living resources"; and the other mandates "states [to] adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources."[104]

The court found that UNCLOS reflects customary international law although it has never been ratified by the United States. The court could hold so since, as the court correctly pointed out, even the United States had never doubted that the UNCLOS represents customary international law to a large extent.[105] Accordingly, the motion to dismiss by Rio Tinto was dismissed "[b]ecause UNCLOS reflects customary international law, [and] plaintiffs may base an ATCA claim upon it."[106] Yet, the reasoning is weakened by the fact that the court made no reference to the "specific, definable and obligatory" standard – the prevailing standard in the aftermath of *Filartiga* before *Sosa*,[107] nor explained what kind of "baseline provisions" the U.S. recognizes as "customary law". The holding may be challenged by other courts in the future with the imposition of the standard of elevated degree of specificity and acceptance among nations announced by the Supreme Court in *Sosa*. In respect of the provisions of UNCLOS, specificity may be an issue. In *Sarei*, the holding did not influence the final outcome of the case since ultimately, the court dismissed the plaintiffs' environmental harm claim based on the act of State doctrine, international comity, and the political question doctrine.[108] On appeal, the Court of Appeals for the Ninth Circuit reversed the dismissal on other grounds without examining the actionability of the law of the sea.[109]

III. *Environment-Related Human Rights Law*

Given the failure of environmental claims in the above-mentioned earlier cases, plaintiffs in environmental ATS cases had to adjust their strategy and not rely exclusively on the law of the sea and/or international environmental law.

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[103] *Id.* at 1161.
[104] *Id.*
[105] *Id.* at 1162.
[106] *Id.*
[107] On the various standards to determine actionable torts under ATS, *see supra* Chapter One: Actionability Standards.
[108] 221 F. Supp. 2d at 1208.
[109] *See Sarei v. Rio Tinto, Plc.*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 2007 WL 2389822.

A. Sarei: *Linking Human Rights to Environment*

In a carefully drafted complaint in *Sarei*, plaintiffs claimed that they do not simply contend environmental pollution; rather, they advanced human rights law linked to the environment. As mentioned above, they contended that the mining processes destroyed the environment upon which the local populations relied for their livelihood.[110] Allegedly, air quality plummeted and the villagers contracted health problems because of the environmental harm, including deaths from upper respiratory infections, increased asthma, and increased tuberculosis.[111] The virtual destruction of the environment rendered the native population desperate, depressed, and prone to alcohol abuse.[112] As a consequence, plaintiffs asserted that the defendants' conduct deprived the inhabitants of Bougainville of their right to life and health on the grounds that Rio Tinto's mining activities destroyed the island's environment on which plaintiffs and the island's inhabitants depended upon for their subsistence.[113]

1. *Soft Law Developments*

Indeed, a link between environment and human rights has been prepared during the last decades by various soft law instruments indicative of the latest developments. In 1968, the UN General Assembly first recognized a general link between the actual enjoyment of basic rights and the quality of human environment in a resolution.[114] The Preamble of the 1972 Stockholm Declaration announced that man's natural and man-made environment "are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself"[115] and proclaimed in its Principle 1 that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[116]

A wide range of non-binding declarations, reports, resolutions, and guidelines have been adopted since then which support the individual's right to a clean and healthy environment. The 1982 World Charter for Nature recognizes the right of the individual to participate in decision-making and have access to

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[110] 221 F. Supp. 2d 1116.
[111] *Id.* at 1123.
[112] *Id.* at 1122–24.
[113] *Id.*
[114] G.A. Res. 2398, U.N. GAOR, 22d Sess., U.N. Doc. A/7218 (1968).
[115] *Supra* note 23, preambular para. 1.
[116] *Id.*

means of redress in case the environment has suffered damage or destruction.[117] The 1989 Declaration of the Hague on the Environment recognized "the fundamental duty to preserve the eco-system" and the "right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the environment".[118] A UN General Assembly resolution asserted the right of all individuals "to live in an environment adequate for their health and well-being".[119] The UN Commission on Human Rights avowed the relationship between the preservation of the environment and the promotion of human rights.[120] The Subcommission on Prevention of Discrimination and Protection of Minorities analyzed the relationship between human rights and the movement and dumping of toxic and dangerous products and wastes.[121]

2. *Right to Health*

In *Sarei*, plaintiffs argued in particular that the right to health is an established principle of international law and that "in relation to environmentally injurious activities that threaten human health and well-being, there is general recognition of the fact that such activities also may abridge basic human rights of the victims."[122] In support of their proposition, they cited a series of international human rights and environmental soft law documents[123] and the binding Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).[124] Plaintiffs argued that while there is no separately applicable internationally-recognized right to environmental protection, international practice suggests that severe environmental destruction may amount to a violation of the right to health.[125]

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[117] *See* G.A. Res. 37/7, U.N. GAOR, 37th Sess., U.N. Doc. A/RES/37/7 (1982).

[118] Declaration of The Hague on the Environment, 11 March 1989, 28 I.L.M. 1308 (1989).

[119] G.A. Res. 45/94, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/94 (1990).

[120] *See, e.g.*, UN Commission on Human Rights Res. 1990/41, U.N.Doc. E/1990/22 (1990).

[121] *See* Rights and the Environment, Preliminary Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, pursuant to Sub-Commission Resolutions 1990/7 and 1990/27, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 43d Sess., Agenda Item 4, at 3, U.N. Doc. E/CN.4/Sub.2/1991/8 (1991).

[122] 221 F. Supp. 2d at 1156.

[123] The soft law mentioned above such as the Stockholm Declaration and a report of the World Commission on Environment and Development.

[124] 221 F. Supp. 2d at 1156.

[125] *Id.*

Within some regional human rights systems, human rights guarantees relating to environmental destruction have emerged.[126] The African (Banjul) Charter on Human and Peoples' Rights ("African Charter"), which can be considered as the most innovative major human rights treaty since, among others, it integrates the whole range of civil, political, economic, social, and cultural rights in a single document, states in article 24 that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development".[127] Indeed, the African Commission on Human and Peoples' Rights has already addressed issues of environmental destruction and found a violation of the right to a satisfactory environment in a case relating to the operations of a TNC which also faces a similar lawsuit under ATS in respect of its business conduct.[128] The Ogoni People of Nigeria alleged that the military government of Nigeria was directly involved in oil production through a state oil company which is a majority shareholder in a consortium with Shell Petroleum Development Corp. and that these oil operations caused environmental destruction and health problems because of the contamination of the environment of the Ogoni People in the Nigerian River Delta.[129] The Ogonis contended that the oil consortium exploited oil reserves in Ogoniland with absolute disregard for the health and the environment of the Ogonis by disposing toxic wastes into the environment and local waterways and failing to maintain its facilities in a manner which would have prevented avoidable spill in the proximity of villages.[130] The Ogonis claimed that the contamination of water, soil, and air led to skin infections; gastrointestinal and respiratory problems; and increased risk of cancer, neurological, and reproductive deficits.[131] In response, the commission explained that a clean and safe environment is "closely linked to economic and social rights in so far

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[126] At the national level, more than 60 constitutions have adopted as of date a specific human right related to environmental protection. Ulrich Beyerlin, "Umweltschutz und Menschenrechte", 65 *ZaöRV* 156, 158 (2005). Beyerlin correctly remarks that such determination does not necessarily imply an actual impact of such human rights. *Id.* at n. 2.

[127] 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[128] Decision regarding Communication No. 155/96, African Commission on Human and Peoples' Rights, 30th Ordinary Session, Banjul, The Gambia, 13–27 October 2001, text *available at* http://www.escr-net.org/usr_doc/serac.pdf (accessed 13 November 2008). *Cf.* Dinah Shelton, "Review of Decision regarding Communication No. 155/96", 96 *Am. J. Int'l L.* 937 (2002); Dinah Shelton, "Human Rights and the Environment", in *Y.B. Int'l Envtl. L.* 13 (2002); Kaniye SA Ebeku, "The Right to a Satisfactory Environment and the African Commission", 3 *Afr. Hum. Rts. L.J.* 149 (2003).

[129] Decision regarding Communication No. 155/96, *supra* note 128, at para. 1.

[130] *Id.* at para. 2.

[131] *Id.*

as the environment affects the quality of life and safety of the individual".[132] It therefore confirmed that article 24 (together with the right to health under article 16) require the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[133] As well as desisting from acts which directly threaten the health and environment of their citizens, the commission ruled that

> compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed by hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions of their communities.[134]

Applying the established standards to the case at hand, the commission held that although Nigeria had the right to produce oil, it had not protected the rights of the inhabitants of the Ogoni region under articles 16 and 24.[135] Moreover, influenced by the African Charter, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which the plaintiffs in *Sarei* explicitly relied upon, declares in article 11 that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services."[136]

3. *Right to Life*

In addition in *Sarei*, plaintiffs relied on the right to life. Plaintiffs pointed to the bundle of international human rights treaties and documents which guarantee a right to life (indeed, almost each one does), such as the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights,

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[132] *Id.* at para. 51 *citing* the UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/21 (2000).

[133] *Id.* at para. 52.

[134] *Id.* at para. 53.

[135] *Id.* at para. 54. The commission also found other violations of the right to freely dispose of wealth and natural resources under article 21; the right to housing and shelter under articles 14, 16, and 18(1); the right to food implicitly guaranteed by articles 4, 16, and 22; and the right to life under article 4 of the charter.

[136] *Available at* http://www.oas.org/juridico/English/Treaties/a-52.html (accessed 1 September 2006).

the African Charter, the European Convention for the Protection of Human Rights, and the Charter of Fundamental Rights of the European Union. While these documents all grant a right to life, the question is whether this (classic) right can be (re-)interpreted as protecting against environmental pollution.

The plaintiffs argued that it does so in instances of "serious environmental degradation". In support, they relied on a report prepared by the Inter-American Commission on Human Rights ("IACHR").[137] The IACHR concluded that "where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."[138] They further noted the aforementioned International Court of Justice's decision on environmental claims in the *Case concerning the Gabcikovo-Nagymaros Project* involving Hungary's refusal to carry out its obligation to build dams and barriers at the Danube river out of an agreement between Hungary and Czechoslovakia which observed that "[t]the protection of the environment is…a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself."[139]

Additionally, as the plaintiffs suggested in respect of the right to life and the right to health, several classic human rights can be interpreted as protecting against environmental destruction.[140] Well-known in the international plane in this regard was the decision in *Awas Tingni*.[141] In this case, both the IACHR

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[137] The IACHR is one of two bodies in the Inter-American system for the promotion and protection of human rights. The other human rights body is the Inter-American Court of Human Rights. It is an autonomous organ of the Organization of American States ("OAS"). It is a permanent body which meets in ordinary and special sessions several times a year and has the principal function of promoting the observance and the defense of human rights. Its mandate is found in the OAS Charter and the American Convention on Human Rights. The IACHR represents all of the member States of the OAS. It has seven members who act independently, without representing any particular country. The members of the IACHR are elected by the General Assembly of the OAS. In carrying out its mandate, the commission receives, analyzes, and investigates individual petitions which allege human rights violations pursuant to articles 44 to 51 of the American Convention on Human Rights. Information *available at* http://www.cidh.org/what.htm (accessed 1 September 2006).

[138] Decision regarding Communication No. 155/96, *supra* note 128, *citing* Declaration of Günther Handl in Opposition to Motion to Dismiss, paras. 23–24. The exact citation of the report is not provided in the judgment.

[139] 221 F. Supp. 2d at 1157 *citing* 1997 I.C.J. at 111, n. 78 (separate opinion of Judge Weeramanty).

[140] The lack of an explicit general human right to a healthy environment and the urgent needs related thereto may have contributed to the strengthening of such approach.

[141] *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., Ser. C, No. 79, 2001 IACHR 9 (31 August 2001) *available at* http:www.worldlii.org/int/cases/IACHR/2001/9.html (accessed 1 September 2006).

and the Inter-American Court of Human Rights found that Nicaragua violated article 21 of the American Convention on Human Rights which guarantees the right to use and enjoy property when it failed to recognize and secure the traditional land tenure of the indigenous Mayagna community of Awas Tingni and instead proceeded to grant a concession to a Korean TNC for large-scale logging on the community's traditional lands?[142] It held that the members of the Awas Tingni community have the right that the State

> carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead to agents of the State itself, or third parties acting with acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out the activities.[143]

Thereafter, the IACHR applied and expanded upon the precedent set down in the *Awas Tingni* case in subsequent cases.[144]

Similarly in Europe, the emergence of ecologically-colored rulings can be witnessed in the jurisprudence of the European Court of Human Rights in the last decades.[145] In *Arrondelle v. United Kingdom*, the plaintiff's home was confronted with heavy airport and highway noise. The applicant argued that the intensity and duration of the noise negatively impacted her personal health under article 8 of the European Convention on Human Rights ("ECHR").[146]

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[142] *Id*. at para. 155. The court assumed that indigenous peoples' customary law is relevant in this regard. The court concluded that possession of land suffices for the indigenous populations lacking real title under domestic law to obtain official recognition of that property and for consequent registration. *Id*. at para. 151.

[143] *Id*. at para. 153.

[144] *See Mary and Carrie Dann, United States*, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, OEA/Ser.L/V/II.117, Doc. 1 Rev. 1 (2002), *available at* http://cidh.org/annualrep/2002eng/USA.11140.htm (accessed 1 September 2006); *Maya Indigenous Communities of the Toledo District, Belize*, Case 12.053, Inter-Am. C.H.R. Report 40/04 (2004), *available at* http://cidh.org/annualrep/2004eng/Belize.12053eng.htm (accessed 1 September 2006).

[145] *Cf*. Richard Desdagné, "Integrating Environmental Values into the European Convention on Human Rights", 89 *Am. J. Int'l L.* 263 (1995); Andreas Kley-Struller, "Der Schutz der Umwelt durch die Europäische Menschenrechtskonvention", 22 *EuGRZ* 507 (1995); Alfred Rest, "Europäischer Menschenrechtsschutz als Katalysator für ein verbessertes Umweltrecht", 19 *Natur und Recht* 209 (1997); Beyerlin, *supra* note 3, at 300 et seq.; *Roman Schmidt-Radefeldt, Ökologische Menschenrechte* (2000); Astrid Epiney & M. Scheyli, *Umweltvölkerrecht* 164 (2000); Dinah Shelton, "Human Rights and the Environment: Jurisprudence of Human Rights Bodies", 32 *Envtl. Pol'y & L.* 158 (2002); Yves Winnisdoerffer, "La jurisprudence de la Cour européenne des droits des l'homme et l'environnement", *Revue Juridique De l'Environnement* 213 (2003).

[146] *Arrondelle v. United Kingdom*, App. No. 7889/77, 26 *Eur. Commission Hum. Rts. Decisions & Rep.* 5 (1982). Article 8 of the ECHR states:

The case, however, was not decided on the merits since the parties reached a settlement. In *Powell v. United Kingdom*, a similar noise case, the court ruled that although the applicant's rights under article 8 of the ECHR had been infringed, the strong economic interest in operating an airport outweighed the plaintiff's interest given the noise abatement measures taken by the government.[147] In *López Ostra v. Spain*,[148] the applicant claimed that the erection of a water purification and waste treatment plant near her residence violated her rights under article 8.[149] As a consequence of the noxious fumes and effluents, the applicant had to relocate. The court held that Spain did not take the necessary measures to protect rights under article 8 and in doing so, violated it.[150] The decision in the following case, one of the prominent environment-related cases, has caused some dissatisfaction within environmentalists' circles.[151] In *Hatton v. United Kingdom*,[152] applicants asserted that the U.K. Government's policy on night flights at Heathrow airport violated their right to privacy under article 8.[153] The Grand Chamber ruled that article 8 applies in environmental cases regardless of whether the pollution is directly caused by government entities or whether State responsibility arises out of the failure to properly regulate private industry.[154] The court held that States are under an obligation to take environmental protection into consideration when acting within their margin of appreciation.[155] In the circumstances of the case at hand, majority of the judges decided that the authorities did not overstep their margin of appreciation by failing to strike a proper balance between the right of the individuals affected by those regulations to have their private life respected on the one hand and the conflicting interests of the community as a whole on the

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(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

147 *Powell v. United Kingdom*, 172 *Eur. Ct. H.R.* (Ser. A) at 27 (1990).

148 *López Ostra v. Spain*, 303-C *Eur. Ct. H.R.* (Ser. A) at 47 (1994).

149 *Id.*

150 *Id.* at 56.

151 Beyerlin, *supra* note 126, at 156.

152 Application No. 36022/97, Judgment of 8 July 2003, European Court of Human Rights, Grand Chamber.

153 *Id.* at paras. 90–93.

154 *Id.* at para. 98. In 2000, a chamber of the court ruled in favor of the applicants. The U.K. requested the case be referred to the Grand Chamber.

155 *Id.*

other, nor did it find that there were any fundamental procedural failings in the preparation of the regulation on limitation on night flights.[156] Dissenting Judges Costa, Ress, Türmen, Zupanic, and Steiner attacked the majority's view with the rhetorical question "what [do] human rights pertaining to the privacy of home mean if day and night, constantly and intermittently, it reverberates with the roar of aircraft engines"?[157] They concluded that there is a positive duty on the part of the State to ensure as far as feasible that ordinary people enjoy normal sleeping conditions and in this case, the State has not properly exercised its margin of appreciation.[158] Be that as it may, note that all these decisions interpreted article 8 of the ECHR which protects private and family life as opposed to article 2 which protects the right to life.

So far, the European Court of Human Rights has taken a more positive stance on environmental cases if the victims were killed as a consequence of grave environmental pollutions or even as a result of a methane explosion at a municipal rubbish tip as was the case in *Oneryildiz v. Turkey*.[159] In this case, the explosion caused a landslide which killed 39 people, 9 of whom were members of the Oneryildiz family.[160] The Grand Chamber restated its jurisprudence that the rights are to be interpreted and applied in such a way as to make its safeguards practical and effective and held that article 2, which protects the right to life, does not solely concern deaths resulting from the use of force by State agents but also lays down a positive obligation on States to take appropriate steps to safeguard life.[161] As the court found the regulatory framework defective since the waste collection site was opened and operated despite its illegality under the applicable norms, the absence of a coherent supervisory system, and a meaningful cooperation among various government entities, the court concluded that such circumstances constitute a violation of the right to life under article 2 of the convention.[162]

4. *Response of Judge Modrow*

Still, the aforementioned trends, while clearly detectable, are regional trends which may not meet the acceptance-among-nations requirement proclaimed by the Supreme Court in *Sosa*. Hence, it did not come as a surprise that

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[156] *Id.* at paras. 116–29.

[157] *Id.*, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner, Introduction before para. 1.

[158] *Id.* at paras. 8–10.

[159] 39 *Eur. H.R. Rep.* 12 (2004), Judgment of 30 November 2004, European Court of Human Rights, Grand Chamber.

[160] *Id.* at para. 19.

[161] *Id.* at paras. 98–90.

[162] *Id.* at para. 110.

in *Sarei*, Judge Modrow rejected the human rights claims advanced by the plaintiffs. He explained that while plaintiffs have identified several (of the aforementioned) multinational agreements and/or treaties, he declared nonetheless that he was unable to describe the parameters of the rights to life and health mentioned therein or to detail what type of environmental misconduct violates those rights.[163] In other words, the contended rights are too indeterminate.

5. *Analysis*

At the global level, there is no substantive human right to a clean environment as of today.[164] While article 25 of the Universal Declaration of Human Rights ("UDHR") refers to everyone's right to a "standard of living adequate for the health and well-being of himself and his family", this provision is generally not deemed to represent international customary law of today.[165] In addition, article 24(2) of the UN Convention on the Rights of the Child ("Convention on the Rights of the Child") which instructs States to "take appropriate measures… [t]o combat disease and malnutrition… through… the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution" is limited in its scope of application so as to base a general case on it. Further, while article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), one key human rights instrument in the world, obliges States parties to improve "all aspects of environmental and industrial hygiene", it is understood narrowly as not encompassing environmental pollution at all.[166] Accordingly, given the lack of an explicit human right to a healthy environment at the universal level, the only viable option for ATS plaintiffs is to reinterpret recognized human rights, such as the right to life or the right

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[163] 221 F. Supp. 2d at 1158. He further criticized the lack of information regarding the number of ratifications in respect of the instruments relied upon. *Id*.

[164] Günter Handl, "Human Rights and Protection of the Environment", in *Economic, Social and Cultural Rights* 303, 306–07 (Asbjørn Eide et al. eds., 2000); Beyerlin, *supra* note 126, at 525, 532. However, several soft law instruments contain human rights proclamations with an express reference to environment and environmental pollution. See the list provided by John Scanlon et al., "Water as a Human Right?", *IUCN Envtl. Pol'y & L. Paper No. 51* (2004), appendix I, 37 et seq.

[165] Handl, *supra* note 164, *citing* International Law Association, Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, ILA, Report of the Sixty-Sixth Conference, Buenos Aires 548–49 (1994).

[166] *See* Alan Boyle, "The Role of International Human Rights Law in the Protection of the Environment, *1995*", in *Human Rights Approaches to Environmental Protection* 43, 50 (Alan Boyle & Michael R. Anderson eds., 1996).

to health, which touch upon environmental issues, to encompass violations caused by environmental dangers and risks since the "universal"-requirement under the *Sosa* standard probably excludes mere regional solutions as decisive for ATS purposes.

Yet, it is indeed possible to interpret article 11 of the ICESCR, which guarantees the right of everyone to an adequate standard of living,[167] and the abovementioned article 12 of the ICESCR, which guarantees the right of everyone to the highest attainable standard of physical and mental health, as prohibitions on certain kinds of environmental pollution.[168] At the global level in recent times, such approach has been followed by the Committee on Economic, Social and Cultural Rights established under article 16 of the ICESCR in order to monitor the implementation of the covenant by the States parties through a reporting system (although individual victims of rights guaranteed by the ICESCR do not have access to the committee). The committee provides regular clarification on the scope and interpretation of individual rights in the so-called General Comments. Although they are not binding on States in a legal sense and are subject to criticism and discussion, the approach in these comments reveals some general features of economic, social, and cultural rights which supposedly constitute the undisputed core meaning of these rights. In its relatively recent General Comment No. 15,[169] the committee leaves no doubt that the two provisions, articles 11 and 12, encompass a right to clean and drinkable water not polluted by residues and toxic material.[170] It states that the "right to water clearly falls within the category of guarantees essential for securing an adequate standard of living,

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[167] See also article 11 of the American Declaration of the Rights and Duties of Man which states: "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources" and article 1(11) of the European Social Charter which provides: "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable".

[168] Beyerlin, *supra* note 126, at 532.

[169] General Comment No. 15 (2002), *The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11.

[170] *Id*. at para. 3. Similarly, one can detect similar traces in the UN Human Rights Committee decision practice established under the ICCPR which has expressed at least a general willingness to discuss environmental pollution under the auspices of the right to life. The case involved the alleged failure of the Canadian government to clean up 200,000 tons of radioactive waste in a dump which had been shut down. *Communication No. 67/1980, in* 2 Selected Decisions of the Human Rights Committee under the Optional Protocol, U.N. Doc. CCPR(C/OP/2, U.N. Sales No. E.89.XIV.1 at 20 (1990). In dismissing the case for lack of exhaustion of local remedies, the committee nonetheless stressed that the dispute raised serious issues with regard to the right to life to be protected by the States parties. *Id*. at 22.

particularly since it is one of the most fundamental conditions for survival."[171] The committee finally states that States have certain core obligations due to the right to water which are directly applicable and of an immediate effect despite the programmatic nature of the IESCR as envisaged by article 2. According to the committee, States have the obligation:

> (*a*) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
> (*b*) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
> (*c*) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
> (*d*) To ensure personal security is not threatened when having to physically access to water;
> (*e*) To ensure equitable distribution of all available water facilities and services;
> (*f*) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
> (*g*) To monitor the extent of the realization, or the non-realization, of the right to water;
> (*h*) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;
> (*i*) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;[172]

The expressions have, without doubt, global reach. Yet, it is unlikely that courts in ATS proceedings will accept such formulations as a restatement of universal consensus required under the *Sosa* standard since courts traditionally focus on actual State practice as opposed to mere documents published by international bodies or organizations. Indeed, General Comment No. 15 itself openly reveals its actual impact. Although proclaiming a right to water, it openly admits the sad but true fact that there are more than one billion people in the world who are denied access to basic water supply.[173] Even if this hurdle

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[171] General Comment No. 15, *supra* note 169. at para. 3.
[172] *Id.* para. 37.
[173] *Id*. at para. 1.

can be overtaken, the rights are still too vague and indeterminate to meet the level of specificity required under the *Sosa* standard. For example, while the General Comment elaborates on the quality and adequacy of drinkable water, it fails to mention any concrete limit values for harmful substances or any kind of scientific parameter.[174] Instead, it merely refers to the World Health Organization's Guidelines for Drinking-Water Quality[175] which, in turn, labels it as a mere framework tool for safe-water.[176] Thus, although the interpretation of the committee is authentic as established under the IECSCR and therefore, maybe authoritative, it is unlikely that in the very near future, environmental concerns or their equivalent will be recognized under ATS directly through the recognition of a right to a healthy environment or indirectly through the reinterpretation of classic human rights law.

Lastly, even if this occurs in the future, the programmatic nature of the ICECSR may still hinder any ATS enforcement. The actual impact of articles 11 and 12 – under whatever interpretation – is significantly impaired by article 2 of the ICESR, according to which, States are merely obliged to undertake "steps…to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means". In accordance with the foregoing, human rights are frequently traditionally categorized, as reflected by the dichotomy of the ICCPR and ICESCR, into civil and political rights on the one hand and economic, social, and cultural rights on the other hand. The former are perceived as black letter law rights subject to immediate implementation, while the latter are merely of a programmatic, progressive nature aimed at future implementation due to its relativization in article 2. Accordingly, the dogmatic approach found in General Comment No. 15 is contestable at the very least and even more so under the *Sosa* standard which requires clearly definable, justiciable rights.[177]

B. Flores: *Second Circuit's Decision on Egregious Standard*

After the first attempts in environmental litigation under ATS failed to a large degree, it was clear that only a decision of the leading ATS court could reverse the trend and bring international environmental law back into the realm of ATS. The Court of Appeals for the Second Circuit, which rendered

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[174] *Id*. at para. 12.

[175] *Id*.

[176] *See* http://www.who.int/water_sanitation_health/dwq/gdwq3_2.pdf (accessed 1 September 2006).

[177] *See* Beyerlin, *supra* note 126, at 525, 542. To escape this argument, one would have to rely on the ICCPR.

the landmark *Filártiga v. Peña-Irala*[178] and *Kadic v. Karadzic*[179] decisions, had the opportunity to provide more ecological guidance to lower courts in 2003 in *Flores v. Southern Peru Copper Corp*.[180]

1. *Factual Background*

Eight residents of Ilo, Peru, representing themselves and deceased Ilo residents, filed an action under ATS against the Southern Peru Copper Corp. ("SPCC") in the District Court for the Southern District of New York.[181] SPCC is a corporation incorporated in the United States with headquarters in Arizona and a principal place of business in Peru, where it has been operating since 1960. Plaintiffs contended that SPCC's mining, refining, and smelting operations emit large quantities of sulfur dioxide and very fine particles of heavy metals into the local air and water.[182] They allege that SPCC's mining and smelting activities caused their own acute asthma and lung diseases and those of the decedents.[183] The allegations appeared credible since the Peruvian government has established commissions which conduct annual or semi-annual reviews of the operation's impact on the region's ecology and agriculture.[184] These commissions found environmental damage inflicted due to SPCC's activities threatening agriculture in the Ilo Valley.[185] It therefore required SPCC to pay fines and restitution to local farmers.[186] In addition, over time, the government of Peru ordered SPCC to adopt measures which would halt or reduce pollution and environmental damage.[187] As of today, SPCC is required by Peruvian environmental laws enacted in 1993 to meet certain levels of emissions and discharges set by Peru's Ministry of Energy

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[178] 630 F.2d 876 (2d Cir. 1980).

[179] 70 F.3d. 232, 240, n. 3 (2d Cir. 1995).

[180] 343 F.3d 140 (2d Cir. 2003).

[181] Another case of Ilo residents against SPCC was originally brought under Texas state common law. The case was however removed to Texas federal court based on federal question jurisdiction and diversity jurisdiction under 28 U.S.C. §§ 1331, 1332. *See Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 895 (S.D. Tex. 1995). In these proceedings, the plaintiffs did not plead a claim under ATS. The district court dismissed the state court claims based on the doctrine of forum non conveniens and comity of nations. *Id.* On appeal, the Fifth Circuit affirmed the dismissal in both respects. 113 F.3d 540 (5th Cir. 1997). The case was then refiled with other residents in New York based on ATS.

[182] 343 F.3d at 143.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

and Mines.[188] Considering that the Peruvian government had finally stepped in and imposed at least some sanctions against SPCC, the facts of the case would not be what an environment activist would wish to bring before the leading Court of Appeals in the field.[189]

2. *District Court Decision*

At first instance, plaintiffs asserted that the "egregious and deadly pollution caused by SPCC was violative of their right to life, right to health and right to sustainable development".[190] Judge Haight of the district court followed the path laid out by the Second Circuit in *Filártiga v. Peña-Irala*.[191] In determining whether plaintiffs had provided satisfactory substantiation of a universal consensus of customary international law, Judge Haight screened the aforementioned ATS precedents, international instruments and declarations, and the works of jurists and scholars.[192] The court reached the conclusion that plaintiffs failed to identify any conduct on SPCC's part which is universally prohibited[193] and granted the defendant's motion to dismiss on the basis of subject matter jurisdiction.[194]

3. *Court of Appeals*

The *Flores* plaintiffs found themselves in a dilemma. In the light of the precedents and in the absence of a specific human right to a clean environment, they knew that mere reliance on a general human right through the reinterpretation of other human rights which are related to the environment such as life and health, even though these touch upon issues of environmental pollution, would likely be insufficient to convince the court of a universal, obligatory, and specific norm required under *Filártiga v. Peña-Irala*.

(a) General Human Rights Argument

On appeal, the court understood the plaintiffs as arguing that the environmental destruction causing their diseases violates their rights to health (and

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[188] *Id*.

[189] *Id*.

[190] 253 F. Supp. 2d 510, 514 (S.D.N.Y. 2002).

[191] *Id. passim*.

[192] *Id. passim*.

[193] *Id*. at 520.

[194] *Id*. at 524. The court did not reach the question of dismissal based on the doctrine of forum non conveniens because it had determined lack of subject matter jurisdiction but nonetheless stated that even if plaintiffs had sufficiently pleaded a violation of international law, dismissal based on forum non conveniens would have been proper. *Id*. at 544.

life)[195] under international law.[196] In doing so, the plaintiffs relied on article 25 of the UDHR which, as mentioned above, guarantees one the "right to a standard of living adequate for the health and well-being of himself and of his family"; article 12 of the ICESCR which protects the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health"; and on Principle 1 of the Rio Declaration which declares that: "Human beings are…entitled to a healthy and productive life in harmony with nature."[197] With very little explanation, the Second Circuit stated that the rights to life and health under article 25 of the UDHR, article 12 of the ICESCR, and Principle 1 of the Rio Declaration reiterating Principle 1 of the Stockholm Declaration[198] are not only far from being clear and unambiguous but also labelled them as "vague and amorphous". The Second Circuit explained that although article 12(2)(b) of the ICCPR instructs States to abate environmental pollution, it does not mandate particular measures or specify what levels of pollution are acceptable.[199] It continued to remark that the text is vague and aspirational, and there is no evidence that States have taken significant steps to put it into practice.[200]

The only treaty advanced by plaintiffs which was ratified by the United States was the ICCPR, article 6(1) of which declares that "every human being has the inherent right to life" that "shall be protected by law" and that "no one shall be arbitrarily deprived of his life." The Second Circuit simply recalled that in order to state a cause of action under ATS, plaintiffs need to allege a "clear and unambiguous" infringement of international law as held in *Filártiga v. Peña-Irala* or as it was put in *Kadic*, a "well-established, universally recognized norm of international law".[201] Next, the court dealt with article 24(1) of the Convention on the Rights of the Child which recognizes "the right of the child to the enjoyment of the highest attainable standard of health". Again, the Second Circuit noted the aspirational nature of the text, the lack of focus on intra-national pollution, and the fact that the provision, in the court's view, did not even reflect actual State practice.[202] Plaintiffs also cited article 24(2)

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[195] 343 F.3d 140. Although the heading of this section refers both to the right to health and the right to life, the Second Circuit did not discuss explicitly any right to life in this section. *See id.* at 160–61. It did so, however, in the following section on the prohibition on intra-national pollution. *Id.* at 161–65.

[196] *Id.* at 160.

[197] *Id.* at 160–61.

[198] *See supra* note 23.

[199] 343 F.3d at 164.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 165.

of the Convention on the Rights of the Child which instructs States to "take appropriate measures… [t]o combat disease and malnutrition… through… the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution." While admitting that the article explicitly mentions "environmental pollution", the Second Circuit claimed that that itself neither regulates nor proscribes environmental pollution.[203] In the circuit's view, article 24 rather defers to the practice and customs of States than articulating or reflecting the actual State practice in the field.[204]

Reliance on regional human rights treaties suffered a similar fate. With respect to article 4 of the American Convention on Human Rights which contains a broad right to life, the court noted that it does not regulate which kind of environmental pollution would infringe the norm. The Second Circuit added that the United States has not ratified the convention and concluded that such abstention denies the universal acceptance within the region.[205]

In sum, with regard to a possible reinterpretation of classic human rights law in the light of environmental destruction, the Second Circuit held in strong

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[203] *Id.*

[204] *Id.* The Second Circuit further addressed the issue of applicability to private actors. However, given the lack of an actionable norm under ATS, the court did not see any need to elaborate on the issue. *Id.*

Other than human rights treaties, plaintiffs proffered several UN General Assembly resolutions to maintain their claim that SPCC's pollution violated rules of customary international law. In response, the Second Circuit categorized General Assembly resolutions as merely aspirational and not binding within the framework of the UN. Relying on the leading commentary on the UN Charter edited by Bruno Simma, the decision declared the General Assembly to be the "world's most important discussion forum." *Id. citing I The Charter of the United Nations: A Commentary* 248, 269 (Bruno Simma ed., 2002). Only the Security Council acting under chapter VII possesses the legal power to bind States through the issuance of resolutions. *Id.* In addition, while conceding that General Assembly resolutions may evolve into customary international law, the court stressed that the same is true only if and to the extent States follow their recommendations out of a sense of legal obligation. *Id.* at 167. Here, in the opinion of the court, the resolutions are of an advisory nature and do not describe actual State practices and customs motivated by legal obligation. *Id.* at 168. As a consequence, the resolutions were not deemed evidence of international law prohibiting intra-national pollution. *Id.*

Plaintiffs also advanced numerous declarations to support their claim of SPCC's violation of the rule of customary international law. Specifically, they relied upon the American Declarations of the Rights and Duties of Man and Principle 1 of the Rio Declaration. *Id.* at 169. The Second Circuit labelled both as merely aspirational principles which do not create true legal obligations and not based on the intention of the States to be actually bound by them. *Id.* Accordingly, the declarations were rejected as evidence of customary international law. *Id.*

[205] *Id.* at 164.

words that such principles are "boundless and indeterminate" in expressing goals at a level of abstraction needed to secure the consent of States without stating how to achieve such goals.[206] More precisely, the court ruled that the rights to life and health fail to specify what kind of environmental damage would fall within the scope of the prohibition to satisfy the "specific, universal, and obligatory" standard to be actionable under ATS.[207]

(b) Egregious Approach in Particular

Given this situation, it seemed that the lack of specificity would once again block the enforcement of environmental claims under ATS. Plaintiffs thus proffered the "egregious approach". As international environmental human rights law was still developing and uncertain in content and nature, it appeared reasonable to argue that the required universal consensus and the content of the norm is sufficiently certain in the very limited category of shocking and extreme instances of environmental destruction which devastates the human, animal, and plant life of a whole region. At least for these limited cases, the argument goes, consensus on the prohibition against it cannot be deemed missing and the content of the prohibition can be expected to be known by everyone. Accordingly, the plaintiffs argued for an alternative approach to the traditional analysis established under *Filártiga v. Peña-Irala* proposing that courts "make a factual inquiry into whether the allegations rise to the level of egregiousness and intentionality required to state a claim under international law".[208] In addressing the issue, the Second Circuit analyzed its decision in *Zapata v. Quinn*,[209] where the term was used for the first time.[210]

In *Zapata*, the New York State Lottery awarded the plaintiff her lottery winnings in an annuity instead of a lump sum.[211] In reaction thereto, she filed an action claiming that the lottery deprived her of her property without due process of law in violation of the law of nations under ATS.[212] The Second Circuit explained that in *Zapata*, the term is used descriptively not prescriptively in order to emphasize that the required universal consensus would be difficult to establish without a "shockingly egregious" conduct.[213] Yet, the Second Circuit declared that such statement should not be read to allow such claims in the absence of a violation of customary international

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[206] *Id.* at 161.
[207] *Id.* at 160.
[208] *Id.* at 159.
[209] 707 F.2d 691 (2d Cir. 1983).
[210] 343 F.3d at 159.
[211] *Id.*
[212] 707 F.2d at 692.
[213] 343 F.3d at 159.

law.[214] It went on to add that plaintiff's egregiousness standard, contrary to the requirement that norms must be clear and unambiguous, would displace international law with the preferences and subjective sensibilities of individual judges, shift the subject of customary international law from mutual to mere several concern of States, and would divert attention from universal rules to concepts which are easily subject to differing interpretations.[215] As a consequence, the Second Circuit rejected this approach as "entirely inconsistent with [its] understanding of customary international law".[216] Such holding was probably the death-blow to any ecological human rights litigation under ATS for a long time to come even if the violation of the right to health brought about by environmental destruction develops more concretely in the international plane in the near future.

C. *Procedural Argument?*

A ground which has not been tested in ATS litigation is the procedural content of human rights. As opposed to the foregoing approaches, leading international environmental law scholars foresee a promising future for this approach. Alan Boyle declares that "[t]he narrowest but strongest argument for a human right to the environment focuses . . . on procedural rights, including access to environmental justice and participation in environmental decision-making."[217] Günter Handel notes that:

> Proposals for an environmental quality right might have a certain attractiveness. . . . In the end, however, they underestimate the difficulties involved in operationalizing such a normative concept. . . . A supplementary, albeit critical assistance function can instead be played by internationally guaranteed individual (or group) procedural rights on the environment. These informational, participatory and remedial approaches are on their way towards gaining recognition as generally protected international entitlements.[218]

Yet, the development is still at an early stage. The *Ogoni* decision discussed above contains some traces of "participatory" terminology.[219] In particular, the African Commission on Human and Peoples' Rights in its conclusions appeals to the government of Nigeria to ensure the protection of the "environment,

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[214] *Id.*

[215] *Id.* at 159–60.

[216] *Id.*

[217] Alan Boyle, "The Role of International Human Rights Law in the Protection of the Environment", *in Human Rights Approaches to Environmental Protection* 59–60 (Alan Boyle & Michael R. Anderson eds., 1996).

[218] Handl, *supra* note 164, at 327.

[219] Decision regarding Communication No. 155/96, *supra* note 128, at 13.

health and livelihood of the people of the Ogoniland by…[p]roviding information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations."[220]

The most visible example of a procedural approach is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) which exclusively build on the individual procedural right approach.[221]

Yet, as to the above-mentioned regional human rights regimes, even within the most elaborate system under the ECHR, no fixed set of rules on procedural rights in relation to the environment can be determined as of today. Recent international law-making in the field has clearly evidenced the strength of such approach and has proven viable.[222] The great virtue of a procedural approach, whether free-standing or interpreted in basic human rights, is that it does not suffer from the very same vagueness of a substantive norm for purposes of ATS actionability, at least where there is no actual input from or transparency for the local population negatively affected by the operation of a TNC. Further, from a policy standpoint, such actual access to administrative proceedings and political process could effectively break the vicious circle of indigenous people and minorities having to fiercely resist TNC industrial projects. As to the second *Sosa* requirement, universal consensus, the further development of international environmental law needs to be awaited. For the near future, given the cautious approach the Supreme Court urged lower courts to take in ATS cases, the judicial recognition of universal consensus in this field does not seem realistic.

IV. *Environment-Related International Humanitarian Law?*

In re "Agent Orange" Product Liability Litigation (decided after *Sosa*) was factually very different from the above-presented cases as it related to environmental protection in times of war. In this case, Vietnamese nationals and a Vietnamese organization sued corporations in the United States for committing violations of the laws of war by manufacturing and supplying herbicides, the most famous of which is Agent Orange nicknamed after the colored identification band painted on the 208-liter barrels, supplied to the

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[220] *Id.*

[221] Adopted 25 June 1998, *available at* http://www.unece.org/env/pp/documents/cep43e.pdf (accessed 1 September 2006).

[222] *See* Beyerlin, *supra* note 126, at 542.

governments of the United States and South Vietnam, which were sprayed, stored, and spilled in Vietnam from 1961 to 1975.[223] The use of herbicides as a means of warfare was employed for two reasons: First, to defoliate forests and mangroves as a natural protection to the Vietcong and to deprive the enemy of food supply through the destruction of rice fields.[224] During the United States' use of herbicides in the Vietnam War, Vietnamese combatants and civilians were directly exposed to herbicides by spraying.[225] More than 1.9 million liters of Agent Purple alone were sprayed by the U.S. forces between 1962 and 1965.[226] Others were exposed indirectly because they came into contact with contaminated water, soil, and food. While the exact numbers are uncertain, it is clear that they are significant. Plaintiffs gave estimates of up to four million Vietnamese who were exposed to herbicides between 1961 and 1975.[227] Residues from herbicides stored, loaded, transported, and left behind at or in the vicinity of United States military bases allegedly led to the continuation up to the present of the contamination of the flora and fauna.[228] Plaintiffs sought damages for the deaths and injuries caused by the chemical warfare, and interesting for the purposes of this study, environmental abatement, clean-up of contaminated vicinities, and the surrender of profits.[229] For example, one plaintiff, Nguyen Thi Nham, who moved to an area in Southern Vietnam which had been exposed to herbicides, lost her first baby who was born prematurely and died at the age of one month. Her second baby suffered from defective intestines and did not survive longer than ten days while her third child survived but continues to suffer from Cloracne.[230] Blood testing revealed extraordinarily high levels of dioxin, which formed part of most of the herbicides used by the U.S. forces, in her blood and which was probably caused by the consumption of locally grown vegetables and fish.[231]

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[223] 2005 WL 555582 at 19 (E.D.N.Y.). See also the ATS decision *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007), where plaintiffs relied on the position that the spraying of herbicides (to eradicate cocaine and opium in Colombia amounts to torture under international law which was blatantly rejected by the district court. *Id.* at 226–27.

[224] *Id*. On the history and development of the use of herbicides in war times, *see generally* Jeanne Mager Stellman et al., "The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam", 422 *Nature* 681 (2003). *See also* Declan Butler, "Flight Records Reveal Full Extent of Agent Orange Contamination", 422 *Nature* 649 (2003).

[225] 2005 WL 555582 at 19.

[226] *Id*. at 21.

[227] *Id*.

[228] *Id*.

[229] *Id*.

[230] *Id*. at 16.

[231] *Id*.

Defendants were 36 American chemical companies, including the giant TNC Dow Chemical Co., all of which were alleged successors-in-interest, parent companies, subsidiaries, or otherwise associated with or related in interest to those defendants who manufactured and supplied the herbicides for use in Vietnam.[232] In the early 1960s, the United States entered into a series of fixed-price production or procurement agreements with the defendants under which the government bought as much of Agent Orange, the most frequently used herbicide mixture in the Vietnam War, as defendants were able to produce.[233]

Plaintiffs relied, inter alia, on article 23 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907 which prohibits the use of poison or poisoned weapons as an expression of customary international law.[234] Judge Weinstein, in accordance with the prevailing view in international law,[235] declared however, that these terms do not cover gas or spraying from the air.[236] In addition, citing a leading treatise on international humanitarian law, he explained that the provision would only cover the use of materials which were "intentionally designed to inflict poisoning as a means of combat" while the goal of the use of the herbicides in the Vietnam War was to protect American soldiers.[237] Moreover, referring to the standard announced by the Supreme Court in *Sosa*, Judge Weinstein concluded that even if article 23 could be interpreted more broadly, the imprecise scope of the provision renders any enforcement through ATS impossible.[238] Plaintiffs further advanced the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (the so-called 1925 Geneva Protocol). On this argument, Judge Weinstein found an array of divergent views in international law on the application of the protocol to herbicides and that it was not ratified by the U.S. before

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[232] *Id*. at 10.

[233] *Id*. at 12.

[234] *Id.* at 95.

[235] *E.g.*, Michael Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und biologischer Waffen* 16–17 (1973). In respect of the legal uncertainty, Judge Weinstein cites Stefan Oeter, "Methods and Means of Combat", in *The Handbook of Humanitarian Law in Armed Conflicts* 105, 149 (Dieter Fleck ed., 1995) who explains that the Chemical Weapons Convention at least has clarified within its scope the disputed issue. *Id.*

[236] 2005 WL 555582 at 96, *aff'd, Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, at 117–23 (2008).

[237] *Id*. at 97 *citing* Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 41–42 (2001).

[238] *Id*.

1975 when the use of herbicides as a means of warfare was abolished.[239] He explained that historically, the 1925 Geneva Protocol was largely a response to the use of lethal gas weapons which were employed during World War I and that State practice such as the use of herbicides as a means of warfare by the British in the 1950s during the Malayan Emergency and the U.S. in Vietnam contradicts the view that a broader reading of the 1925 Geneva Protocol was, at the time of the Vietnam War, representative of customary international law.[240] Lastly, even if it did, he ruled that the proscription would not be sufficiently "definite" and "universal" to render the norm actionable under the *Sosa* standard which requires universal, specific consensus on a given norm.[241] Accordingly, the action was dismissed.[242] Judge Weinstein's reasoning clearly shows that at least at the time of the Vietnam War, the international law on wars was underdeveloped to cover new techniques, such as the spraying of herbicides.

However, as of today, international humanitarian law has evolved and expanded with respect to the protection of the natural environment which is often severely and negatively affected in times of war. In particular, article 35(3) of the Additional Protocol I of 1977 to the Geneva Conventions prohibits the "employ[ment of] methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment."[243] Further, article 55(1) provides that "[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage".[244] This protection includes a prohibition of the use of methods or means of warfare which are intended to or may be expected to cause such damage to the natural environment and thereby to prejudice the health and survival of the population.[245] In *In re "Agent Orange"*, while Judge Weinstein correctly noted that the protocol was not in force at the time of the Vietnam War and was in fact never ratified although signed by the United States, he suggested that it may apply to the spraying of herbicides in war times, as it

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[239] *Id*.

[240] In support, he pointed out that it had always been the position of the U.S. that the 1925 Geneva Protocol does not regulate herbicides. *Id*. at 98. *But see* Bothe, *supra* note 235, at 24–25, 28–29.

[241] 2005 WL 555582 at 98.

[242] Claims based on domestic tort law failed under the government contractor defense. *Id*. at 17.

[243] On this norm and its background, *see International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 1440–59 (1987).

[244] *See id*. at paras. 2114–41.

[245] *See id*. at 1441; Yoram Dinstein, "Protection of the Environment in International Armed Conflict", 5 *Max Planck U.N.Y.B*. 523, 530–35 (2001).

was practiced in Vietnam, today but not to the alleged past events at hand as a restatement of customary international law.[246] And if one reads article 35 as a direct response of the international community to the use of herbicides in the Vietnam War and as mirroring international customary international law on the point, the specificity required by the *Sosa* standard may be met as well as the acceptance requirement due to the widespread ratification. Accordingly, specific norms of the law of wars provides legal limitations on the employed means of warfare for the protection of the environment which are a direct reaction to a factually certain and concrete means of warfare in a previous armed conflict and could be relevant for litigation against TNCs under ATS as they, given their factual specificity in addressing a certain problem they were created to react to, may suffice the *Sosa* test.

V. *Conclusions*

In practice, TNCs' operations often have a devastating impact on the environment and subsistence of local communities in developing countries. Typically, these local communities have limited political influence and limited access to judicial fora, where environmental regulations are often not enforced purportedly to protect the comparative advantage of developing nations in a transitional economy from agriculture-based to industrialized, especially if the governments are not accountable to the people. Meanwhile, the fact that the courts of capital-exporting countries have a longer historical experience in dealing with environmental pollution and accordingly, have adequately developed principles of environmental tort law, render such courts better equipped in adjudicating complex environmental litigation. Undoubtedly, international environmental law has been developing fast in the last decades. However, the preponderance of soft law, general principles, and declarations render the enforcement of environmental claims under ATS difficult since the Supreme Court in *Sosa* only allows those international wrongs which enjoy an elevated specificity and consensus to be actionable under ATS. In particular, the first requirement is a major obstacle for ATS litigation against TNCs based on international environmental law. This evaluation is based on the fact that international environmental law, as envisaged by Principle 23 of the Stockholm Declaration, still leaves the formulation of concrete and specific obligations to a great degree to national legislation and domestic regulation which allows an adaptation of the rules to the socio-economic circumstances of a given country. Most environmental law and regulation still take place at

[246] 2005 WL 555582 at 109–10.

the national level according to national laws (no matter how toothless these laws may be in capital-importing countries). Besides, at the structural level, the focus of international environmental law on public goods and interest may render enforcement through torts law difficult because torts law, by definition, centers on the specific rights of individuals. With respect to resorting to human rights law related to the environment as a potential substitute, as of today, there is no explicit general human right to a healthy environment, at least not at the global level. Within regional human rights systems, such as the European Court of Human Rights, classic human rights are increasingly being interpreted as covering and prohibiting certain kinds of environmental pollution. Yet, the universal consensus-requirement under the *Sosa* test will most likely bar any reliance on these as evidenced by the Second Circuit's decision in *Flores*. With regard to the idea of compensating the indeterminateness of a norm with the egregious nature of a conduct, the same has been similarly rejected by the Second Circuit in *Flores* as irreconcilable with international law. Lastly, an approach which has not been tested before courts under ATS is the reading of environment-related human rights at the global level as containing procedural or due process rights which call for the participation of local populations in the planning, designing, and administration of industrial projects. This approach would not suffer from the inherent indeterminacy of a substantive approach. For example, if even the slightest opportunity to provide input to a TNC project located in their ancestral lands is fully denied to indigenous peoples, a violation of international law could be argued and the right violated would not be uncertain. From a policy standpoint, a procedural approach could break the vicious circle of indigenous peoples having no alternative in resisting a TNC's project which threatens their subsistence because of resulting environmental devastation. However, for the time being, despite some indices in this respect, there appears to be no universal consensus in this respect and given the rather restrictive stance taken by the Supreme Court in *Sosa*, one cannot expect environmental torts to be actionable under ATS at least in the near future with one exception: It is only in the field of international humanitarian law protecting the environment that norms which were developed to cover certain narrow, concrete means of warfare may suffice the *Sosa* test as indicated by Judge Weinstein of the Eastern District Court of New York with respect to the use of herbicides.

Part III
Corporate Participation Covered

Chapter Six

Application to TNCs

I. *Introduction*

International law still predominantly regulates the public sphere: It regulates relations between and among sovereign States. In a still valid definition given in 1928, eminent international law scholar James Leslie Brierly characterized the subject of his research classically "as the body of rules and principles of action which are binding upon civilized states in their relation with one another."[1]

Torts law is by definition private law aimed at the regulation of private actors within the private sphere. Similarly, TNCs are by nature private business entities; they belong to civil society, understood in a broad sense as encompassing all kinds of private actors and non-government organizations. Naturally, a TNC's primary goal is to make money and not the exercise of any sovereign police powers usually associated with statehood.

ATS, by requiring not only a "violation of the law of nations" but also a "tort", combines both the public and the private sphere[2] because it does not only incorporate public international law by reference but equally forms part of federal torts law. As such, it may be labelled as a hybrid statute.

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[1] James Leslie Brierly, *The Law of Nations – An Introduction to the International Law of Peace* 1 (1928). On the notion of international law, *see also* I(1) *Jost Delbrück & Rüdiger Wolfrum, Völkerrecht* 27–29 (*Georg Dahm* 1958) (1989). The general literature in international law on this point is extensive. *See generally* Homer J. Angelo, "Multinational Enterprise", 3 RdC 125 (1968); Detlev F. Vagts, "The Multinational Enterprise: A New Challenge for Transnational Law", 83 *Harv. L. Rev*. 739 (1969/70); Rainer Hellmann, *Transnational Control of Multinational Corporations* (1977); Luzius Wildhaber, *Multinationale Unternehmen und Völkerrecht, Berichte der Deutschen Gesellchaft für Völkerrecht* 18 (1978); David Adedayo Ijalaye, *The Extension of Corporate Personality in International Law* (1978); Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (1987); Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law* (2001).

[2] ATS as codified in 28 U.S.C. § 1350 provides that district courts shall have "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."

In certain instances, the practical application of a hybrid statute may pose significant ramifications for the interpreting judge because public and private law have their own distinctive and not always compatible crucial features.[3] It is clear though that no field of law simply takes preponderance over the other. Instead, as in other fields of federal lawmaking by adjudication (and the Supreme Court in *Sosa* has held that ATS jurisprudence falls into one of the few categories where federal courts are authorized to shape and develop new rules),[4] courts need to find suitable rules in the light of the statute's underlying purpose.

The first urgent question which arises under ATS is whether the fact that TNCs do not belong to the subjects of international law precludes any liability under ATS, i.e., whether ATS private actor liability is restricted to natural as opposed to legal persons, regardless of the TNC's participation in the wrongdoing. In this respect, it must be noted that despite trends to the contrary, the view that international law primarily regulates States and in limited instances such as international criminal law, individuals, but not TNCs, is still the prevailing one among international law scholars.[5]

This chapter explores the issue of applying ATS to TNCs. Parts II and III present two relatively recent ATS decisions on the point. Part IV analyzes the possible guidance given by the Supreme Court in *Sosa v. Alvarez-Machain*. It is clear that a narrow restriction of ATS's scope of application to the more classic subjects of international law (States; possibly, not even individuals) would seriously bar ATS's further development as a compensatory tool for the lack of TNC regulation in international law.

II. Presbyterian Church of Sudan

In the ATS case *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[6] Sudanese plaintiffs alleged gross and systematic human rights violations, including genocide, committed upon the local population to clear the territory around

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[3] *See generally* Paul R. Dubinsky, "Human Rights Law Meets Private Law Harmonization," 30 *Yale J. Int'l L.* 211 (2005); Michael Mráz, *Völkerrecht im Zivilprozess – Zum möglichen Beitrag von Zivilgerichten zur Entwicklung des Rechts der internationalen Gemeinschaft* (2004).

[4] 124 S. Ct. 2739, 2764 (2004).

[5] This is the classic view among international scholars. *See* I(2) *Jost Delbrück & Rüdiger Wolfrum, Völkerrecht* § 108 (*Georg Dahm* 1961) (2002). Wolfrum himself is quite critical of the majority view. *Id.*

[6] 244 F. Supp. 2d 289 (S.D.N.Y. 2003). The case was later dismissed on other grounds. 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

oil exploitation operations in southern Sudan.[7] The TNC defendant, Talisman Energy, Inc., is the largest independent Canadian energy company.[8]

For the first time in an ATS proceeding, a corporate defendant contended that corporations are legally incapable of violating international law which may reach in some instances (i.e., international criminal law) individuals but not corporate entities like the defendant company and urged the court to dismiss the case accordingly.[9] In doing so, defendant relied on the affidavits of the highly-reputed international law scholars, James Crawford and Christopher Greenwood, who, reportedly after a careful review of materials, confirmed the prevailing view that there exists no concept of corporate liability in international law.[10]

A. *Previous Ignorance of Issue*

In approaching the issue, Judge Schwartz of the district court for the Southern District of New York pointed to an array of ATS precedents with corporate defendants.[11]

In the few ATS cases against corporations prior to *Filártiga v. Peña-Irala*,[12] numerous courts rejected ATS claims against corporations on the ground that in the particular instance, an infringed norm of international law could not be identified.[13] In *Lopes v. Reederei Richard Schroeder* decided in 1960,

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[7] *Id*. at 296.

[8] *Id*. at 299–300.

[9] *Id*. at 308.

[10] *Id*.

[11] Judge Schwartz also relied on the Second Circuit's decision in *Kadic v. Karadzic*. *Id*. at 309 *citing Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. den.*, 116 U.S. 2524 (1996). The *Kadic* decision firmly established the principle that for certain categories of wrongs, actors may be held liable regardless of their official or private nature under international law and consequently, under ATS. For more details, *see infra* Chapter Eight: Norms that Can Be Violated by Everyone. Accordingly, in the *Presbyterian Church of Sudan* case, Judge Schwartz argued that since *Kadic*, it was generally recognized among federal courts that private actors could be held liable under ATS for violations of international criminal law. 244 F. Supp. 2d at 309–10. The *Kadic* decision, however, is inconclusive because the ruling was technically restricted to the issue of whether private individuals as opposed to State actors can be held liable under international law and did not touch upon the status of TNCs under international law.

[12] 630 F.2d 876 (2d Cir. 1980).

[13] Similarly, actions against other private entities, such as unions, have failed but not because of lack of legal personality of the latter. The Second Circuit in *Khedivial Line, S.A.E. v. Seafarers' Intern. Union*, 278 F.2d. 49 (2d Cir. 1960), in which compensation was sought against a union defendant, the court did not negate the legal personality of unions under international law. Instead, it merely stated: "Plaintiff has presented no precedents or arguments to show either that the law of nations accords an unrestricted right of access to harbors by vessels

the seaman-plaintiff sought monetary compensation from the corporate ship-owner using the doctrine of seaworthiness as an alleged violation of international law under ATS.[14] The district court for the Eastern District of Pennsylvania did not even mention the potential lack of legal personality of a corporate wrongdoer under international law. Upon close examination of the doctrine's emergence, the court noted that not until the late

> nineteenth century did there develop in American admiralty courts the doctrine that seamen had a right to recover for personal injuries beyond the maintenance and cure and that during that period it became generally accepted that a ship-owner was liable to a mariner injured in the service of a ship as a consequence of the owner's failure to exercise due diligence.[15]

The court stressed that the doctrine was likely boosted by the Merchants' Shipping Act of 1876 and changing social values, and resulted in a much more favorable legal treatment of injured seamen than what was recognized in Great Britain or in the Continent.[16] Accordingly, in light of this history, the court held that the doctrine is a creature of American judge-made law and that "the doctrine [of seaworthiness] does not come from the law of nations."[17] Hence, its reasoning must be interpreted as analyzing the relevant legal issues on the assumption that corporate responsibility is available under ATS.[18] A similar approach is visible in the Court of Appeals for the Second Circuit 1975 decision *ITT v. Vencap Ltd.*[19] In *ITT v. Vencap Ltd.*, again arising within a business relationship, a Luxemburg investment trust brought action for fraud, conversion, and corporate waste against the Bahamian corporate

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of all nations or that, if it does, this is a right of the foreign national rather than solely of the nation". *Id.* at 52.

[14] 225 F. Supp. 292 (E.D. Pa. 1963). The plaintiff further sought to hold the defendant liable for his negligent conduct. In this regard, the court ruled that the action is not one for "tort only". *Id.* at 295–96.

[15] *Id.* at 294.

[16] *Id.* at 295.

[17] *Id.*

[18] *Id. passim.*

[19] 519 F.2d 1001 (2d Cir. 1975). *See also Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975) concerning the action filed by relatives of Vietnamese babies allegedly forcibly removed from Vietnam in the last days of the Vietnam War and later adopted by American parents and detained in the United States. The court went further than its counterpart in the west. While the case was not primarily based on ATS claims, it suggested in a footnote that the private U.S. adoption agencies which participated in the alleged babylifting are joint tortfeasors with the U.S. government and may be held liable under ATS. *See* Kenneth C. Randall, "Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute", 18 N.Y.U. *J. Int'l L. & Pol.* 473, 501–02 (1985–1986).

defendant and others.[20] While the decision drafted by Judge Friendly largely focuses on the issue of application of U.S. securities laws to transnational business transactions, the plaintiff also attempted to rely on ATS to recover damages, arguing that the Eighth Commandment "thou shalt not steal" forms part of international law.[21] The Second Circuit rejected such proposition. It explained that the mere fact that the rule is recognized by any developed legal system does not transform the norm to an international character without any reference to or indication of the potential issue.[22] The Second Circuit decision *Benjamins v. British European Airways*,[23] in which the plaintiff filed an action against an international air carrier and a foreign aircraft manufacturer to recover damages incurred upon the death of his wife as well as for the loss of the baggage when an airplane where the wife was a passenger crashed in England, points to the same direction. No mention was made of any lack of legal personality of the corporate defendants.[24] Instead, the court merely retreated to the ruling that international law "does not prohibit aircrashes" and therefore, subject matter jurisdiction under ATS was missing.[25]

Similarly, in the aftermath of *Filártiga v. Peña-Irala* starting in the 1990s, numerous decisions of the Second and other Circuits in the wave of proceedings against TNCs under ATS, such as *Jota v. Texaco Inc.*,[26] *Wiwa v. Royal Dutch Petroleum Co.*,[27] *Bigio v. Coca-Cola*,[28] *Aguinda v. Texaco, Inc.*,[29] *Deutsch v. Turner Corp.*,[30] *Doe v. Unocal Corp.*,[31] and *Beanal v. Freeport-McMoran, Inc.*,[32] took a similar approach.

In sum, not a single decision raised legal personality as an issue and therefore, must be understood to have impliedly recognized that corporations are potentially liable for violations of international law under ATS because, as a threshold requirement, it would deserve some discussion.[33] In *Presbyterian*

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[20] 519 F.2d. 1001.
[21] *Id.* at 1015.
[22] *Id.*
[23] 572 F.2d. 913 (2d Cir. 1978).
[24] Id.
[25] *Id.* at 916. However, the court held that the Warsaw Convention creates an action for wrongful death.
[26] 157 F.3d 153 (2d Cir. 1998).
[27] 226 F.2d 88 (2d Cir. 2000).
[28] 239 F.3d 440 (2d Cir. 2000).
[29] 303 F.3d 470 (2d Cir. 2002).
[30] 317 F.3d 1005 (9th Cir. 2003).
[31] 395 F.3d 932 (9th Cir. 2002).
[32] 197 F.3d 161 (5th Cir. 1999).
[33] In *Khulumani v. Barclays National Bank Ltd.*, 505 F.3d 254, 282–83 (2007), the Second Circuit exactly takes this position. One possible explanation for this silence is that the lawyers

Church of Sudan, Judge Schwartz consequently held that defendants failed to cite a single U.S. court decision in support of their motion and noted that in the opposite, numerous ATS decisions of the Second and other Circuits involving TNCs impliedly recognized that corporations are potentially liable for violations of international law under ATS.[34]

B. *Partial Subjectivity of TNCs under International Law*

However, Judge Schwartz did not stop at this point. He also made arguments based on international law.[35]

The only direct way[36] to overcome the lack of legal personality under international law is not to declare TNCs full subjects of international law but to impose specific (human rights) obligations on TNCs which are binding upon them and which a TNC is capable of infringing.[37] This is exactly what Judge

representing TNCs decided that the argument of lack of personality of TNCs in international law had no chance of success and would ultimately fail.

[34] 244 F. Supp. 2d at 313–15.

[35] *Id*. at 319.

[36] An indirect way to overcome the invisibility of TNCs would be the doctrine of horizontal effect. *See infra* Chapter Seven: Norms that Can Be Violated Only by State Actors, IV. However, even in this case, it is not the TNC which technically violates international law. Instead, it is the State being held responsible for the omission of not intervening and protecting private subjects from the actions of other private actors such as TNCs.

[37] On the application of human rights law to TNCs, *see generally* Nicola Jägers, "The Legal Status of the Multinational Corporation under International Law," in *Human Rights Standards and the Responsibility of Transnational Corporations* 259, 262 (Michael K. Addo ed., 1999); David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", 44 *Va. J. Int'l L.* 932, 944–45 (2003–2004); Viljam Engström, "Who Is Responsible for Corporate Human Rights Violations?", Abo Akademi University (Finland), Institute for Human Rights (2002), *available at* http://www.abo.fi/instut/imr/norfa/ville.pdf (accessed 1 June 2005); Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", 111 *Yale L.J.* 443 (2001); Kirsten Schmalenbach, "Multinationale Unternehmen und Menschenrechte", 39 *Archiv des Völkerrechts* 57 (2001).

Another route taken to turn TNCs into partial legal subjects of international law is the application of the principle of non-intervention. The ICJ has determined that the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference and constitutes part and parcel of international law. *Case concerning Military and Paramilitary Activities in and against Nicaragua (United States v. Nicaragua) (Merits)*, 1986 I.C.J. 14, para. 202. According to the ICJ, by virtue of its sovereignty, each State is permitted to freely decide in matters concerning political, economic, social, and cultural issues. *Id.* at para. 205. The Declaration of the General Assembly on the Admissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty confirms the breadth of the doctrine and the great potential of violations through economic power. U.N.G.A. Res. 2131 (XX), U.N. Doc. A/RES/2131 (XX)/Rev. 1

Schwartz attempted in respect of international criminal law.[38] He took the position that corporations are legally capable of violating gross and systematic human rights violations.[39] At the very least, he argued, corporations must be bound by *jus cogens*.[40]

(1966), adopted on 21 December 1965. Resolution 2131 explicitly recognizes the use of economic power to coerce a State "in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind". *Id*. at para. 2. Thus, an argument can be made that in order to achieve its goals, a TNC can violate the principle of non-intervention through the exercise of its economic power to influence the internal affairs of a country.

A notorious example in this respect is the involvement of International Telephone and Telegraph ("ITT"), a U.S.-based TNC, in the coup d'état against Chilean President Allende. Allende's policy of nationalization threatened the Chilean assets of ITT. Since 1927, ITT owned 100% of all shares of Compania de Telefonos de Chile ("CTC"), the first provider of telephone services in Chile. Since the big earthquake of 1960, after which the absence of a long distance telecommunication network became painfully visible as many devastated towns in the south were cut off from the rescue efforts, the relations between the government and CTC deteriorated. In 1964, the government established Entel, a state-owned long-distance company, to fill the gap. In 1967, the government increased its control over the telecommunications network with the creation of the state development agency Corporacion de Fomento de la Produccion which was authorized to purchase 49 percent of CTC's stocks. Finally, in 1971, the government under Allende informed ITT that it would take steps to nationalize CTC and appointed an overseer to take over the company. The government offered $24 million for ITT's shares which were valued by the latter at $153 million. In reaction, ITT and other U.S. companies with assets at stake in Chile cooperated to create economic chaos in Chile in order to support the overthrow of Allende that contributed to the coup d'état against Allende in 1973. The CIA's involvement triggered a hearing of the Senate. *See* Committee on Foreign Relations, Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93rd Cong., 1st Sess, 1970–71, at 1–5. *See generally* Anthony Sampson, *The Sovereign State of ITT* (1973); F.F. Sergeyev, *Chile: CIA Big Business* 119–41 (Lev Brobov trans., 1981); Walter Molano, "The Forces of Privatization: The Privatization of Chile's Telephone Industry," 4 *Nafta L. & B. Rev. Am*. 120, 122–24 (1998); Jeffrey K. Powell, "Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy", 17 U. *Penn. J. Int'l Econ. L*. 957, 977–78 (1996).

Given that there is only one declaration (see above), even though of the General Assembly, it is insufficient to establish customary international law.

[38] 244 F. Supp. 2d at 319.

[39] In respect of international law, Judge Schwartz explicitly acknowledged drawing on the analysis of Ratner in Corporations and Human Rights: A Theory of Legal Responsibility, *supra* note 37, and the International Council on Human Rights Policy in Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (2002), *available at* http://www.ichrp.org/ac/excerpts/41.pdf. 244 F. Supp. 2d at 319.

[40] *Id*. at 315.

As evidence of such view, he referred to the trials of German war criminals after World War II in Nuremberg.[41] In the *I.G. Farben* case, one of the cases involving leading German industrialists and businessmen tried by American military tribunals in Germany after World War II under the Allied Forces' Control Council Law No. 10,[42] there is wording that supports this. Although the court's jurisdiction was restricted to the prosecution and punishment of individual managers of the TNC I.G. Farben,[43] the court stated a passage which was cited by Judge Schwartz:

> With reference to the charges … concerning Farben's activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond reasonable doubt that offenses against property as defined in Control Council No. 10 were committed by Farben. … The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. … Such violation on the part of Farben constituted a violation of the Hague Regulations.[44]

Accordingly, the tribunal treated legal persons as capable of violating norms of international humanitarian law, at least with respect to property.[45] Moreover, Judge Schwartz attempted to rely on international criminal law such as the Genocide Convention and common article 3 to the Geneva Conventions, the text of which does not distinguish between natural persons and juridical persons and therefore, is also applicable to corporations.[46] From these, he

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[41] *Id*. at 315–16.

[42] Control Council Law No. 10 (20 December 1945) *reprinted in* 1 *Trials of War Criminals before the Nuernberg Military Tribunals* xvi (1949).

[43] However, the Statute of the International Criminal Tribunal at Nuremberg provided for the crime of membership in a criminal organization. 41 *Am. J. Int'l L.* 172 (1947). Declared as criminal organizations were the Leadership Corps of the Nazi Party, the Gestapo, the SD (Sicherheitsdienst des Reichsführers SS), and the SS (Schutzwaffen). Nonetheless, no one was convicted of such membership. For details, *see* Andrew Clapham, "The Question of Jurisdiction under International Criminal Law over Legal Persons", in *Liability of Multinational Corporations under International Law* 143, 160–65 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

[44] 244 F. Supp. 2d at 315 *citing United States v. Krauch*, 8 *Trials of War Criminals before the Nuernberg Military Tribunal*s 1081, 1140 (1952). *See also United States v. Krupp*, 9 *Trials of War Criminals before the Nuernberg Military Tribunals* 1327, 1352–53 (1949), which states that "the confiscation of the Austin plant … and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations … [and] the Krupp firm, through defendants[,] … voluntarily and without duress participated in these violations". *See* Clapham, *supra* note 43, at 167–68.

[45] Clapham, *supra* note 43, at 167.

[46] 244 F. Supp. 2d at 316. For the full titles and citations of the Geneva Conventions, *see supra* Chapter Two: International Criminal Law, n. 138.

concluded that they apply equally to private persons, natural or juridical.[47] In addition, he was able to point to an array of international conventions, such as the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy the wording of which directly imposes liability on the operator of a nuclear installation or other institution.[48] Lastly, Judge Schwartz cited the preamble of the Universal Declaration of Human Rights ("UDHR") which declares that

> 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.

and does not appear to limit its scope of application to States. Judge Schwartz explicitly pointed to an article on the occasion of the UDHR's 50th anniversary by Louis Jenkin, the Chief Reporter of the Restatement (Third) of the Law of Foreign Relations and a prominent U.S. international law scholar in which he pathetically announces – without giving any footnote or authority – that "[e]very individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."[49] Lastly, Judge Schwartz explained that the United Nations Security Council resolution imposing sanctions on Iraq required corporations to follow a specific procedure if they wished to purchase oil from Iraq.[50]

Still, while not untenable, the path taken by Judge Schwartz in *Presbyterian Church of Sudan* which assumes legal personality for TNCs is difficult to maintain even with respect to international criminal law and does not match the still prevailing view among scholars. None of the statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, or the International Criminal Court covers legal entities.[51] Their jurisdiction is restricted to individuals. Indeed, attempts by the United States to open the ICC Statute to legal entities failed in the

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[47] 244 F. Supp. 2d at 317.

[48] *Id.*

[49] *Id.* at 318 *citing* Louis Henkin, "The Universal Declaration at 50 and the Challenge of Global Markets", 25 *Brook. J. Int'l L.* 17, 25 (1999).

[50] *Id. citing* U.N.S.C. Res. 986, U.N. SCOR, U.N. Doc. S/RES/986 (1995); Letter dated 26 July 2001 from the Chairman of the Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait Addressed to the President of the Security Council, U.N. Doc. S/2001/738. Judge Schwartz further referred to practice of the United Nations General Assembly and the European Union. *Id.*

[51] *See* Ratner, *supra* note 37, at 494.

negotiations.[52] Therefore, one would have to argue that emerging customary international criminal law from World War II embraced the concept of corporate liability and remained untouched by these new statutes based on the argument that States did not include the concept of corporate responsibility for technical reasons and concerns. While this argument can be made, this approach does not conform to the cautious path the Supreme Court urged lower courts to take in *Sosa*.[53]

And while it is true that many formulations in the UDHR are stated in absolute terms and can be understood as rights which apply likewise to State and private actors, the main implementing treaty, the International Covenant on Civil and Political Rights, makes it implicitly clear in various provisions that it identifies States as the bearers of obligations under the treaty. For example, article 19(3) speaks of restrictions "provided by law".[54]

And the *jus cogens* argument is similarly critical although it can be frequently found in international legal literature.[55] Scholars argue that it is reasonable to assume that private actors are generally bound by *jus cogens* in general as the absolute minimum standard of humanity.[56] If *jus cogens* is absolutely binding on States, the argument goes, it must be even more so on private actors who are not shielded by sovereignty. Yet, arguments from mere logic as a means to fill gaps in a coherent system of law are difficult to justify in international law (other than in national law) since the former still does not present a coherent

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[52] At the beginning of the negotiations at the Rome Conference, the draft statute provided for the court's jurisdiction over legal persons. The issue of inclusion of legal persons under the jurisdiction of the court was a matter of hot debate. Some delegates fiercely opposed it, others strongly supported it, while others remained open. *See* Clapham, *supra* note 43, at144, n. 4.

Draft article 23 provided in brackets that "[t]he Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives." *Cited in* Clapham, *id*. at 144.

> Draft article 76 proscribed penalties to legal persons. It stated (again in brackets) that: A legal person shall incur one or more of the following penalties: (i) fines, (ii) dissolution, (iii) prohibition, for such period as determined by the Court, or the exercise of activities of the kind, (iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime, (v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct; (vi) appropriate forms of reparation.

Cited in id. In the end, the attempts did not find the necessary broad support. For more details on the negotiating history in this respect, *see id.* at 143–60.

[53] *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2762–63 (2004).

[54] Example given by Eckart Klein, "The Duty to Protect and to Ensure Human Rights under the International Covenant on Civil and Political Rights", in *The Duty to Protect and to Ensure Human Rights* 295, 297 (Eckart Klein ed., 1999).

[55] Knut Ipsen, *Voelkerrecht* § 8, para. 12 (1999).

[56] *Id*.

fully-fledged legal system and fragmentary or inadequate regulation of issues is commonplace. Logical arguments do not free oneself from the necessity of being able to point to a source of international law as a basis such as treaty law, customary international law, or general principles of law.[57]

III. *Agent Orange*

The post-*Sosa* decision of the District Court for the Eastern District of New York in *In re "Agent Orange" Product Liability Litigation* involving the action of Vietnamese nationals against U.S. manufacturers of the herbicides used by the U.S. army during the Vietnam War for harm allegedly caused by such use, is only the second case after *Presbyterian Church of Sudan* where the issue was raised. Again, defendants argued that TNCs cannot breach norms of international law.[58]

A. *Torts Law Policy Argument*

Judge Weinstein took a simple but different path from Judge Schwartz in *Presbyterian Church of Sudan*. He did not attempt to justify the application of ATS to TNCs from the viewpoint of international law even though he also made references to the *I.G. Farben* case. Instead, he explained that "limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world."[59] Moreover, he added, that defendants were unable to present one policy reason why corporations should be insulated from liability under ATS.[60]

Such reasoning refers to the empirical fact that in today's world, the overall majority of vital business enterprises are conducted by corporations organized within corporate groups like TNCs. TNC activity, in this field as in other fields of public interest such as antitrust, is too pervasive to be neglected. Indeed, given the lack of regulation at the global level and the prevalence of mere soft law initiatives, without universally applicable binding rules on

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[57] As to the sources of international law, *see* Statute of the International Court of Justice, art. 38, 26 June 1945, 59 Stat. 1055, T.S. No. 993.

[58] *In re "Agent Orange" Product Liability Litigation* 373 F. Supp. 2d 7, 54 (as to TVPA), 58–59 (as to ATS) (E.D.N.Y. 2005). On appeal, the Court of Appeals for the Second Circuit affirmed the dismissal but did not reach this issue because it held that no norm of international law satisfying the *Sosa* standard has been breached. *See Vietnam Association for Victims of Agent Orange v. Dow Chemical Company*, 517 F.3d 104, 117–23 (2007).

[59] *Id*. at 58.

[60] *Id*. at 59.

TNCs such as ATS, business activities of global players take place almost in a legal vacuum.

Legally speaking, denying the responsibility of TNCs in civil rights litigation as opposed to individuals heading such TNCs seriously undermines the very purposes and goals civil rights statutes such as ATS and the Torture Victim Protection Act ("TVPA")[61] aim to achieve. Like in the law of corporations in general, change of personnel and the complexity of the decision-making process within TNCs would otherwise render liability impossible. Indeed, it would be a strange tort statute to impose liability on individuals but not on corporations. The mere fact that a legal entity has caused injuries as opposed to an individual cannot be legally decisive.

The decision shows that corporate liability can be exclusively justified by domestic law principles. Hence, the difficult undertaking to justify corporate liability under international law as pursued by Judge Schwartz is unnecessary.

In addition, two more arguments other than those raised in *In re "Agent Orange" Product Liability Litigation* can be made from ATS torts law perspective but which were not mentioned in the previous judgments.

B. *Systematic Argument from TVPA*

First, an additional argument which was not made in *Presbyterian Church of Sudan* can be drawn from the comparable discussion emerging under ATS's sister act adopted in 1992 in support of ATS litigation, the TVPA which provides an explicit cause of action for torture and extra-judicial killings and, further than ATS, expands its scope to U.S. citizens.[62] In several ATS cases against TNCs, defendants argued that the TVPA does not apply to corporations but merely to individuals.[63] So far, some courts have followed this argument based on the supposedly clear wording of the statute which speaks of "individual" (as opposed to persons).[64] In addition, the statute applies the term "individual" equally to the perpetrators as well as to the victims of the

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[61] Pub. L. No. 102–256, 106 Stat. 73 (1992).

[62] *See* Beth Stephens, "Corporate Accountability: International Human Rights Litigation against Multinational Corporations in US Courts", in "Liability of Multinational Corporations under International Law" 209 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Ryan Goodman & Derek P. Jinks, "Filártiga v. Peña-Irala's Firm Footing: International Human Rights and Federal Common Law", 66 *Fordham L. Rev*. 463, 513 (1997).

[63] *E.g., Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y.2004); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997).

[64] *Arndt,* 342 F. Supp. 2d at 141; *Beanal*, 969 F. Supp. at 382.

human rights violations.[65] Such use of terminology gave rise to the argument that as corporations cannot be tortured or are unable to suffer pain, a uniform interpretation of the TVPA leads to the conclusion that the term "individual" does not encompass legal persons.[66] Some courts, however, have nonetheless held the opposite.[67] What matters for purposes of this paper is that if courts find it difficult to negate corporate liability given TVPA's clear wording, more so with ATS which has an open-ended terminology which does not explicitly mention the covered wrongdoers.

C. *Historic Argument*

Next, historic evidence not mentioned in *Presbyterian Church of Sudan*, further supports the pragmatic position taken here specifically since the origin of ATS is largely unknown.[68] As early as 1907, the opinion of U.S. Attorney General Bonaparte recognized the legal capability of a U.S. corporation to be held liable under ATS for violations of international law.[69] The opinion dealt with the violation of the U.S.-Mexican Boundary Convention of 1889 establishing the International Boundary Commission with exclusive jurisdiction to decide differences and questions arising out of natural or artificial changes in the beds of the Rio Grande boundary river and the Colorado River where they form the boundary line between the two States.[70] Mexican authorities complained that the American Rio Grande Land and Irrigation Company's construction works resulted in "a change in the current channel of the Rio Grande where it constituted the boundary between the United States and Mexico."[71] The Attorney General confirmed that rights of Mexican citizens have been accordingly violated by the change of the channel.[72] As a consequence, he took the position that ATS provides for these Mexican citizens a right of action and a forum.[73] In effect, the Attorney General plainly assumed that the provisions of the U.S.-Mexican Boundary Convention of 1889 enforced through ATS

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[65] *Arndt*, 342 F. Supp. 2d at 141; *Beanal*, 969 F. Supp. at 382. *See also In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d at 54–58.

[66] *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1167 (C.D. Cal. 2005).

[67] *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1266–67 (N.D. Ala. 2003); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358–59 (S.D. Fla. 2003).

[68] See the discussion in *supra* Chapter One: Actionability Standards.

[69] 26 U.S. Op. Atty. Gen. 250 (1907). *See* Randall, *supra* note 19, at 502–03.

[70] 26 U.S. Op. Atty. Gen. at 252. *See* Randall, *supra* note 19, at 502–03.

[71] 26 U.S. Op. Atty. Gen. at 251. *See* Randall, *supra* note 19, at 502–03.

[72] 26 U.S. Op. Atty. Gen. at 252–53.

[73] *Id*. at 252.

equally applies to State actors and private corporations and could thus be violated by both.[74]

D. *Fragmentary Nature of International Law*

Lastly, contrary to what one might think at first sight, such view does not contradict international law. One should bear in mind that international law typically provides for minimum standards and mainly, these standards are applicable only to States. Clearly, no State is being prevented from raising its standards by holding TNCs which are involved or contribute to violations of international law liable as long as the cause of international law is served because international law leaves individual liability (as opposed to State liability), be it of a natural or a legal person, largely to domestic law.[75] This argument is accurately reflected in the reasoning of the court in *In re "Agent Orange" Product Liability Litigation* according to which, corporations are not immune from civil legal action based on international law.[76]

IV. *Guidance by* Sosa*?*

Lastly and most importantly, in *Sosa v. Alvarez-Machain*, the first and so far, only case where the Supreme Court enunciated interpretations of ATS, the majority refers in footnote 20 to the related discussion among courts faced with ATS actions of the instances in which private actors are capable of violating international law in the absence of State actors involved.[77] In this footnote, the court explicitly labelled both "corporations" and "individuals" as "private actors"[78] and by equation, impliedly recognized the possibility of corporate tort liability under ATS. The Supreme Court seemingly assumes that ATS, although incorporating international law, is still governed by and forms part of torts law which applies equally to natural and legal persons unless the text of a statute provides otherwise.

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[74] *Id.*

[75] *See* André Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", 52 ICLQ 615, 617 (2003). However, it cannot be excluded in the long term that the emergence of transnational corporate human rights litigation may constitute the beginning of a development under international law the end of which would result at least to the partial recognition of corporate legal personality under international law.

[76] 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005).

[77] 124 S.Ct. 2739, 2766 (2004).

[78] *Id.*

V. *Conclusions*

ATS incorporates public international law by reference while remaining part of private federal torts law. This hybrid nature may pose significant ramifications as both fields have their own distinctive and not always compatible features. Such conceptual problems however, are not a problem in respect of the issue of application of ATS to TNCs.

The reason for this is that the issue of whether ATS applies to TNCs should be decided from the viewpoint of domestic law, not international law, and that international law does not inhibit such solution. While it is certainly true that ATS incorporates international law, it nonetheless remains part of U.S. private torts law which naturally applies equally to natural and juridical persons. The common reason for this is that otherwise, the complexity of decision-making and the change of personnel of and within TNCs would undermine the effective application of the statute, here, the ATS.

This solution does not undermine international law which does not recognize a concept of corporate responsibility because international law provides only for minimum standards. Any State is free to impose higher international standards on its TNCs. Therefore, it is irrelevant whether the defendant TNC in an ATS case technically violates international law or not.

Chapter Seven

Norms that Can Be Violated Only by State Actors

I. *Introduction*

The wording of ATS unambiguously requires a violation of international law.[1] Today, international law still largely regulates the relations among and the conduct of States.[2] Consequently, it is clear that typically as a general rule under ATS, there should be a sovereign State whose actors are, in one way or another and together with the TNC concerned, involved in the wrongdoing because only State actors are technically able to infringe norms of international law.

This chapter explores corporate liability in instances of cooperation between TNCs and State actors resulting in a violation of international law in respect of the overwhelming majority of international norms which can only be violated by State actors.[3] It is subdivided into three parts. Part II presents the general rule that international law only applies to States, i.e., State actors as recognized in ATS litigation. Part III analyzes what kind of cooperation between and among official State and private actors is necessary to qualify as a violation of international law in the meaning of and as required by the wording of ATS. Lastly, Part IV outlines some general considerations on the hybrid nature of ATS and presents some conclusions which can be drawn from the results in Parts II und III. It is clear that an overly high threshold of required interaction between the private and the public spheres under ATS would pose a substantial impediment to TNC liability under ATS.

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[1] ATS as codified in 28 U.S.C. § 1350 (2004) provides as follows: "The district courts shall have 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."

[2] *See supra* text and accompanying notes to Chapter Six: Application to TNCs, I. Introduction.

[3] On the state action requirement under the ATS after *Sosa*, *see generally* Jessica Priselac, "The Requirements of State Action in Alien Tort Statute Claims – Does Sosa Matter?", 21 *Emory Int'l L. Rev*. 789 (2007). As to norms which can be violated regardless of the private or public nature of the actor, *see infra* Chapter Eight: Norms that Can Be Violated by Everyone.

II. *The State Action Requirement*

In ATS litigation, courts refer to the fact that international law applies only to States and State actors and not to private actors such as TNCs under the heading "state action requirement." Such practice stems from the *Kadic v. Karadzic*[4] decision of the Second Circuit rendered in the mid-1990s.

The underlying facts of the case are peculiar and complicated. In February 1992, behind the background of the general disintegration of the former State of Yugoslavia, Croats and Muslims of Bosnia-Herzegovina declared independence in a referendum.[5] Serbs living in Bosnia-Herzegovina boycotted the referendum and instead declared their own independence from the new State claiming areas predominantly populated by Serbs as part of their territory.[6] This Bosnian-Serb entity named Sprska never attained formal recognition as a sovereign State in the international arena and was later legally and factually reintegrated into the State of Bosnia-Herzegovina.[7] Nonetheless, at the time of the uprising, the discord quickly escalated into a bitter and bloody civil war between the different ethnic and religious groups of Bosnia-Herzegovina.[8] At the time, defendant Radovan Karadzic was the president of this Serb entity and in this capacity, headed the military forces which committed the atrocities in the attempt of the Serb minority to gain and control power over Bosnia-Herzegovina.[9]

Two groups of victims from Bosnia-Herzegovina brought actions against Karadzic in the United States. The first class consisting of thousands of people alleged genocide; war crimes; summary execution; wrongful death; torture; cruel, inhuman, and/or degrading treatment; assault and battery; rape; and intentional infliction of emotional harm inflicted by Bosnian-Serb military

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[4] 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 U.S. 2524 (1996). *See generally* William Aceves, "Affirming the Law of Nations in U.S. Courts," 14 *Berkeley J. Int'l L.* 137 (1996); Peter Schuyler Black, "Kadic v. Karadzic", 31 *Ga. L. Rev.* 281 (1996); Amy E. Eckert, "Kadic v. Karadzic", 25 *Denv. J. Int'l L. & Pol'y* 173 (1996); Alan Frederick Enslen, "Filártiga's Offspring," 48 *Ala. L. Rev.* 695 (1997); Beth Ann Isenberg, "Genocide, Rape, and Crimes against Humanity," 60 *Alb. L. Rev.* 1051 (1997); Eric Johnson, "Kadic v. Karadzic and Doe I and II v. Karadzic", 39 *German Y.B. Int'l L.* 434 (1996); David P. Kunstle, "Kadic v. Karadzic, 6 *Duke J. Comp. & Int'l L.* 319 (1996); Charles F. Marshall, "Re-framing the Alien Tort Act after Kadic v. Karadzic, 21 *N.C. J. Int'l L. & Com. Reg.* 591 (1996); Jordan J. Paust, "Suing Karadžić," 10 *Leiden J. Int'l L.* 91 (1997).

[5] *Doe v. Karadzic*, 866 F. Supp. 734, 736 (S.D.N.Y. 1994).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 735.

units under the command of the defendant.[10] The second group of plaintiffs alleged mainly gender-related wrongs such as rape, forced prostitution, forced pregnancy, forced childbirth, and gender and ethnic discrimination as war crimes.[11]

At first instance, the District Court for the Southern District of New York found itself in a difficult situation.[12] Any pending recognition of the self-proclaimed "Republik Sprska" by the United States government which could not be excluded as an option at the time although it never occurred in fact[13] would have rendered the defendant a head of State with the correlating privilege of judicial immunity under the Foreign Sovereign Immunities Act,[14] depriving the court of its jurisdiction over the defendant.[15] As to ATS, in the absence of a formal recognition, the court found the Serbian entity Sprska as constituting a non-state actor[16] and announced in accordance with classic international law that "acts committed by non-state actors do not violate the law of nations".[17] In other words, the district court held that ATS claims presuppose State action and that the Serb entity "Srpska" did not meet the definition of a State.[18] Accordingly, the court dismissed all federal claims and declined to exercise jurisdiction over possible state law claims.[19]

On appeal, despite claiming to be the president of a sovereign State, Karadzic once again contended that there is no identifiable violation of international law because it does not cover mere private behavior.[20] The Second Circuit held

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[10] *Id*. at 735–36. In particular, plaintiffs contended that the systematic nature of the violence employed by the Serb forces amounted to an "ethnic cleansing" designed, ordered, implemented, and directed by the defendant, falling within the definition of genocide. *Id*.

[11] *Id*.

[12] *See generally* Michele Brandt, "Doe v. Karadzic", 79 *Minn. L. Rev*. 1413 (1995).

[13] *See* Roger Cohen, "Washington Might Recognize a Bosnian Serb State", *N.Y. Times*, 13 March 1994, at A10.

[14] 28 U.S.C. § 1603(b)(2).

[15] See the remarks of the court in this regard. 866 F. Supp. at 737–38. It declared that this background is not dispositive but deemed it to militate against the exercise of jurisdiction. *Id*. at 738.

[16] *Id*. at 740–41.

[17] *Id*. at 739.

[18] *Id*. at 739–41. The underlying assumption goes like this: International law applies exclusively to States. Therefore, State action is needed to establish liability. *Cf. id*. As to the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102–256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note, the court similarly found the lack of State action decisive in rejecting the claims. *Id*. at 741–42.

[19] *Id*. at 744.

[20] *Id*. at 739.

that appellants are entitled to prove the statehood of Srspka[21] and recognized that international human rights, including the prohibition on torture, apply only to States.[22] In accordance with U.S. constitutional law doctrine, the Second Circuit discussed this under the term "state action requirement".[23] Ever since, courts in ATS litigation generally required State action in cases targeting TNCs.

III. *Color of Law-Jurisprudence as Litmus Test*

The next question which arises then is which law or standards should be applied to determine the State action.

A. *Justification of Incorporation of Color of Law-Jurisprudence*

A possible solution was already indicated in *Forti v. Suarez-Mason* issued in 1987.[24]

1. *The* Forti *Reference to 42 U.S.C. § 1983*

In this case, plaintiffs brought action under ATS against a former Argentine military general for various violations of international law including torture.[25] In defense, the defendant argued that allegations of official conduct under the ATS would automatically trigger the act of state doctrine.[26] Under this doctrine, a court may abstain from adjudicating claims when it is required to judge the acts of foreign sovereign governments made within their own sovereign territory.[27]

District Court Judge Jensen of the Northern District of California deemed such argument "unpersuasive".[28] He declared:

> Claims for tortious conduct of government officials under [ATS] may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983, where plaintiffs must allege both deprivation of a federally protected right and action "under color of" state law. So, too, for purposes of [ATS,] a plaintiff must allege "official"

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[21] *Id.* at 744.
[22] *Id.*
[23] *Id.*
[24] 672 F. Supp. 1531, 1535–36. (N.D. Cal. 1987), *recon. granted* on other grounds, 694 F. Supp. 707 (N.D. Cal. 1988).
[25] *Id.* at 1535.
[26] *Id.* at 1546.
[27] For details, *see infra* Chapter 12: Nonjusticiability Issues.
[28] 672 F. Supp. at 1546.

> (as opposed to private) action – but this is not necessarily the governmental and public action contemplated by the act of state doctrine. That is, a police chief who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be "official" simply by virtue of his position and the circumstances of the act; his conduct may be wholly unratified by his government and even proscribed by its constitution and criminal statutes. . . . . Thus, allegations of official action for purposes of [ATS] do not necessarily require application of the act of state doctrine. Indeed, since violations of the law of nations virtually all involve acts practiced, encouraged or condoned by states, defendant's argument would in effect preclude litigation under [ATS] for "tort[s] . . . committed in violation of the law of nations."[29]

Accordingly, in *Forti v. Suarez-Mason*, a judge referred to 42 U.S.C. § 1983 as a standard to determine official activity under ATS for the first time.

In the American legal system, § 1983 is one of, if not the, most effective mechanism for enforcement of (domestic) civil rights. The leading commentator on the provision estimates that each year, between 40,000 and 50,000 cases are brought under § 1983 in federal courts.[30] Accordingly, federal judges are already very familiar and well-experienced with color of law jurisprudence under § 1983.

Historically, the outcome of the Civil War resulted in the Reconstruction Amendments (the 13th, 14th, and 15th Amendments to the U.S. Constitution)[31] and based thereon, the enactment of the Civil Rights Act, § 1 of which is now § 42 U.S.C. § 1983.[32] The purpose of the act was the actual enforcement of the 14th Amendment rights.[33] The "color of law" (state action) requirement itself was included because Congress distrusted the Southern States as either unwilling or unable to enforce the law and grant political and civil rights to Afro-Americans and Unionists against the outburst of hate, violence, and crimes committed by the omnipresent Ku Klux Klan constituted by whites.[34] Under 42 U.S.C. § 1983:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

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[29] *Id*.

[30] 1A Martin A. Schwartz & John E. Kirklin, Section 1983 *Litigation – Claims and Defenses*, § 5.11 at 3 (1997).

[31] The purposes were to cement the defeat of the Confederation and its sympathizers and to complete the victory of the Union. *See* Thomas Giegerich, "Die Drittwirkung der Grundrechte in den USA" 136 (1992).

[32] The other provisions are currently codified as 42 U.S.C. §§ 1981, 1982, 1985, and 1986.

[33] *Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990); *Quern v. Jordan*, 440 U.S. 332, 354 (1979).

[34] *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *Ngiraingas*, 495 U.S. at 188.

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Therefore, under the conventional "color of law" standard, the question of who acts under the color of law or authority is relatively easy to determine when government officials and public employees caused the alleged deprivation.[35] Difficulties arise, however, in case of private individuals linked to government officials or private acts are involved in the alleged violation as to how and when to classify private persons as acting under the color of law resulting in individual liability of these private actors.[36] In such situations, courts had to develop standards as to what kind of government interference, entanglement, or connection is necessary to transform the acts of the private individual as falling within the reach of the color of law.[37] Under § 1983, every person amounting to an actor under the color-of-law is automatically liable.

2. Kadic *Precedent of the Second Circuit*

Nine years later, the suggestion in *Forti* to apply standards derived under 42 U.S.C. § 1983 was picked up by the Second Circuit in *Kadic v. Karadzic*[38] where the district court dismissed ATS claims due to lack of State action.

As indicated above, on appeal, plaintiffs-appellants claimed that they were not only entitled to prove that Srpska satisfies the definition of a State under international law but also that "Karadzic *acted in concert* with the recognized state of the former Yugoslavia",[39] a classic formulation which resembles one test developed under § 1983 to determine the color of law.

The Second Circuit explained:

> *Acting in concert with a foreign state.* Appellants also sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort

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[35] Karen M. Blum & Kathryn. R. Urbonya, *Section* 1983 *Litigation* 5 (1998).

[36] *Id*.

[37] For details, see below, sec. III.B.

[38] 70 F.3d. 232.
Id. at 244.

[39] *Id*.

Act. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal.1987), *recon. granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988).[40]

3. *Analogy to TVPA since 1992*

Neither Judge Jensen in *Forti* nor the Second Circuit in *Kadic* explained why 42 U.S.C. § 1983 should be a relevant guide for purposes of ATS. However, the analogy seems reasonable given that the color of law requirement is also employed in the TVPA (since 1992).

4. *Wording of ATS Itself*

The approach of applying § 1983 and not international law further perfectly matches the wording of ATS. ATS requires a "tort" in "violation of the law of nations". Hence, while an infringement of international law is a necessary element, the domestic tort remains the basis of liability.[41]

5. *Better Alternative of International Standards?*

Accordingly, under the impression of the *Kadic* precedent and the example of the TVPA, courts look at domestic law for guidance to determine a violation of international law under ATS.

Under general international law as expressed in the Articles on State Responsibility (the "Draft Articles")[42] concluded by the International Law Commission in 2001, which are widely perceived as reflecting customary international law,[43] a violation of international law exists when a conduct

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[40] *Id*. at 245.

[41] Such view is confirmed by the legislative history of ATS as presented in *Sosa* where attacks on ambassadors were mentioned as one major reason for ATS's enactment.

[42] *Printed in Report of the International Law Commission on the work of its Fifty-third session*, Official Records of the General Assembly, 56th Session, Supp. No. 10 (A/56/10) 43, ch. IV.E.1, art. 2 (Elements of an internationally wrongful act of a State) (2001). Historically, the law on State responsibility emerged from the protection of the rights of aliens. *Ian Brownlie, System of the Law of Nations: State Responsibility: Part 1*, 9 (1983). The Permanent Court of International Justice in *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), Germany v. Poland, Merits*, embraced it not only as a general principle of international law but also as a "greater conception of law" that every primary breach of a legal obligation results in a secondary obligation to undo the harm (reparation). PCIJ Ser. A No. 13 at 29 (1928). *Cf. The Corfu Channel Case, United Kingdom v. Albania, Merits*, 1949 I.C.J. 4, 23.

On State responsibility, *see generally* James Crawford, *The International Law Commission's Articles on State Responsibility* (2002); *René Provost, State Responsibility in International Law* (2002).

[43] *See* David Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority", 96 *Am. J. Int'l L.* 857, 867 (2002), who provides a brief overview of the stances taken by international lawyers in respect of the status of the Draft Articles.

consisting of an action or omission (a) is attributable to the State under international law and (b) constitutes a breach of an international obligation of the State.[44] Accordingly, from the perspective of international law, to determine a violation of international law as required by ATS, the missing link after the identification of the actionable breached norm thereunder[45] remains the attribution of the alleged conduct to the classic subject of international law, a State. The necessity of attribution is a result of the fact that a State as such is an artificial construct, thus, the (wrongful) acts of living individuals need to be attributed to the State in order to hold the individual liable under international law. Thus, under the violation of international law requirement in ATS litigation, courts would need to determine whether the conduct of the private and State actors involved is actually attributable to a State, and hence, amounting to a violation of international law.

Yet, admittedly, the application of international law would pose significant ramifications. Other than the 42 U.S.C. § 1983 jurisprudence, international law does not seem apt to regulate TNCs for at least two reasons.

(a) Inadequacy of Regulation in TNC-as-Main Perpetrators Constellations

Firstly, international law on State responsibility rests upon the general premise that a State is not responsible for private acts undertaken on its territory.[46] In other words, actions of TNCs cannot be attributed to the States where the events occurred only for reason of the State's territorial sovereignty. According to article 8 of the Draft Articles, the conduct of a person or group of persons acting on the instructions of or under the direction or control of a State is attributable to such State.[47] Where the private actions were authorized by a State, the latter incurs State responsibility regardless of the private nature of the acts undertaken.[48] It is generally recognized that the scope of article 8 is limited.[49] Conduct is only attributable if the control or direction is directly related to the alleged wrongdoing and forms an integral part of the transferred operation.[50] The high threshold of liability became visible in the judgment of

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[44] *See* Draft Articles, *supra* note 42, art. 2.

[45] *See supra* Chapter Two: International Criminal Law; Chapter Three: Civil and Political Rights; Chapter Four: Labor Standards; Chapter Five: Environmental Destruction.

[46] *See* Rüdiger Wolfrum, "State Responsibility for Private Actors: An Old Problem of Renewed Relevance," in *International Responsibility Today – Essays in Memory of Oscar Schachter* 423, 424 (Maurizio Ragazzi ed., 2005).

[47] Draft Articles, *supra* note 42, art. 8.

[48] Crawford, *supra* note 42, at 110.

[49] *Cf. id.*

[50] *Id.*

the International Court of Justice in *Case concerning Military and Paramilitary Activities in and against Nicaragua*.[51] In this case, the government of Nicaragua alleged that the U.S. government funded and directed the Contras, a Nicaraguan rebel group, and was therefore responsible for the atrocities committed by the latter group in their struggle against the Nicaraguan government at the time. The International Court of Justice, while recognizing that the U.S. planned, directed, and supported the Contras, repudiated the legal consequence of attribution and responsibility.[52] The court explained that to incur State responsibility, it must be established that the United States "had effective control of the military and paramilitary operations in the course of which the alleged violations were committed".[53] In *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia softened the strict standard by holding (within the context of imputing individual criminal responsibility) that the required level of control of armed forces by a State for the activities of armed forces allegedly acting under the latter's control would be "overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military".[54] While the tribunal aimed to lessen the level of control required to trigger attribution, it is still the consensus among international law scholars that the stakes remain high.[55] And in developing countries where infringements of international law on which ATS cases are based typically occur, it may be the TNC which is exercising pressure on the government rather than vice versa which is the exact opposite of what is envisaged by the overall and effective control standards which require government control over private actors. This shows that the international law on State responsibility may not be suitable for TNC regulation at least in instances where the TNC is the main perpetrator and the State officials are merely accomplices.[56]

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[51] *Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States, Merits*, 1986 I.C.J. 14.

[52] *Id*. at 62.

[53] *Id*. at 64.

[54] IT-94–1–A, Judgment 145 (Appeals Chamber, 15 July 1999). *See* Marco Sassòli, "La première décision de la Chambre d'appel du Tribunal penal international pour l'ex-Yugoslavie", 100 R.G.D.I.P. 101 *passim* (1996).

[55] Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Means of Holding Private Actors Accountable for Human Rights Violations", 5 *Melb. J. Int'l L. 1*, 7 (2004).

[56] Similarly, other rules on State responsibility seem not suitable for TNC regulation, too. According to article 5 of the Draft Articles, the conduct of a person not being the official organ of a State is attributable if "empowered by the law of that State to exercise elements of the governmental authority". *Supra* note 42. This rule encompasses any kind of body to which governmental authority has been delegated to, e.g., security services to prisons or

Exemplary of the underlying pitfalls is the decision of the District Court for the Southern District of Florida in an ATS labor standard dispute, *Villeda Aldana v. Fresh Del Monte Produce*.[57] In this proceeding, all the plaintiffs were officers of the trade union Sindicato de Trabajadores del Banano de Izable ("SITRABI"), the Guatemalan union representing workers at the Bopos banana plantation which was operated by the U.S. fruit TNC Del Monte in Guatemala.[58] In September 1999, SITRABI was involved in negotiations with the Del Monte Group and was about to call a strike due to infringements of

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immigration control by airlines. *See* Crawford, *supra* note 42, at 100. In an ATS context, the question that could arise is whether the grant of a concession to a TNC in relation to a certain part of the State's territory combined with the absence of any infrastructure or governmental officials and agencies on this territory may be read as an implied delegation of governmental authority under article 5 (even though the issue is not explicitly covered under the terms of the concession alone or together with the investor-State agreement). A case which may have come relatively close to such a situation is *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 370–71 (E.D. La. 1997). In this case, the U.S. corporations Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. (together, "Freeport") owned a subsidiary in Indonesia incorporated under the name P.T. Freeport Indonesia. It operated the open pit copper, gold, and silver "Grasberg" mine located in the Jayawijaya Mountain in Irian Jaya, Indonesia, covering an area of 26,400 square kilometers. The largest copper, gold, and silver mine on earth, it extends from the 13,500-foot high mountain over alpine-like zones, mountain rainforests to the mangrove swamps finding its end at the Arafura Sea. *See* Jean Wu, "Pursuing International Environmental Tort Claims under the ATCA: Beanal v. Freeport-McMoran", 28 *Ecology L.Q.* 496 (2001). Unfortunately, the plaintiff was not well-represented. The court concludes that "it is unclear from the complaint whether Freeport actually operates or owns a town, controls the roads and walkways, residences, markets, etc., or has taken over the functions of regulating local life. The allegations create a picture, nonetheless, of Freeport's vast and draconian control over the Grasberg Mine area." *Id.* at 380.

According to article 9 of the Draft Articles, the conduct of private persons or groups exercising elements of governmental authority is attributable in the "absence of the official authorities and in circumstances such as to call for the exercise of those elements of authority". The conditions can be met only in exceptional circumstances such as revolutionary change, armed conflict, or foreign occupation where the regular official governmental agencies have been dissolved or otherwise have been rendered incapable of carrying out their daily governmental functions. *Crawford, supra* note 42, at 114. *See Yeager v. Islamic Republic of Iran*, 17 Iran-USCTR 92 (1987).

Finally, according to article 11 of the Draft Articles, conduct which cannot be attributed to the State under any other rules is an act of State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Therefore, whenever a State acknowledges or adopts the acts of a TNC, the State will be liable under international law for the acts. Chirwa, *supra* note 55, at 8–9. This seems to be an option in cases where the State publicly supports the activities of the TNC even after public allegations against the latter in mass media and diplomacy.

[57] 305 F. Supp. 2d 1285 (D.C.S.D. Fla. 2003).

[58] *Id.* at 1288–89.

the collective bargaining agreement at the Bopos plantation.[59] In the early evening of 13 October 1999, an armed private security force stormed and seized SITRABI's headquarters and detained the plaintiffs at gunpoint.[60] One was forced into a car to show where other leaders reside who were then kidnapped and brought to the headquarters.[61] Again, under the threat of immediate death, another plaintiff was forced to call another leader to the office under a pretext, who, upon arrival was similarly detained.[62] In the late evening, the armed gang had gathered all the union leaders who were repeatedly threatened with death.[63] Later that night, accompanied by the city's mayor, two of the plaintiffs were transported to the local radio station where they were forced under the threat of death to make an on-air public announcement that the labor dispute with Del Monte was over and that workers should return to work.[64] After the announcement, the plaintiffs were taken back to the headquarters, forced to sign a resignation fax to Del Monte at gunpoint, and relieved in the early morning.[65] Plaintiffs alleged that they were threatened with death if they did not leave the plantation area. Shortly after these events, plaintiffs left Guatemala and were granted asylum status in the United States.[66] They further alleged in their complaint that American parent company Del Monte Inc. was directly involved in the events which took place.[67] At first instance, the district court dismissed the complaint based on lack of State action. The alleged threats and violence were exercised by a private security firm hired by the defendant. On appeal, the Eleventh Circuit reversed and remanded the case for further proceedings.[68] Plaintiffs had successfully argued that the complaint must be read as stating that the city's mayor was not only present most of the time during the hostage-taking but was directly involved.[69] Under domestic standards, the alleged involvement is sufficient and the Eleventh Circuit reversed the district court decision. Under international law, on the other hand, mere involvement, as indicated,

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[59] *Id*. at 1289. Compania de Desarollo Bananero de Guatemala, S.A., a Guatemalan corporation and allegedly a wholly-owned subsidiary of Del Monte Inc. announced that it was terminating the production at Bopos and laying off all 918 workers, all of whom were SITRABI members.

[60] *Id*.

[61] *Id*. at 1290.

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*. at 1290–91. Other defendants were Del Monte Fresh, Florida, and Bandegua.

[67] *Id*. at 1290.

[68] 416 F.3d 1242 (11th Cir. 2005).

[69] *Id*. at 1248–49.

without some form of actual control would be insufficient to attribute the private actions to the city's mayor and his country as a sovereign State, and the appeal would have been rejected.

(b) Remaining Need to Determine Individual and/or Corporate Responsibility
Secondly, and more important for purposes of this paper, one needs to be aware that even if the court applied the law on State responsibility outside of international criminal law, international law still leaves individual and/or corporate liability, i.e., rules on participation, largely to domestic law.[70] For example, in considering the responsibility of France for an act of torture by a French police officer, the European Court of Human Rights in *Selmouni v. France* explained that any issue of guilt of the officer is a matter for the French courts to decide and that "[w]hatever the outcome of the domestic proceedings, the police officers' conviction or acquittal does not absolve the respondent State from its responsibility under the Convention."[71] In this sense, international law on State responsibility as the term reveals, determines the responsibility of the legal construct State if the attribution of the private or State actors' conduct is possible. Yet, it is silent on the individual consequences to the persons whose acts are being attributed. This is left to domestic law. The concept under 42 U.S.C. § 1983 is totally different in this respect. Here, the issue is not attribution (although one could label it using such term) but whether the private actor amounts to a State actor for a specific wrong, i.e., whether the private actor acts under the color of law. If this question has been affirmatively answered, the private actor is automatically liable. In other words, 42 U.S.C. § 1983 does not distinguish between State action on the one hand and rules on participation on the other hand. Instead, with the determination of State action, the issue of participation is simultaneously resolved.

Thus, although it may be more accurate from the viewpoint of international law to determine first a violation of international law through the help of the law on State responsibility and thereafter, to separately determine individual and/or corporate responsibility under domestic standards through the help of § 1983 standards, courts may view this as overly complicated and burdensome. In ATS litigation, in addition to international law on State responsibility, courts would still need to apply § 1983 standards or other domestic tests. Generally, as to the possibility of divergence between public international law and private torts law, note that the more domestic and international laws become

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[70] *See* André Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", 52 ICLQ 615 (2003), who explains that "responsibility of individuals is a matter of national, not international law". *Id.* at 617.

[71] *Selmouni v. France*, 5 ECHR Rep. (1999), 29 EHRR 403, para. 87.

intertwined, as it has been the case during the last decades not only under ATS, a total convergence between the two is an ideal which cannot be realistically achieved in practice anyway. Accordingly, despite the strong emphasis on international law by the Supreme Court in *Sosa v. Alvarez-Machain*,[72] not only from the domestic law perspective but also from the perspective of international law, the law on State responsibility may not be the clear better alternative as opposed to 42 U.S.C. § 1983 jurisprudence.

B. *Domestic Tests as Applied to Determine State Action*

Under § 1983, courts have shaped and developed various approaches in finding a private actor acting under the color of law resulting in the latter's liability.[73] Under each of the approaches to color of law, "the conduct allegedly causing the violation of the norm must be 'fairly attributable to the State'."[74] All of these tests require a fair amount of inter-action between the private actor and the government employee to translate the latter into a State actor which incurs liability.

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[72] 124 S. Ct. 2739, 2755 which states: "When the United States declared their independence, they were bound to receive the law of nations", *citing Ware v. Hylton*, 3 U.S. (Dall.) 19, 281; 1 L. Ed. 568 (1796).

[73] Despite the extensiveness of case law under § 1983, one should be aware of the fact that the Supreme Court itself has admitted openly that formulating an "infallible test" is an "impossible task", *Reitman v. Mulkey*, 387 U.S. 378 (1967), and the developed standards are not "a model of consistency", *Lebron v. National Road Passenger Corp.*, 387 U.S. 374, 378 (1995); O'Connor, J., dissenting in *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

The Supreme Court has further declared that "only by sifting facts and weighing circumstances can the non-obvious involvement of the State in the private conduct be attributed its true significance". *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Evans v. Newton*, 382 U.S. 296, 300–01 (1966); *Reitman v. Mulkey*, 387 U.S. at 378; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 115 (1973); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 574 (1974); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359–60 (1974); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1013 (1982).

Similarly, prominent U.S. law Professor Black has expressed a common attitude among scholars that the doctrine is a "conceptual disaster". Charles Black, Jr., "Foreword: 'State Action,' Equal Protection, and California's Proposition," 81 *Harv. L. Rev.* 69 (1967).

In other words, in practice, color of law jurisprudence is highly fact-specific and fact-dependent. *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d. 1442, 1448 (10th Cir. 1995), states: "As is the case with all of the various tests for state action, the required inquiry is fact-specific". *Cf. Burton*, 365 U.S. at 722.

[74] *Lugar*, 457 U.S. at 937.

1. *Joint Action Approach*

In *Tachiona v. Mugabe*,[75] which involved claims against the president of Zimbabwe, its foreign minister, and their political party for alleged torture and terror as a tactic to stay in power, the district court for the Southern District of New York applied the joint action test.

Under the joint action test in § 1983 jurisprudence, it is well-settled that a private actor who acts in concert or jointly with State actors to deprive a third party of a secured right is acting under the color of law. This joint action approach focuses on the deprivation of a specific right at a given point in time. Case law on this approach establishes two general patterns. It is necessary to show either a conspiracy,[76] i.e., "acting in concert"[77] or "a substantial degree

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[75] 169 F. Supp. 2d. 259 (S.D.N.Y. 2001).

[76] *Dennis v. Sparks*, 449 U.S. 24 (1980).

[77] In the well-known case *Adickes v. Kress Co.*, 398 U.S. 144 (1970), a white woman was refused service in a restaurant since she was in the company of Afro-Americans. It was unclear whether at that time, a police officer was in the restaurant. After Adickes and her companions left the building indignantly, she was arrested for vagrancy. The court suggested that the private restaurant acted in concert, i.e., conspired with the local police to cause her arrest on the false charge of vagrancy because she was a white person in the company of Afro-Americans and is acting under the color of law. The judgment states:

> [A] private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting under color of law for purposes of the statute. To act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents".

Id. at 152. The judgment cites *U.S. v. Price*, 383 U.S. 787 (1966), and other decisions although not mentioning that the precedents exclusively dealt with the deprivation of rights by private and State actors as co-perpetrators. This case is based on 18 U.S.C. § 242, the criminal law equivalent of § 1983. The two concepts of color of law are identical. *See Adickes*, 398 U.S. at 152; *Monroe v. Pape*, 365 U.S. 167, 185 (1961). In *Price*, for example, the three Afro-American victims were released from prison in the middle of the night and transported to an isolated place to be beaten to death by three police officers and 15 private citizens. *Price*, 383 U.S. at 790. Thus, *Adickes* established the principle that mere co-conspirators of an official agent of the State who deprived a third party of constitutionally or statutorily secured rights act under the color of law and become liable under § 1983.

The equally-known *Dennis v. Sparks* case, 449 U.S. 24 (1980), is most probably the clearest case in this category due to the simplicity of the underlying facts. *Dennis* affirmed *Adickes* and clarified that the private co-conspirator does not have to be an actual co-perpetrator in the challenged action. In this case, the defendants bribed a judge to order a favorable but unjustified injunction prohibiting plaintiffs from producing minerals in their oil leases. After the injunction had been dissolved on appeal, the plaintiffs brought an action under 42 U.S.C. § 1983 claiming that the agreement between the judge and the defendants resulted in deprivation of their property without due process of law. *Id.* at 25–26. The court held that the "official act of the defendant judge was the product of a conspiracy involving bribery

of cooperation".[78] In *Kadic*, the Court of Appeals continued to elaborate on the exact meaning of color of law:

> A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753–54, 73 L. Ed. 2d 482 (1982). The appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.[79]

Lugar v. Edmondson Oil Co.,[80] which was cited by the Second Circuit in *Kadic*, gave rise to another common variation of the formulation of the joint action test.[81] Thus, according to the *Lugar* variation as indicated in *Kadic*, a private actor amounts to a State actor if the private actor acted in concert with State officials or has obtained significant State aid.[82] In the aftermath of *Kadic*, courts overwhelmingly followed the line taken by the Second Circuit.[83]

Applying the *Lugar-Kadic* formula in *Tachiona v. Mugabe*, the court of the Southern District of New York determined that the ruling party of the incumbent president, in striving to prolong its hold on power and the suppression of the opposition, had "acted in concert" with the government or with "significant state aid", inflicting the campaign of intimidation against the opposition by resorting to violence, rape, torture, terror, and seizure of

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of the judge. Under these allegations, the private parties conspiring with the judge were acting under the color of law." *Id.* at 28. The court clarified that the private co-conspirators turned into State actors at the time of the bribery of the judge. *Id.* These two cases give the impression that a real agreement or meeting of the minds for the conspiracy is needed. *See also NCAA v. Tarkanian*, 488 U.S. 179 (1988).

[78] *Collins v. Womancare*, 878 F.2d. 1145, 1154 (9th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

[79] *Id.* at 245.

[80] 457 U.S. 922.

[81] See text accompanying *supra* note 79.

[82] 457 U.S. at 932, 939–42. The court found that a creditor who used a State prejudgment statute acted under the color of law since in attaching the debtor's property with help from the court clerk and sheriff, the creditor received assistance from State officials. *Id.* at 939–42. The subsequent private and public conduct as prescribed by statutory law which leads to a deprivation of a secured right were apparently crucial in this case. It is unclear whether cases wherein, by statute, State participation is necessary should form a separate category or should merely represent another formulation of the "substantive degree of cooperation" approach. *See Schwartz & Kirklin, supra* note 30, § 5.17 at 554.

[83] Admittedly, neither the *Kadic* decision nor the *Forti* decision which it cites provides any further explication as to how standards developed within § 1983 jurisprudence could be employed in an ATS context to detect State action. *See* Craig Forcese, "ATS's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act", 26 *Yale J. Int'l L.* 487, 501 (2001).

property of the victims supposedly supporting the opposition.[84] In the concrete justification of the applied test, the court pointed to *Kadic*.[85]

Similarly, in *Bigio v. Coca-Cola Co.*,[86] a case concerning the privatization of a Jewish property in Egypt later leased or sold to Coca-Cola, the Second Circuit held that a "private person does not 'act under the color' simply by purchasing property from the government".[87] Although the acquisition was dependent on the expropriation, the plaintiffs could not show that Coca-Cola influenced the decision to seize in any way as a conspirator or otherwise.[88]

And in *Wiwa v. Royal Dutch Petroleum Co.*,[89] the case about the alleged corporate wrongdoing by Shell in relation to its oil operations in the Nigerian River Delta in the 1990s, Judge Wood declared that the joint action test is the appropriate test in determining individual liability. He cited *Kadic* stating that: "A private individual acts under the color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid."[90] As to the allegations of the plaintiffs that Shell provided financial and logistical support to the Nigerian military and police to enable them to pursue a campaign of violence, torture, and judicial corruption against the indigenous people in the delta, Judge Wood ruled that if the alleged activities are proven, a substantial degree of cooperation between Shell and the Nigerian government is visible and therefore, joint action is present.[91]

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[84] 169 F. Supp. 2d at 314.

[85] *Id*. On appeal, the complaint was dismissed in toto on immunity grounds. *Tachiona v. U.S.*, 386 F.3d 205 (2d Cir. 2004).

[86] 239 F.3d. 440 (2d Cir. 2000).

[87] *Id*. at 448.

[88] *Id*.

[89] 2002 WL 319887 (S.D.N.Y.).

[90] *Id*. at 13.

[91] *Id*. In the face of the broad and general accusations, Shell argued that the plaintiffs must prove that Shell acted in concert with the government with regard to each human right violation and alleged that they had not satisfied this burden. The court did not adopt this position for three reasons. First, the judge stressed that plaintiffs alleged specific acts such as planning the arrest and killing of Ken Saro-Wiwa and John Kpuine, the attempted bribery of Owens Wiwa, and the bribery of witnesses in the trial against Saro-Wiwa. Second, the court cited *Burton*, 365 U.S. 715, as a paradigm case for the rule that § 1983 petitioners are not required to assert in their complaints that private and State actors "acted in concert to commit each specific act that violates plaintiffs' rights". Third, the judge cited rule 8(a)(2) of the Federal Rules of Procedure which requires the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and the holding of the Supreme Court which interpreted the Federal Rules of Civil Procedure as not demanding from the plaintiff "to set out in detail the facts upon which he bases his [§ 1983] claim."

In *Bao Ge v. Li Peng*,[92] involving the case of the inmates of Chinese prison camps against, inter alia, Adidas, who claim to have been subjected to forced labor to produce soccer balls bearing the Adidas logo, the federal court of the District of Columbia stressed the failure of the plaintiffs to present Adidas's direct role in plaintiffs' incarceration or their treatment while in prison suggesting that Adidas intellectual property rights may have been infringed. Based on these facts, the court was unable to detect a "substantial degree of cooperation" between the Chinese defendants and Adidas.[93]

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[92] 201 F. Supp. 2d 14 (D.D.C. 2000).

[93] *Id*. at 22.

The *Unocal* case filed in the Ninth Circuit and which was later settled is one of few decisions which contain quite an elaborate discussion of state action. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). Unocal, the Californian oil and gas exploration company, entered into a joint venture with the military government of Myanmar. *Id*. at 1297. In the joint venture for the construction of a pipeline, the military allegedly employed forced laborers. *Id*. at 1298. From the known facts, it appears that whenever Unocal became aware of this situation, it provided compensation to the workers. *Id*. at 1301 (based on a letter from Total, S.A., another co-venturer). At first instance, Judge Lew, in addressing the issue of state action, based its holding on two leading color-of-law precedents in the Ninth and Tenth Circuit, *Collins* and *Gallagher*.

In *Gallagher*, a private promoter and its security firm organized a rock concert at a state university. 49 F.3d at 1445–46. The concertgoers were subjected to pat-down searches to detect prohibited items such as drugs, weapons, and other tools that could be used as weapons. *Id*. Under the lease agreement for the venue of the concert, the university as well as the promoter was responsible for security. *Id.* at 1445. Prior to the concert, a university representative was present when the searches were discussed and uniformed officers of the University Department for Public Health were approximately six to ten feet away from the private personnel conducting the searches. *Id*. at 1446. Alleging unreasonable search under the Fourth Amendment, the plaintiffs brought action under § 1983 against the university, the promoter, and the security firm. *Id*. at 1444. The Tenth Circuit did not find a substantial degree of cooperation. It held that the university had not, in any way, attempted to influence the security standards. *Id*. at 1455. It ruled that the "shared common goal of producing a profitable music standard does not establish the necessary degree of concerted action. Under this approach, state and private actor must share a specific goal to violate the plaintiff's rights by engaging in a particular course of action." *Id*. In the second prominent case, *Collins*, anti-abortionists were picketing in front of the facilities of Womancare, a feminist women's health institution which provided, inter alia, the service of abortion to women. 878 F.2d at 1146. In the belief that the protestors violated a court injunction, Womancare called the police. *Id*. After arriving, the policeman decided not to take action. *Id*. He advised Womancare of the possibility of a citizen's arrest but not without warning them about the threat of liability if a court of law later determines the requirements of a citizen's arrest were not met. *Id*. Nevertheless, Womancare employees performed the arrest. *Id*. After the charges against the protesters were dismissed, the anti-abortionists filed suit against Womancare and its directors alleging deprivation of constitutional rights under § 1983. *Id*. The court

2. *Nexus Approach*

In *Abdullahi v. Pfizer, Inc.*, the Nigerian plaintiffs alleged that the world's largest pharmaceutical company conducted drug trials in Nigeria without the consent of the patients resulting in numerous deaths and other injuries.[94] Pfizer defended itself, inter alia, by pointing out its character as a private organization.[95] Plaintiffs responded that Pfizer acted as a State actor because it conducted the study with the assistance of the Nigerian government and government employees from the hospital.[96]

In addressing the issue, the court relied on the nexus test.[97]

The nexus approach requires that "there is a sufficiently close nexus" between the State and the private actor "so that the action of the latter may be fairly treated as that of the State itself."[98] Under this test, a government actor can be held responsible for "a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert."[99] That way, liability is excluded if it cannot be determined that the State was responsible for the specific acts of the private actor.[100] Note, however,

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held that if the conditions for a citizen's arrest as such are not met, it cannot be classified as a delegation of authority. *Id.* at 1152.

In *Unocal*, Judge Lew, in describing the events which gave rise to the *Collins* case and the ruling itself implied that Unocal's involvement is similarly minimal to trigger color of law. 110 F. Supp. 2d at 1305–06. After an extensive discussion of *Gallagher*, he admitted that, as in *Gallagher*, Unocal and the military did share the common goal of a "profitable project". However, as the *Gallagher* court stated, this shared goal does not establish State action. He stressed that Unocal did not in any way influence or participate in the human rights violations of the Myanmar government and denied joint action. *Id.* at 1306–07. The decision was appealed and an extra-judicial settlement was reached before the issues could be finally settled. The Ninth Circuit held though that the crimes (forced labor) alleged do not require State action and therefore, was not forced to address the first instance's analysis in detail. *See Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002).

[94] 2002 WL 31082956, at 1 (S.D.N.Y.).

[95] *Id.* at 5.

[96] *Id.*

[97] *Id.*

[98] *Jackson*, 419 U.S. at 351; *Blum*, 457 U.S. at 1004; *Moose Lodge*, 407 U.S. at 176; *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–42 (1982). *See also Schwartz & Kirkland, supra* note 30, § 5.11 at 543.

[99] *Blum*, 457 U.S. at 1004; *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson*, 419 U.S. at 357.

[100] *Blum*, 457 U.S. at 1004.

In a series of decisions, the Supreme Court has indicated factors which, established alone, are insufficient to translate private action into governmental conduct through a nexus. First, the mere fact that the private action is subject to State regulations does not by itself translate private action into that of the State even if the regulation is extensive and detailed. *Jackson*,

that courts in recent years have narrowly applied the test, best exemplified by the *Blum* case.[101] In *Blum*, a private nursing home decided that certain residents (the plaintiffs) should be taken to a lower level of care.[102] The plaintiffs brought action against the city alleging a violation of the 14th Amendment as no possibility to an administrative hearing of the concerned residents or an adequate notice of the decisions were provided.[103] They pointed out that the nursing home was fully reimbursed by the government and reviewed its residents and their conditions only in order to stay eligible under the funding program and to comply in detail with its set of conditions.[104] The Supreme Court held that plaintiffs failed to establish State action of the nursing home in ruling that the private decision constitutes a medical judgment according to professional standards not set by State actors.[105]

In *Abdullahi*, the court determined that the cooperation between the government officials and Pfizer as alleged, in particular

> by providing a letter of request to the FDA to authorize the export of Trovan, arranging for Pfizer's accommodation in Kano's IDH, assigning Nigerian physicians to work with Pfizer, back-dating an "approval letter" that international protocol required be ascertained prior to the test, and acting to silence the Nigerian physicians critical of the company's test[106]

suffice to meet the State action requirement.[107] In doing so, the court employed a formulation which was known to be representative of the joint action test rather than the nexus test. This further confirms the view that the tests employed are not that different and may be mere different formulations of the same elements.[108] In respect of § 1983, the Supreme Court has recognized that the different tests may simply be "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court."[109]

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419 U.S. at 351; *Moose Lodge*, 407 U.S. at 176–77. Second and related to the first, a governmental unit may fund and finance private activity such as a school or university without assuming constitutional safeguards for the private entities' actions. *Rendell-Baker*, 457 U.S. at 841; *Blum*, 457 U.S. at 1007–78. Lastly, the "mere approval of or acquiescence in the initiatives" of a private party is not sufficient to classify the private actions as governmental. *Blum*, 457 U.S. at 1004–05; *Jackson*, 419 U.S. at 353; *Flagg Bros. Inc.*, 436 U.S. at 164–65.

[101] *Blum*, 457 U.S. 991. *See also Blum & Urbonya, supra* note 35, at 8.

[102] *Blum*, 457 U.S. at 995.

[103] *Id.* at 996.

[104] *Id.* at 991.

[105] *Id.* at 1008.

[106] 2005 WL 1870811 at 5.

[107] *Id.*

[108] *Id.*

[109] *Lugar*, 457 U.S. at 939.

3. *Symbiotic Relation Approach*

In *Sinaltrainal v. Coca-Cola Co.*[110] where paramilitary units allegedly killed a Coca-Cola bottling employee and unionist, the court employed the symbiotic relationship test.

The symbiotic relationship approach is so closely related to the nexus test that it is difficult to distinguish the two of them.[111] This test asks whether

> the State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been…purely private.[112]

While the test itself emerged from the *Burton* case, the formulation was fleshed out in the court's description of *Burton* in *Moose Lodge*.[113] In *Burton*, an Afro-American was refused service in a restaurant.[114] The restaurant was, together with other stores, in the parking garage building of a City Parking Authority, whose purpose was to provide adequate parking facilities.[115] The relationship was mutually beneficial to all participants. The City Parking Authority leased part of the building for commercial use in view of the fact that the revenues from the parking area were insufficient to finance the construction and operation of the facility. On the other hand, for convenience, customers of the restaurants could use the building to park their cars. Again, the issue was whether the act of the restaurant owner, who claimed that serving an Afro-American would harm his business, could be fairly attributed to the City Parking Authority. The Supreme Court answered this question affirmatively citing the following: (a) the land and the building are government-owned; (b) the restaurant was placed in a public building with a U.S. flag; (c) the leases to private stores and restaurants were an indispensable part of the governmental project; and (d) the City Parking Authority in fact profited from the discrimination.[116] Taken together, these demonstrated a degree of cooperation sufficient to justify a finding of State action.[117] As is true in respect of the nexus test, *Burton* has proven to be a weak precedent which was already reflected in the dissent of Justice Harlan joined by Justice Whittaker and in the concurring opinion of Justice Stewart who determined

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[110] 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

[111] Accordingly, some authors address the two tests together. *E.g.*, *Blum & Urbonya, supra* note 35, at 8–10.

[112] *Burton*, 365 U.S. at 725.

[113] *Moose Lodge*, 407 U.S. at 175.

[114] *Burton*, 365 U.S. at 717.

[115] *Id.* at 717–19.

[116] *Id.* at 724–26.

[117] *Id.*

the statute on which the decision of the Supreme Court of Delaware was based to be unconstitutional.[118] For the time being, although in theory still a good law, the Supreme Court has constantly refused to apply the symbiotic relationship approach.[119] Instead, the court has distinguished every single case on the unique facts that the restaurant in Burton was an "indispensable part of the government project" and the City Parking Authority profited from the discrimination.[120] Recently, the Supreme Court has further weakened the value of its precedent as forming a separate test by depicting *Burton* as one of its "early" State action decisions containing only "vague" joint participation language.[121]

In *Sinaltrainal*, the court held in respect of the paramilitary units which are frequently relied upon by the Colombian government in the fight against left-winged guerrilla:

> The complaint meets the minimum requirement by specifically alleging that the Bebidas plant manager (Mosquera) conspired with the paramilitaries who "were functioning openly in Carepa, and were supported by and received cooperation from the military and police forces in the area such that the paramilitaries were in a symbiotic relationship with the military and police forces in the area" and that the paramilitary "are permitted to exist, openly operate under the laws of Colombia, and are assisted by government military officials." . . . Plaintiffs further allege that the paramilitary has a "mutually-beneficial [sic] symbiotic relationship with the Colombia government's military." . . . These details, if true, establish that the paramilitary murdered Gil under color of law by acting with significant aid from officials of the Colombian government.[122]

The symbiotic relationship test focuses on long-term relationships between the private and the State actor. The test is an option for ATS plaintiffs if a concrete conspiracy or substantial degree of cooperation may be present but cannot be proven in court. Yet, even in these instances, it may be difficult to establish State action. In cases where the main perpetrator is the corporate actor, the likelihood of failure is high. This is particularly true in labor cases and in environmental cases.

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[118] *Id*. at 726–28.

[119] *Schwartz & Kirklin, supra* note 30, § 5.11 at 526 stating: "Although neither *Burton* nor the symbiotic relationship doctrine has been overruled, they have been severely diminished." The Supreme Court assumed State action possibly based on *Burton* only in one case. *Edmonson*, 500 U.S. 614. In this case, a civil litigant's exercise of the peremptory challenge based on the juror candidate's race was found to be not private.

[120] *Rendell-Baker*, 457 U.S. at 842. *See Frazier v. Board of Trustees*, 765 F.2d. 1278, 1278 (5th Cir. 1985); *Vincent v. Trend W. Technical Corp.*, 828 F.2d. 563, 569 (9th Cir. 1987); *Gallagher*, 49 F.3d. at 1451.

[121] *American Manufacturers Mutual Insurance Co. v. Sullivan*, 119 S. Ct. 977, 989–90 (1999).

[122] 256 F. Supp. 2d at 1353. Accordingly, the motion to dismiss was rejected in this regard. *Id*. However, the complaint against Coca-Cola failed for lack of actual involvement. *Id*. at 1354.

For example, if a TNC hires personnel to kill one or several of its workers in order to prevent a unionization of a given plant,[123] the showing of public involvement may be difficult. Further exemplary of this category is the environment-related *Flores* case.[124] In this case, eight residents of Ilo, Peru, representing themselves and deceased Ilo residents, filed an action against the Southern Peru Copper Corporation ("SPCC") in the U.S District Court for the Southern District of New York under ATS.[125] SPCC is a corporation incorporated in the United States with headquarters in Arizona and a principal place of business in Peru, where it has been operating since 1960. Plaintiffs contended that SPCC's mining, refining, and smelting operations emit large quantities of sulfur dioxide and very fine particles of heavy metals into the local air and water.[126] They alleged that SPCC's mining and smelting activities caused their own acute asthma and lung diseases and those of their decedents.[127] The Second Circuit simply dismissed the environmental claims based on the notion that customary international law deals with matters involving State actions (as opposed to private business activities).[128] The Second Circuit was so sure of the result that it did not even attempt to apply the symbiotic relationship or any other test.

4. *Public Function*

As the business of TNCs often involves electric power plants and other industrial projects of great importance for the development of a region, public function might be a reasonably expected factor in cases filed against TNCs. Accordingly, the public function test is mentioned and referred to in many ATS cases. So far however, no court has substantially based its holding on the test, a fact which can be explained by the perception that many courts perceive all § 1983 tests as interchangeable.[129] If a State actor delegates to a private actor functions which are traditionally and historically reserved

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[123] *See infra* Chapter Four: Labor Standards.

[124] *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

[125] Another case of Ilo residents against SPCC was originally brought under Texas state common law. However, the case was removed to Texas federal court based on federal question jurisdiction and diversity jurisdiction under 28 U.S.C. §§ 1331 and 1332. *See Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 895 (S.D. Tex. 1995). In these proceedings, the plaintiffs did not plead a claim under ATS. The district court dismissed the state court claims based on the doctrine of forum non conveniens and comity of nations. *Id.* On appeal, the Fifth Circuit affirmed the dismissal in both respects. *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997). The case was then refiled with other residents in New York based on ATS.

[126] 343 F.3d at 143.

[127] *Id.*

[128] *Id.* at 155.

[129] *Doe v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997).

to the government, the acts of the private actor are attributable to the State under the public function test of § 1983.[130] The test is founded on the premise that a government should not escape its constitutional checks and statutory restraint in carrying out its functions by outsourcing its essential functions to a private entity.[131]

5. *Proximate Cause Test*

Sarei v. Rio Tinto involving the alleged suppression of the Papua New Guinea island inhabitants of Bougainville opposing large scale mining by Rio Tinto resulting in a bloody war was finally dismissed under the political question doctrine, act of state doctrine, and comity principles.[132] Upon ruling on the motion for summary judgment, Judge Morrow of the Central District of California stated that the allegations were sufficient to support a finding of "proximate cause".[133]

As a key component of color of law jurisprudence, several circuits, in particular the Ninth Circuit where the *Sarei* court is, advance proximate cause principles[134]

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[130] *See Schwartz & Kirklin, supra* note 30, § 5.13 at 532.

[131] *Id.* In recent times, the Supreme Court has narrowed down the concept by demanding that the function must be "the exclusive prerogative of the state". *Jackson*, 419 U.S. at 352; *Rendell-Baker*, 457 U.S. at 842; *Blum*, 457 U.S. at 1011; *Flagg Bros. Inc.*, 436 U.S. at 155. Accordingly and similar to the symbiotic relationship approach, this test is extremely difficult to satisfy. *See Gallagher*, 49 F.3d at 1457. *See also, Blum & Urbonya, supra* note 35, at 10–11. The court has declined to determine exclusive governmental function in numerous cases for a wide range of facts. In *Jackson*, a customer of a privately owned corporation, which held a certificate from the competent authorities, brought action under § 1983 after her electric service was terminated without adequate notice and administrative hearing. 419 U.S. at 352–53. She argued, inter alia, that providing electricity is an essential public function which subjected the company to constitutional restraints. The Supreme Court noted that they were not dealing with "some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain", *id.* at 353, and pointed to state court decisions holding that electricity as a service is neither a state nor a municipal function, *id.* at 455, *citing Girard Life Ins., Annuity & Trust Co. v. City of Philadelphia*, 88 Pa. 393 (1879); *Baily v. City of Philadelphia*, 184 Pa. 594, 39 A. 494 (1898). As a result, the court did not find color of law. *Id.* at 358–59.

[132] 221 F. Supp. 2d 1116 (C.D. Cal. 2002). *See infra* Chapter Twelve: Nonjusticiability Issues regarding the political question, act of state, and comity doctrines.

[133] 221 F. Supp. 2d at 1149.

[134] *See The Restatement of the Law (Second) on Torts* (1963–64) which provides:

> § 431. What Constitutes Legal Cause.
>
> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm.
>
> Comment declares the concept of legal cause equally applicable to international causation of harm.

derived from ordinary torts law[135] in deciding whether a private actor was acting under the color of law.[136]

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[135] In ordinary torts law, two schools of thought have dominated the teaching and jurisprudence concerning the concept of proximate cause although there are countless variations on the topic. *Cf.* Robert E. Keeton, "Legal Cause in the Law of Torts" 79–81 (1963). For the first approach, the keystone of the concept is foreseeability. Kenneth S. Abraham, *The Forms and Functions of Tort Law* 119 (2000). In torts law, it is said, the scope of liability should extend to but not beyond the scope of risks which are foreseeable and can therefore be reasonably expected to be avoided. *Id.* The second theory captures the issue as a matter of duty. William Lloyd Prosser & Page Keeton, *Prosser and Keeton on Torts*, 273–74 (W. Page Keeton ed., 1984). The question is whether the defendant in the concrete case under the concrete circumstances was under a duty to protect the plaintiff against the event which in fact occurred. *Id. See also* Leon A. Green, *Rationale of Proximate Cause* 11–43 (1927); Richard V. Campbell, "Duty, Fault and Legal Cause", 1938 *Wis. L. Rev*. 402 (1938); E. Wayne Thode, "Tort Analysis: Duty-Risk v. Proximate Cause and Rational Allocation of Functions between Judge and Jury", 1977 *Utah L. Rev*. 1 (1977).

The often-cited landmark case on proximate cause is *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), *reargument denied*, 249 N.Y. 511, 164 N.E. 564 (1928), in which the issue reached the most excellent of all state courts at the time presided by legendary Judge Cardozo. *Prosser & Keeton supra* note 135, at 285. This is probably the most debated and discussed torts case in the history of the United States. See, e.g., citations in *Prosser & Keeton, id.*: Leon A. Green, "The Palsgraf Case," 30 *Colum. L. Rev*. 789 (1930); Arthur L. Goodhart, "The Unforeseeable Consequences of Negligent Act," 39 Yale L.J. 449 (1930); Thomas A. Cowan, "The Riddle of the Palsgraf Case," 23 Minn. L. Rev. 46 (1938); Charles O. Gregory, "Proximate Cause in Negligence – A Retreat from Rationalization," 6 U. *Chi. L. Rev*. 36 (1938); Warren A. Seavey, "Mr. Justice Cardozo and the Law of Torts", 52 *Harv. L. Rev*. 372 (1939); Albert. A. Ehrenzweig, "Loss-Shifting and Quasi-Negligence", 8 U. *Chi. L. Rev*. 729 (1941); Clarence Morris, "Duty, Negligence and Causation", 101 *U. Pa. L. Rev*. 189 (1952); Fleming James, "Scope of Duty in Negligence Cases", 47 *Nev. U. L. Rev*. 778 (1953).

The factual picture before the court was as follows: A passenger was rushing on the platform to catch one of the trains of the defendant, a railroad company. 248 N.Y. at 340. The defendant's servants, trying to assist the passenger in boarding the train, dislodged a package which contained fireworks from the passenger's arm and let if fall upon the rails where the fireworks fiercely exploded. *Id.* at 340–41. The explosion caused the overturn of some scale on the platform which fell down on the plaintiff and injured her. *Id.* at 341. Accordingly, the defendant's servants, who the jury found to be acting negligently, could have foreseen damage to the package, or even to the passenger they were assisting, but they could not possibly foresee the harm incurred by the plaintiffs due to the firework's explosion resulting in the overturn of scales. *Id.* Thus, the specific issue raised was whether the defendant's servants' conduct was the proximate cause of the injuries sustained by the plaintiff. Judge Cardozo, writing for the majority of four judges of the court, proclaimed that there was no proximate cause, and thus no liability, because there was no negligence, he said, towards the plaintiff. *Id.* Negligence, he stated, rests on a relation between the wrongdoer and the injured party through the foreseeability of the harm to the person in fact injured. *Id.* at 344. He stressed that the servants' conduct was not a tortuous wrong towards the plaintiff just because it was negligent towards a third party, the passenger who wanted to board the train. *Id.* In his famous words, he declared that she must "sue in her own right for a wrong

It is common knowledge in American torts law that even if the plaintiff has proven that the defendant was negligent or engaged in a tortuous activity, that the plaintiff sustained the injury, and the defendant's acts constitute a cause in fact of the plaintiff's injury or damage, liability is not imposed unless the defendant's actions were the "proximate cause" of the plaintiff's injury.[137] Although the concepts of causation in fact and proximate cause are often (at least verbally) intermingled, this is primarily a question of law.

The application of the common law principles of proximate causation confirms the categorization of 42 U.S.C. § 1983 by the Supreme Court as "a species of tort liability"[138] and should be read against the background of tort liability.[139] Some circuit courts, however, impose a higher standard of proximate cause under § 1983.

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personal to her, and not as the vicarious beneficiary of a breach of a duty to another." *Id*. Three judges dissented. Judge Andrew expressed their objections that "[d]ue care is a duty imposed upon each one of us to protect the society from unnecessary danger, not to protect A, B or C alone.... Every one owes to the world at large the duty of refraining from those acts which unreasonably threaten the safety of others.... Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what can generally be thought the danger zone." *Id*. at 345.

[136] Compare the Ninth Circuit dictum in *Van Ort v. Estate of Stanewich* that "although state action and causation are separate concepts,... elements of the causation analysis have been used in determining state action." 92 F.3d 831, 836 (9th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

[137] In effect, after other prerequisites to liability are satisfied, the doctrine of proximate cause works as a limitation to legal responsibility. The terminology as such can be traced back to Lord Chancellor Bacon, who stated in his Maxims of the Law that: "In jure non remota causa, sed proxima, spectator" (In law the near cause is looked to, not the remote one). *Cf.* James Bacon, *The Element of the Common Laws of England* (1630): "Reg. I. It were infinited for the law to judge the causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree."

[138] *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). *See City of Montgomery v. Del Monte Dunes at Monterey*, 526 U.S. 687, 727 (1999); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Wyatt v. Cole*, 504 U.S. 158, 163 (1992); *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 (1986); *City of Oklahoma v. Tuttle*, 471 U.S. 808, 838 (Stevens, J., dissent) (1985); *Smith v. Wade*, 461 U.S. 30, 33 (1983); *Martinez v. State of California*, 444 U.S. 277, 285 (1980); *Carey v. Piphus*, 435 U.S. 247, 253 (1978). *Cf. Hague v. Committee for Industrial Organization*, 307 U.S. 496, 507 (1983), with regard to the predecessor of § 1983. However, generally, in the overwhelming majority of torts proceedings, proximate cause is not even an issue. Richard E. Epstein, *Cases and Materials on Torts* 118 (2000).

[139] *Monroe*, 365 U.S. at 187. *See Pierson v. Ray*, 386 U.S. 547, 556 (1967); *Rizzo v. Goode*, 423 U.S. 362, 384 (1976); *Paratt v. Taylor*, 451 U.S. 527, 535 (1981); *Malley v. Bricks*, 475 U.S. 335, 345, n. 7 (1986). In *Martinez v. State of California*, 444 U.S. 277 (1980), the Supreme Court decided that a parole board is not responsible for the death of a victim killed by a parolee who was released by the board five months before the crime was committed. *Id*.

The Fifth Circuit, for example, held in *Doe v. Rains County Independent School* that causation under § 1983 is "not to be gauged by the standards of ordinary tort law.... Indeed, this requirement of a causal connection in a § 1983 action often may have the practical effect of imposing a heightened standard of proximate cause."[140] While the exact scope of the requirement remains uncertain, in particular in instances where the wrong was committed by State officials yet this perpetration was in one way or another prompted previously by a private party's action, the standard is viable.[141]

The leading precedents in the Ninth Circuit where the higher standard of proximate cause mainly developed and eagerly applied by courts and of which, courts faced with ATS proceedings have so far expressed their willingness to apply such approach are *Arnold v. IBM*[142] and *King v. Massarweh*.[143] In the *Arnold* case, the defendant, the president of a minor competitor of IBM, brought action under § 1983 because of IBM's involvement in the prosecutorial investigation against him. The IBM initiative to detect a leak on classified industrial product information had led to the establishment of a special police task force which illegally searched and arrested Arnold.[144] As the starting point of its analysis, the court emphasized that "[t]he causation requirement of § 1983... is not satisfied by a showing of mere causation of fact. Rather, the plaintiff must establish proximate or legal causation."[145] While the court stressed that proximate cause implies the foreseeability common in

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at 285. According to the court, although under tort law principles, the board undoubtedly had a duty to avoid the death of the victim, the board did not participate in the crime or at least, did not deprive the victim of his life. *Id*. Rather, the cause of the death was the released criminal. Therefore, the Supreme Court stated that the victim's death "was too remote a consequence of the parole officers' action to hold them responsible". *Id*. The court, however, left the question open if and how a parole officer could ever be held responsible for the crimes committed by the parolee after his release. *Id*. Later decisions unequivocally read *Martinez* as requiring proximate causation in order to establish a cause of action under § 1983. *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which states that the "causal connection" in *Martinez* is "too attenuated"; *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989), which cited *Martinez* and held that proximate cause is a necessary requirement under § 1983.

[140] 66 F.3d. 1402, 1414 (5th Cir. 1995), *citing Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d. 745, 755 (5th Cir. 1993). See also the clarification of the Ninth Circuit in *Van Ort v. Estate of Stanewich*: "[A]lthough state action and causation are separate concepts,... elements of the causation analysis have been used in determining state action." 92 F.3d at 836.

[141] *See* Forcese, *supra* note 83, at 505.

[142] 637 F.2d. 1350 (9th Cir. 1981).

[143] 782 F.2d. 825, 829 (9th Cir. 1986).

[144] 637 F.2d. at 1352.

[145] *Id*. at 1355.

torts law, it continued to require the plaintiff to show that IBM "had some control or power over the Task Force, and that defendants directed the Task Force to take action against Arnold."[146] The court emphasized that IBM, although "certainly more than just a complaining witness",[147] had not "exerted any control over the decision making of the task force" and concluded that proximate cause did not exist.[148] Despite some criticism,[149] the Ninth Circuit affirmed the requirement of control by the private actor over the government official for purposes of § 1983 litigation in *King v. Massarweh* wherein a dispute between a landlord and tenants prompted the former to call the police who searched the apartment and arrested the tenants after being told that they did not belong to the premises.[150] The Ninth Circuit remarked that the dismissal of the case against the landlord under § 1983 was proper since nothing indicated control exercised over the police by the landlord.[151]

In the *Sarei* case, without further amplification on the issue of the accurate standard of proximate cause, Judge Morrow of the Central District of California simply determined that plaintiffs had asserted control by the TNC Rio Tinto over the government of Papua New Guinea because of alleged threats of withdrawal by the company from Papua New Guinea and the large dependency of the government on the incomes generated from the mine in Bougainville.[152] Specifically, plaintiffs declared that the fact that the largest copper mine in the world provided 18 percent of Papua New Guinea total

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[146] *Id*. at 1355–56.

[147] *Id*. at 1357.

[148] *Id*.

[149] The precedent of the Ninth Circuit has not been equally welcomed by all courts. For example, the Seventh Circuit in *Tidwell v. Schweiker* weakened the precedent's value, a case in which a set of state and federal rules resulted in violations of the supremacy clause and due process standards under the Constitution. 677 F.2d 560 (7th Cir. 1982). On appeal, the state defendant argued, citing *Arnold*, that the illegal element of the procedure was within the exclusive control of the federal, not state, defendants, and the latter therefore, could not be held responsible. *Id*. at 569. The court did not follow this argumentation. Instead, the Seventh Circuit distinguished *Arnold* factually on the ground that in *Arnold*, the constitutional violation was not a foreseeable outcome, whereas in *Tidwell*, the state "set in motion a series of acts when the [state defendants] knew or should have known that a constitutional injury was the only reasonable outcome." *Id*. at 569, n. 12. Secondly, the court held that "it was not necessary for the state defendant to have had control over the illegal procedures when the [state] willingly participated in and benefited from the procedures." *Id*. Therefore, the case seems to suggest that the *Arnold* case should be read as based on the traditional foreseeability approach.

[150] 782 F.2d. 825.

[151] *Id*. at 829.

[152] 221 F. Supp. 2d at 1148.

revenue during the period of its operation, 36 percent of its export earnings, and 10 percent of gross domestic product puts the government of Papua New Guinea under the control of Rio Tinto.[153]

IV. *Practical Abandonment of Violation of International Law-Requirement?*

What has been presented above shows that although the state action requirement as applied to ATS cases is by no means insurmountable, it may nonetheless in many cases constitute a difficult hurdle for plaintiffs targeting TNCs in terms of being able to provide the necessary evidence of cooperation between a TNC and state actors.

Therefore, since the State action requirement cannot be fully eliminated given ATS's wording, one would need to look for legal constructs in international law under which State action would be at least de facto meaningless, in other words, always present in ATS cases.

Such approach would, on the one hand, correspond to the emergence of soft law initiatives and codes of conduct which aim at the further development of corporate responsibility.[154] In fact, one would codify all codes of conduct *uno actu* into binding law in the United States under ATS because codes of conduct typically impose human rights, labor, and environmental standards typically applicable to States on TNCs.[155] On the other hand, such approach would also align with economic thinking: Under an economic theory of law (a theory which has given the leading rationale for the application and development of torts law in the United States in the last decades),[156] the externalization of

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[153] *Id*. at 1148–49, 1126, n. 60

[154] *See, e.g.*, Diana Woodhouse, "Delivering Public Confidence – Codes of Conduct, A Step in the Right Direction", *Pub. L.* 511, *passim* (2003). The following are critical of the approach: Wilhelmus J. van Genugten & Sophie C. den Dekker-van Bijsterfeld, "Codes of Conduct for Multinational Enterprises – Useful Instruments or a Shield against Binding Responsibility?", 7 *Tilburg Foreign L. Rev*. 161, *passim* (1998); Johanna Elisabeth Maria Kolk et al., "International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?", 8 *Transnat'l Corps.* 143, *passim* (1999).

[155] *Cf., e.g.*, Organisation for Economic Co-operation and Development, OECD Guidelines on Multinational Enterprises (Revision 200), IV, V, *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 5 August 2006).

[156] For the notion of shaping the law of torts in order to increase economic efficiency and overall wealth, *see generally* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987).

costs onto the population of developing countries through the commission of human rights violations are welfare-reducing and therefore, sub-optimal.

In order to minimize the actual impact of the state action requirement in ATS cases, two options appear possible. These options would, by their very wording, maintain the State action requirement but which, in fact, i.e., for all practical purposes, abolish it. Both concepts have not yet been tested in ATS litigation.

A. *Host State Responsibility by Omission*

One option to effectively abandon the State action requirement for purposes of ATS could be the doctrine of State responsibility by omission. In human rights law, the State incurs a triad of obligations: a duty to respect, a duty to protect, and a duty to fulfil human rights.[157] Article 2 of the International Covenant on Civil and Political Rights ("ICCPR") obliges State parties to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant".[158] The Human Rights Committee, which is in charge of ensuring States' compliance with the ICCPR, has recognized in its General Comment No. 6 that "states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing loss of life".[159] It has held in several decisions that a State has failed to fulfil its obligations under the ICCPR by not protecting individuals from other individuals.[160] As to the right to privacy for example, the Human Rights Committee has declared that States incur an obligation to establish the necessary legal framework for the effective prohibition of private acts constituting arbitrary and unlawful interference with privacy, family, home, or correspondence.[161] Accordingly, implicit in the obligation to protect is the duty to regulate and supervise private actors, including TNCs. Similarly, the Committee on Economic, Social and Cultural Rights, which monitors the application of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") has declared

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[157] Asborn Eide, "Economic, Social and Cultural Rights as Human Rights," in *Economic, Social and Cultural Rights: A Textbook* 9, 23 (Asborn Eide et al., eds., 2001); Paul Hunt, *Reclaiming Social Rights* 31–34 (1996).

[158] 9 December 1966, 999 U.N.T.S. 171.

[159] Human Rights Committee, General Comment 16, *in* Report of the Human Rights Committee, U.N. GAOR, 43rd sess. Annex VI, U.N. Doc. A/43/40 (1988).

[160] For a thorough review of the Human Rights Committee's practice, *see* Eckart Klein, "The Duty to Protect and to Ensure Human Rights under the International Covenant on Civil and Political Rights," in *The Duty to Protect and to Ensure Human Rights* 295 (Eckart Klein ed., 1999).

[161] *Id*. at 69.

that ICESCR obliges State parties to prevent the violation of the rights covered through private parties.[162] For example, on the right to water, the committee held that the State has an obligation to prevent private companies from "compromising equal, affordable, and physical access to sufficient, safe and acceptable water".[163] Within regional human rights instruments, a similar approach is also visible.[164] For example, the African Commission in the report *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, the very facts of which gave rise to the ATS case against Shell involving the violation of human rights and environmental destruction to the homeland of the Ogoni People in the Nigerian River Delta, explicitly held that the government of Nigeria had breached its duty to protect the people of Ogoni from the acts of oil companies, including Shell, by failing to regulate and control the TNC activities and by allowing the infringement of rights without legal recourse.[165]

The situation under customary international law though is less clear.[166] With respect to mass violence and mass destruction, the law on this point may be sufficiently universally recognized.[167] It appears that as of today, such argument has not been put forward by plaintiffs in ATS litigation.[168] Given the uncertainty under international customary law, however, it is not likely that courts would adopt such reading.

B. *Home State Responsibility*

The second option to effectively abandon the state action requirement could be to establish state action by imposing liability on the home State of the TNC. Traditionally, States are only responsible for breaches of human rights law within their respective territories. Article 2(1) of the ICCPR mirrors this classic understanding in stipulating that a State Party has a duty to respect and ensure the rights covered to all individuals "within its territory and subject to its jurisdiction". However, prominent international law scholar Ian

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[162] Chirwa, *supra* note 55, at 12.

[163] Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15: The Right to Water*, U.N. ESCOR, 29th Sess., Agenda Item 3, U.N. Doc. E/12/2002/11 (2002).

[164] Chirwa, *supra* note 55, at 13.

[165] African Commission, *Communication No. 155/96*, 59–60 (2001).

[166] For the treaty alternative of ATS, *see supra* Introduction.

[167] *Cf.* Sarah Joseph, *Corporations and Transnational Human Rights Litigation* 39 (2004), who puts big hopes on this line of thinking.

[168] *See also id.*

Brownlie already stated in the 1980s that this principle is "open to serious question and can operate, if at all, only as a weak assumption."[169] In addition, recent research by international lawyers has clarified that within international law the principle of home State responsibility has gained momentum.[170] The Human Rights Committee, which monitors compliance with the ICCPR, held in *Lilian Celiberti de Casariego v. Uruguay* that article 2(1) ICCPR "does not imply that the State Party concerned be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State" and arguing that it would be "unconscionable to so interpret the responsibility…to permit a State party to perpetrate violations…on the territory of another State, which violations it could not perpetrate on its own territory".[171] The ruling is placed within the responsibility of a State for the acts of state organs abroad. It could however be read as to similarly apply in the context of state responsibility for private acts abroad. The afore-mentioned *Nicaragua Case* confirms this view. In this case, the breaches of international law occurred in Nicaragua by a private rebel group, but the State whose responsibility for the acts was at stake was the United States.[172] The focus on home State responsibility should be seen behind the background of the north-south divide and the weak rule of law in many developing countries which renders the responsibility of an additional State attractive from the viewpoint of effective implementation of human rights law.[173] Indeed, in this context, ATS litigation against TNCs itself is being cited as an indication of this current trend.[174] In this sense, the concept may even be shakier under customary international law than the one on host State responsibility. Many questions have not even been addressed, for example, the issue of possible dual responsibility of the home and host States and the legal relationship between the concurrent obligations needs to be resolved.[175] Therefore, the chances of success in using this option are even lower.

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[169] Ian Brownlie, *System of the Law of Nations* 165 (1983).

[170] Chirwa, *supra* note 55, at 20.

[171] Human Rights Committee, *Communication No. 56/1979*, U.N. Doc. CCPR/C/13/D/5671979 (29 July 1981).

[172] *See* 1986 I.C.J. 14, 64.

[173] Chirwa, *supra* note 55, at 29.

[174] *Id.*

[175] In addition, in respect of ATS litigation, the danger of circular argumentation is always present.

V. Impact of Sosa *and Post-*Sosa *Developments*

The Supreme Court did not elaborate on state action in *Sosa*. However, it noted in footnote 20 that a "consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual".[176]

After *Sosa*, a district court held in *Doe v. Exxon Mobil Corp.* that recognizing acts committed under the color of law would run afoul with the warnings of the practical consequences uttered by the Supreme Court and would "end-around the principle that most violations of international law can be only committed by states".[177] The district court in *Bowoto v. Chevron* took a similar approach, stressing that the color of law jurisprudence developed under § 1983 is not a well-developed norm of international law.[178] Thus, post-*Sosa* courts appear to reject color of law principles for purposes of ATS. The problem is that international law is largely silent on the responsibility of private actors which cooperate with state officials in the violation of international law (beyond international criminal law). The *Bowoto* court felt the inadequacy of its result when in a later decision, it relied on aiding and abetting liability, holding that ATS courts must draw on federal common law and stressed that there are well-settled theories of vicarious liability under federal common law.[179] This is supported by the Ninth Circuit's analysis on appeal in *Sarei v. Rio Tinto, PLC*, where it stated that "courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law"[180] and holding that it had jurisdiction over plaintiffs' claims, including a discrimination claim.[181] Similarly, Judge Katzmann explained in *Khulumani v. Barclay National Bank* that recognized "aiding and abetting liability" for private actors does not undermine the state action requirement as accessorial liability presupposes a principal offense (by a state actor).[182] Thus, it appears that vicarious liability under ATS will be determined alike for those norms of international law that require state action and those which do not.[183]

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[176] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733, n. 20.
[177] 393 F. Supp. 2d 20, 26 (D.D.C. 2005).
[178] Civ. No. 99–02506, 206 US Dist. LEXIS 63209, at 26 (N.D. Cal. 21 August 2006).
[179] *Bowoto v. Chevron Corp.*, 2007 WL 2349341, at 7 (N.D. Cal. 14 August 2007).
[180] *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (2007).
[181] *Id.* at 1200–03.
[182] *Khulumani v. Barclays National Bank Ltd.*, 505 F.3d 254, 281 (2007).
[183] *See infra* Chapter Eight: Norms that Can Be Violated by Everyone.

VI. *Conclusions*

Since international law still largely regulates the conduct of States, it is clear that the overwhelming majority of international law norms apply exclusively to States. Accordingly, TNCs can only be held responsible under ATS, which requires a violation of international law, if they cooperate with State actors in such a violation.

The question then is what standard(s) should be applied to determine such cooperation. In *Kadic*, the Second Circuit suggested 42 U.S.C. § 1983 color of law jurisprudence to determine State action in relation to a violation of international law. In U.S. legal culture, the norm is a civil rights statute which allows suits even against private persons as long as they were acting "under the color of law". This seems sound since the TVPA likewise contains a color of law requirement and even under ATS, a tort remains the basis of liability. It is thus not surprising that in the aftermath of *Kadic*, courts, by and large, followed the guidance given by the Second Circuit.

In the concrete determination of State action, courts typically rely on established § 1983 color of law jurisprudence. Among the tests employed, the joint action test appears to be the most popular among courts. But courts also employ other tests such as the nexus approach, the symbiotic relationship approach, the public function approach, and the proximate cause test. This flexibility is furthered by the fact that these tests are usually treated as interchangeable formulations of one single test.

More accurate from the viewpoint of international law would be the application of international law on state responsibility. However, many international rules were not drafted within the context of a TNC investor-State relationship and may not adequately regulate the factual patterns alleged in ATS cases involving TNCs. In particular, given the power and size of TNCs, the effective or overall control requirement of the private actor by the State precludes any liability. In practice, it may rather be the TNC which controls the government than vice versa. In addition, after having found a violation of international law attributable to the State, courts would still need to turn to § 1983 for the exact legal responsibility since individual responsibility is still left to domestic law. Accordingly, domestic rules may be the better suitable regime for a domestic statute like ATS. Generally, with the increasing overlap and interaction between private and public international law during the last decades, total convergence is an ideal but which may not be realistically achievable.

With such limited account for international law, the question is whether the requirement of a violation of international law should be totally abolished. Yet, while the clear wording of ATS inhibits such solution, practical

approaches may come close to the abolition option. This option is the host and/or home State responsibility due to the omission to protect its citizens from the wrongdoing of the TNCs. However, such concept has not yet been tested under ATS. Post-*Sosa* judgments indicate that the distinction between norms that require state action and those that do not may be fully abolished. Vicarious liability would then be measured based on the same rules.[184]

[184] *See* Chapter Eight: Norms that can Be Violated by Everyone.

Chapter Eight

Norms that Can Be Violated by Everyone

I. *Introduction*

While it cannot be overstated that most norms of international apply exclusively to States and their actors,[1] some norms of international law, particularly in the field of international criminal law, apply to all actors regardless of the private or public nature of their undertaking. In such instances, whether the TNC cooperated with State actors in the violation or not, the norm applies to the former if the elements of the norm are met.[2]

This chapter explores the regime of TNC liability through norms that can be violated by States as well as private actors. Part II analyzes the norms identified by ATS courts as falling within the category of norms not requiring State action. Part III evaluates what modes of participation (triggering liability) apply in respect of these norms and the methodology to be employed in determining them. From all possible modes of participation, aiding and abetting (where the main perpetrators are State officials or military personnel) is the most critical from TNCs' perspective since they capture corporate wrongdoing which may be far removed from the action of the main perpetrators.

II. *Recognized Exceptions*

In *Kadic v. Karadzic*, after proclaiming the recognized general rule that international law applies only to States, the Second Circuit did not stop at this point.[3] In accordance with the developments undertaken and progress

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[1] Nonetheless, it cannot be overstated that most norms of international law apply only to States and their officials. *See supra* Chapter Seven: Norms that Can Be Violated Only by State Actors. For the overwhelming majority of international norms, participation and liability is determined by reference to 42 U.S. § 1983 litigation. *See id. passim*.

[2] Under the premise that the norm applies to TNCs for purposes of ATS, *see supra* Chapter Six: Application to TNCs.

[3] 70 F.3d 232, 239 (2d Cir. 1995), *cert. denied*, 116 U.S. 2524 (1996). *See supra* Chapter Seven: Norms that Can Be Violated Only by State Actors.

made in international law, the decision continued to elaborate on the possible exceptions to the aforesaid rule:

> We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.[4]

A. *War Crimes and Genocide*

In particular, the Second Circuit held that under current international law, genocide and war crimes under the common article 3 of the Geneva Conventions are exceptional in that they could be typically infringed by private actors (regardless of State involvement).[5]

In support, Judge Newman, writing for the court, put forward the following arguments. First, he pointed to an early recognition of the application of international law to private individuals in U.S. case law explaining that the prohibition against piracy had been recognized by a number of U.S. Supreme Court precedents.[6] He noted that in *The Brig Malek Adhel*, the Supreme Court declared that pirates were "hostis humani generis" (an enemy of all mankind).[7] Relying on the works of two prominent international law scholars, M. Cherif Bassiouni[8] and Jordan Paust,[9] he went on to add that slave trades and war crimes would constitute later examples of this category of international law.[10] Second, Judge Newman relied on § 404 of the Restatement of the Law, Third, Foreign Relations Law of the United States ("Restatement"), which states, in accordance with international law, that certain offenses are 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."[11] According to the Second Circuit, while § 404 primarily

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[4] 70 F.3d at 239.

[5] *Id.* For the full titles and citations of the Geneva Conventions, *see supra* Chapter Two: International Criminal Law, n. 138.

[6] *Id., citing United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196–97 (1820).

[7] *Id.* at 239, *citing The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844). None of the decisions, however, are based on ATS.

[8] M. Cherif Bassiouni, *Crimes against Humanity in International Law* 193 (1992).

[9] Jordan Paust, "The Other Side of Right: Private Duties under Human Rights Law", 5 *Harv. Hum. Rts. J.* 51 (1992).

[10] 70 F.3d at 239.

[11] Restatement of the Law, Third, Foreign Relations Law of the United States (1987). Section 404 of the Restatement reads as follows:

restates international law on universal jurisdiction in respect of certain crimes regardless of nationality or territory, "the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of 'universal concern' include those capable of being committed by non-state actors."[12] Third, Judge Newman, pointing to historic evidence, relied upon the opinion of Attorney General Bradford relating to acts of American citizens aiding the French fleet in plundering British property off the coast of Sierra Leone in 1795 in which the Executive Branch itself, as early as 1795, recognized violations by private actors as actionable under ATS.[13] Fourth and related to the third reason, Judge Newman pointed to the Statement of Interest by the United States in the case at hand, in which the Executive Branch strongly took the position of private liability for acts of genocide, war crimes, and other violations of international humanitarian law.[14] Fifth, as to precedents which could be interpreted as pointing to another direction, *Filártiga v. Peña-Irala*[15] and *Tel-Oren v. Libyan Arab Republic*,[16] Judge Newman distinguished them on the grounds that *Filártiga* exclusively dealt with torture committed by a public official and did not imply any holding on the separate and distinct issue of private liability and *Tel-Oren* on the basis that the opinion merely negates private liability for torture by a private actor but does not deny the general possibility of private responsibility under international law.[17] Finally, the argument of the defendants that ATS's scope was reduced by the enactment of the Torture Victim Protection Act ("TVPA")

> Universal Jurisdiction to Define and Punish Certain Offenses: 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.

Section 402 of the Restatement provides for the conventional bases to prescribe jurisdiction, such as territorial sovereignty.

[12] 70 F.3d at 240. The Introductory Note to the Restatement declares in this regard that "[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes and genocide." Restatement, *supra* note 11, pt. II, introductory note.

[13] 70 F.3d at 240. In *Sosa v. Alvarez-Machain*, the Supreme Court also referred to the opinion of Attorney General Bradford in its historic analysis of ATS. 124 S. Ct. 2739, 2758 (2004). *See generally* Chapter One: Actionability Standards.

[14] 70 F.3d at 239–40.

[15] 630 F.2d 876 (2d Cir. 1980). *See supra* Introduction; Chapter One: Actionability Standards; Chapter Three: Civil and Political Rights.

[16] 726 F.2d 774 (D.C. Cir. 1984). *See supra* Chapter One: Actionability Standards.

[17] 70 F.3d at 240.

was rejected based on the legislative history of the statute showing that the new act was meant as a mere supplement to the ATS.[18]

From the viewpoint of international law and for purposes of determining TNC liability, it is in international criminal law where it is well-settled that the core crimes of genocide and war crimes do not require State action any more. The positivist argument is that the statutes of the current international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC"), are generally silent on State action.[19] The non-positivistic argument is the belief among States which emerged after World War II that international criminal law norms take such a high rank that they should apply to everybody, even to mere private actors.

In sum, the *Kadic* decision established in accordance with international criminal law the principle that for certain categories of wrongs, including genocide and war crimes, actors may be held liable regardless of the official or private nature of their act under ATS. As a result, the judgment of the district court, which dismissed the claims of genocide and war crimes for lack of subject matter jurisdiction,[20] was reversed and the case was remanded for further proceedings.[21]

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[18] *Id.* at 241.

[19] However, for violations other than these, an evaluation is difficult. In particular, it seems that the so-called historical paradigms of slavery and piracy as private actor violations of international law seem to be recognized only within common law countries but less in civil law countries. *See* James Leslie Brierly, *The Law of Nations* 311 (1963), who speaks with regard to piracy as an "ancient rule of maritime law".

The main reason for this uncertainty is that many international agreements contain wording that implies a direct obligation on private parties. Overall however, other provisions of the texts are usually read to indirectly affect private parties through direct obligation of State parties to regulate the covered private activities. E.g., it is said that the International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, art. 1(2), *available at* http://admiraltylawguide.com/conven/civilpol1969.html (accessed 17 September 2006) and the Convention on the Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993, art. 2, 6 Eur. T.S. No. 150, *available at* http://conventions.coe.int/treaty/en/Treaties/Word/150.doc (accessed 17 September 2006) directly regulate private parties. *See* David Kinley & Junko Tadaki, "From Talk to Walk, The Emergence of Human Rights Responsibilities for Corporations at International Law", 44 *Va. J. Int'l L.* 931, 946–47 (2003–2004). However, the conventions can also be read as obliging States to regulate and control private parties.

[20] *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

[21] 70 F.3d at 251. The proceedings ended with awards for the plaintiffs. *See* David Rohde, "Jury in New York Orders Bosnian Serb to Pay Billions", *NY Times*, 26 September 2000, at A10.

B. *Crimes against Humanity*

In *Wiwa v. Royal Dutch Petroleum Co.* involving the suppression of the Ogoni People in the furtherance of oil production in the Nigerian Delta, Judge Wood ruled that crimes against humanity fall within the general category of international torts which require State action without any further explanation.[22] In doing so, he followed a minority view in current international law.[23] The prevailing view in international law today is that no State action is required in respect of crimes against humanity. Supporting this view are the statutes of the above-mentioned international criminal tribunals, the wording of which are silent on the State action requirement as is true for genocide and war crimes which are recognized by ATS jurisprudence as not requiring State action. Indeed, the ICTY held that a "state policy" was (only) required as part of the crime during and in the aftermath of World War II but stressed that the tribunal needs to abide by international law as it stands today.[24] Further, in the Nuremberg trial, genocide, which, undisputedly does not require State action, was punished as a crime against humanity.[25] Thus, many scholars argue that the State action requirement is not necessary and that it would be illogical to require State action for crimes against humanity but not for genocide.[26]

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[22] *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at 9 (S.D.N.Y.).

[23] As to the arguments of the minority view, *see* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 64–67 (1997).

[24] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment of 7 May 1997, paras. 633–34, *reprinted in* 36 I.L.M. 908, 944–45 (1997). The evolutionary concept of international law in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, suggests the adoption of this modern understanding. On the other hand, if one perceives crimes against humanity as an international crime directed against the typically occurring abuses during the reign of a totalitarian regime as opposed to genocide which protects the right of a group to exist, as others scholars do, it might be reasonable to conclude that state action is the distinguishing feature between them.

[25] *See* Nuremberg Charter, London Agreement of 8 August 1948 for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c) *reprinted in "The Medical Case", I Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* IX–XIV at X (1950). The London Agreement provided for the establishment of an international tribunal for the trial of war criminals whose offenses have no particular location.

[26] *See, e.g.*, Leila Nadya Sadat & S. Richard Green, "The International Criminal Court: An Uneasy Revolution", 88 *Geo. L.J.* 381, 431 (1998); Richard L. Herz, "Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment", 40 *Va. J. Int'l L.* 545, 619 (2000).

C. *Forced Labor*

In the aftermath of *Kadic*, courts expanded the scope of the exception under which State action is not necessary to state a claim under ATS. For example, in the *Doe v. Unocal Corp.* litigation involving the alleged use of forced labor for the construction of a gas pipeline in Southern Myanmar, the Ninth Circuit confirmed that forced labor is a private actor abuse for which State action is not required under ATS.[27] It explained that forced labor is a "modern variant of slavery to which the law of nations attributes individual liability such that state action is not required".[28] It cited a series of Supreme Court and other court decisions which included forced labor in the definition of slavery,[29] thus, was relying on domestic law.[30]

D. *Aircraft Hijacking*

In *Burnett v. Al Bakara Investment and Development Corp.*,[31] in which family members and representatives of victims of the 11 September 2001 terrorist attacks brought an action, inter alia, under ATS against individuals and organizations which allegedly funded and supported the international terrorist network referred to as Al Qaeda, the District Court of the District of Columbia held that aircraft hijacking is "generally recognized as a violation

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[27] 395 F.3d 932, 946–47 (9th Cir. 2002).

[28] *Id.* at 946. Likewise, at first instance, the district court found the allegations of forced labor sufficient to confer subject matter jurisdiction because in the court's perception, they constituted an allegation of participation in slave trading. *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 891–92 (C.D. Cal. 1997).

[29] 395 F.3d at 946–47. *See Pollock v. Williams*, 322 U.S. 4, 17 (1944); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450 (E.D. Wis. 1974); *World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

[30] Under international law, the legal analysis is less clear. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 266 U.N.T.S. 3, obliges parties to penalize infractions of laws enacted to give effect to the provisions of the convention (article 2) and declares acts of enslaving to be criminal offences under the law of the parties (article 6). Thus, it is possible to assume that international law's broad prohibition of slavery is directly imposed merely on State actors and only indirectly on private actors. On the other hand, in common law, slavery seems to be the paradigm of a private actor abuse. *See also* Slavery Convention, 25 September 1926, 60 L.N.T.S. 253. *See generally* Anne M. Trebilock, "Slavery", in IV(1) *Encyclopedia of Public International Law* 422 (Rudolf Bernhardt ed., 1998).

However, under international law, forced labor which amounts to a crime against humanity does not require state action. *See also supra* note 19.

[31] 274 F. Supp. 2d 86 (D.D.C. 2003).

of international law that gives rise to individual liability."[32] It read *Kadic* and its progeny as establishing the principle of individual responsibility for private misconduct without State involvement for certain categories of international law and deemed aircraft hijacking to form part of one.[33] In doing so, the court pointed to § 404 of the Restatement which lists aircraft hijacking as a ground for universal jurisdiction and which, as explained above,[34] was also referred to by the Second Circuit in *Kadic*.[35]

E. *Human Rights Violations as Part of Genocide or War Crimes*

Moreover, the Second Circuit in *Kadic* and the numerous courts which followed its reasoning held that while the classic human rights violations such as torture, summary execution, arbitrary detention, etc., are only proscribed by international law when committed by State actors, when committed in the course of a wrong for which State action is not required such as genocide or generally as a war crime under the common article 3 of the Geneva Conventions, State action is not a precondition to liability.[36] The Second Circuit declared that "acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of such hostilities" are an infringement of international humanitarian law.[37] Accordingly, in these instances, all claims, e.g., forced prostitution, torture, arbitrary detention, etc., can be brought independently of State involvement.[38] Such approach can be traced back to international law.[39]

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[32] *Id*. at 100.

[33] *Id*.

[34] *See supra* text accompanying notes 19 and 30.

[35] *Id*. Although as previously pointed out, the provision by its very title addresses universal jurisdiction and not explicitly private responsibility under international law. *See supra* note 11.

[36] 70 F.3d at 244.

[37] *Id*. at 242.

[38] In the aftermath of *Kadic*, in the Unocal litigation involving the alleged use of forced labor for the construction of a gas pipeline in Myanmar by the Californian-based company Unocal, although finally settled extrajudicially, the Ninth Circuit extended the approach, which can be labelled as the backpack-approach, to forced labor, confirming that forced labor is a private actor abuse for which State action is not required and under which all other claims which usually presuppose State action such as torture are actionable. 395 F.3d at 946. This is especially true of forced labor which amounts to a crime against humanity. See the discussion under II.B. above.

[39] Parallel thereto is the approach taken by a trial chamber of the ICTY, likewise in the context of crimes committed in the process of the disintegration of the former Yugoslavia as in the Second Circuit's *Kadic v. Karadzic* judgment, which reckoned after a thorough review of relevant authorities that the definition of torture under international humanitarian law (as

III. *Participation in the Violation*

After having determined which norms apply to TNCs regardless of whether or not there is cooperation with State actors, the next question is what kind of direct or indirect contribution to the above-presented norms is necessary to incur liability. ATS neither defines what modes of participation are applicable nor how they are to be interpreted.[40]

A. *Legislative Gap and Methodology for Judicial Gap-Filling*

Therefore, judicial-lawmaking is required.

1. *Law-Making Authority*

Under conventional doctrine, federal common law-making is admissible in two instances: first, in particular enclaves of federal law where federal rules are "necessary to protect uniquely federal interests"[41] and second, where it is necessary to effectuate congressional intent as expressed in a statute.[42] Since *Sosa*, ATS litigation has been clarified as falling at least into the former category.[43]

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opposed to human rights law) does not comprise the same elements as the definition of torture generally applied under human rights law and does not require State action. *Prosecutor v. Kunarac*, Cases Nos. IT-96-23-T & IT-96-23/1-T, Judgment of 22 February 2001, para. 496. The trial chamber was "of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offense to be regarded as torture under international humanitarian law." *Id.* at 883–89. In effect, the court adopted the approach taken by the Second Circuit in *Kadic*.

[40] Other than in respect of those norms which can only be breached by State actors, § 1983 jurisprudence is not an option as it presupposes State action, in other words, norms that apply exclusively to State actors or persons acting under the color of law. *See supra* Chapter Seven: Norms that Can Be Violated Only by State Actors.

[41] *See* Erwin Chemerinsky, *Federal Jurisdiction* § 6.1 (2004), *citing Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

[42] *Id.*

[43] *See* 124 S. Ct. at 2764 which states that "post-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries, we have affirmed that the domestic law of the United States recognizes the law of nations".

The judgment may also be reasonably read as falling likewise into the second category of congressional intent. *See* 124 S. Ct. at 2765 stating: "Congress, however, has not only expressed no disagreement with out view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.... [in the] Torture Victim Protection Act." However, it

2. *Branch of Law from Which Rules are Derived*

After determining the judicial authority for developing and shaping appropriate rules, the first practical issue that arises relates to the applicable law where rules on participation resulting in individual or corporate liability under ATS should be drawn from. The ATS's wording assigns jurisdiction to federal courts for "violations of the law of nations."[44] Under this wording, it is clear that international law applies as to the specific substantive law norm. However, it is less clear to what body of law ATS refers to and to what extent in respect of direct and indirect (vicarious and/or ancillary) liability.

The issue came up in the *Unocal* case. In *Unocal*, Circuit Judges Pregerson and Tashima had to choose between the application of aiding and abetting as a mode of participation in international criminal law as federal common law and third party liability standards under federal torts law as proclaimed by Judge Reinhardt in his concurring opinion so as to determine the indirect responsibility of the TNC defendant Unocal.[45] In fact, Judge Reinhardt found

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is more sound to read the reference as a general deference to Congress's power to revoke the law-making power of the courts.

[44] ATS provides: "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." 28 U.S.C. § 1350.

[45] *Doe v. Unocal Corp.*, 395 F.3d at 965–69. He provided three reasons for the application of federal tort third-party liability principles in such instances. Firstly, he stressed that one recognized function of federal common law adjudication is "to fill the interstices of federal law", *id.* at 966, *citing United States v. Kimbell Foods, Inc.*, 440 U.S. 714, 727 (1979), where courts are required to implement the policies underlying an imperfect federal statute, *id., citing Illinois v. City of Milwaukee, Wisc.*, 406 U.S. 91 (1972). Secondly, he stated that federal common law, which he understood as federal torts law on third party liability, provides for the "traditional and time-tested method" of regulatory framework to fill such statutory gaps. *Id.* at 966. Thirdly (still under a traditional choice-of-law analysis as the decision was handed before the Supreme Court's decision in *Sosa*), almost all factors typically considered by courts in the determination of applicable law in this respect favor the application of federal common law, such as ease of determination and application of the law, predictability, the existence of federal common law principles of joint liability which could be easily applied in an ATS context, and the provision of a federal policy forum by ATS. He deemed only two factors neutral in this regard, i.e., the "needs of the interstate and international system" and "relevant policies of other states". *Id.*

Judge Reinhardt's opinion cannot be simply discarded by reference to the Supreme Court's decision in *Sosa* since the Supreme Court merely held that ATS claims are based on federal common law. *See* 124 S. Ct. at 2764. However, it did not address the issue of which field of federal law should be used to develop rules of indirect liability.

Nonetheless, if there is one insight gained from the general torts litigation of the last five decades in the United States, it is that broad and undefined torts law principles would lead to almost unlimited liability for any kind of social grievance in the name of public policies

Unocal liable under federal tort law principles of joint venture liability,[46] agency liability,[47] and reckless disregard.[48] It must be noted that in holding that ATS claims are based on federal common law,[49] the Supreme Court in *Sosa* discarded only domestic state law or foreign state law as options.[50] It left open the question of whether international criminal law as federal common law or federal torts law should apply.

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and the general welfare. In particular, under ordinary torts law, joint venture and agency liability entails strict liability for the acts of another. Daniel Diskin, "The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute", 85 *Ariz. L. Rev*. 805, 831 (2005). Accordingly, if those principles applied, TNCs similarly would potentially face liability even for business conduct which is far remote and unrelated to the violation of international law (at least in the long run) because in most developing countries, violations of international human rights law is a common and frequent phenomenon.

[46] 395 F.3d at 970–72.

[47] *Id*. at 972–74.

[48] *Id*. at 974–76.

[49] 124 S. Ct. at 2764. *See supra* Chapter One: Actionability Standards.

[50] Moreover, the solution of applying foreign law carries the disadvantage that it would force judges to interpret and apply a body of law derived from a legal system of which they do not form part of and which they may not fully understand its historical, political, cultural, and economic context. *See* Paul L. Hoffman & Daniel A. Zaheer, "The Rules of the Road: Federal Common Law and Aiding and Abetting under the Alien Tort Claims Act", 26 *Loy. L.A. Int'l & Comp. L. Rev*. 47, 58 (2003). And even worse, in some ATS cases, judges would face the awkward position of being forced to apply foreign precedents which are not even actually applied by their foreign colleagues in their respective countries due to the general instability of the situation there or the lack of a functioning legal order. *Id*. at 58–59. This difficulty further runs counter to the interests of TNCs as potential investors in other countries. Moreover, legal certainty (something TNCs can reasonably expect from the U.S. legal system) on what is allowed and not allowed is endangered if a body of a relatively underdeveloped law not yet adjusted to the complexities and ramifications of a complex industrial society is applied. *Id*.

These arguments do not necessarily apply in case the applicable law is American state law (forum) of the state where the court resides – the second option. State torts law is typically sufficiently developed, well-enhanced, and will be effectively applied by competent courts. Yet, the Supreme Court's holding in *Sosa* that international law forms part of federal common law also speaks against using this option. While it is true that federal courts sometimes borrow legal implants from sophisticated and well-developed areas of state law, generally the Supreme Court has warned lower federal courts of such practice by labelling state laws as "unsatisfactory vehicles for the enforcement of federal law" when Congress has not directly or indirectly authorized federal courts to apply it. *Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 160, 161 (1983). The reason for this as the Supreme Court correctly expressed is that state laws typically are not drafted with a view to implementing a given federal statute and may therefore undermine or abridge the latter's underlying purpose. *Id*. at 161 (with respect to state statute of limitations).

In Unocal, the majority opted for the application of international criminal law.[51] In a choice of law-analysis,[52] they shape the factors supporting their choice: "the needs of the international system"; "the relevant politics of the forum" and the protection of "justified expectations"; "the ease in the determination and application of the law" the origins of which, they note, dates back to World War II tribunals; and the "underlying policy of the Statute" to provide a forum for violations of international law, in their opinion, favor

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[51] As to the possible application of international criminal law existing on the point, Judge Reinhardt warned the majority of the relative recent nature of this law as developed by the international criminal tribunals for Yugoslavia or Rwanda and in his view, the not-to-be-underestimated possibility that other judges appointed to other ad hoc tribunals may apply different concepts and may come to different conclusions than their predecessors. The Second Circuit's decision was rendered in 2002 though. Further adjudication of international criminal law by international tribunals and the statute of the International Criminal Court have effectively rebutted his contentions. The law has been confirmed, clarified, and deepened, and there are no indices of further clash among international tribunals or chambers thereof in the future. *Cf.* the concise treatises of Gerhard Werle, *Principles of International Criminal Law (2005)*; Antonio Cassese, *International Criminal Law* (2003).

Accordingly, Judge Reinhardt's approach has remained singular. No court picked up his proposals. Instead, after some hesitance at the start, courts now consistently vote for the application of international criminal law on participation in respect of violations of international criminal law. See the case law below.

[52] Before the Supreme Court's decision in *Sosa v. Alvarez-Machain*, past ATS cases often conducted a classic choice of law analysis. The idea is that ATS forms part of torts law under which traditional choice of law principles apply. For example, in *Wiwa v. Royal Dutch Petroleum Co.*, the Second Circuit construed its own holding in *Filártiga v. Peña-Irala* to mean that while ATS provides jurisdiction for actions based on violations of international law, it "requir[es] the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action." 226 F.3d 88, 105, n. 12 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). More recently, *see Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).

In doing so, courts considered the application of the law of the foreign State where the events occurred, the law of the (American) forum state where the federal court is residing, federal torts law, and international (criminal) law. The pre-*Sosa* development was not consistent although courts turned increasingly to international law. Judge Edwards in his concurring opinion in *Tel-Oren v. Libyan Arab Republic* suggested that while international law triggers jurisdiction under ATS, tort laws of the forum state might provide substantive causes of action. 726 F.2d 774, 781–82 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). In *In re Estate of Ferdinand Marcos*, 978 F.2d 493, 503 (9th Cir. 1992), the Ninth Circuit affirmed the district court procedure that based jurisdiction on international law but applied tort law of the state where the underlying events occurred. *See also Filártiga v. Peña-Irala*, 630 F.2d at 889, in which the Second Circuit held that ATS establishes a cause of action for violations of international law but required the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action.

the application of international law.[53] In addition and limiting the potential of conflict, they noted the similarity of the aiding and abetting standard under international law with the aiding and abetting standard under the Restatement domestic standard[54] and explained that under these circumstances, the application of the international criminal standard is "appropriate".[55]

One counter-argument against the use of international law on modes of participation is that this field of international law did not exist in 1789 when ATS entered into force. Yet, this argument, while valid, should not be decisive. Firstly, the approach taken here accords with the evolutionary concept of the Supreme Court in *Sosa* where the court explained that ATS claims should be based on current-day international law. Secondly, this solution also promotes the federal interest in the consistency, coherency, and uniformity of international law as federal common law. The application of international criminal law on individual liability allows the further coherent development of international law as wrongdoers in international tribunals are subject to the very same standards applied to defendants in ATS cases in the United States, preventing negative repercussions on the international legal order which would otherwise likely emerge in the long term perspective. Employing international criminal law accordingly serves best the interests of uniformity, coherence, and predictability. The limits to this rule, however, are the particularities of ATS and the federal legal system. In some cases, it may not be possible to adopt the international law on the point in toto without the necessary adjustments.

3. *Methodology*

Under the traditional approach for the determination of international law, courts typically look for guidance at suitable federal precedents which include

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[53] 395 F.3d at 949.

[54] *See* Restatement (Second) of Torts § 876 (1997). On the potential use of § 876 for ATS litigation, *see* Diskin, *supra* note 45, 830–36 (2005). Section 876 provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [or she]
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

[55] 395 F.3d at 951. Also recently, a majority of two judges of the Second Circuit opted for international law as benchmark, whereas the third judge opted for domestic law arguing that international law does not specify the details of its domestic enforcement. *Khulumani v. Barclay National Bank*, 504 F.3d 254, 270–84 (2d Cir. 2007).

international precedents since international law forms part of federal common law as confirmed by *Sosa* and federal precedents interpreting such international law (like previous ATS judgments) which may offer guidance for the resolution of the specific case at hand.[56] For example, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court analyzed State conduct and various sources of international law in order to determine the exact scope of the act of state doctrine.[57] The Supreme Court also looked at its own precedents on the point.[58]

This is not to say simplistically that the complete set of international criminal law has to be fully translated into domestic law. Rather, it is international criminal law having a substantial impact on domestic law with a general view to the peculiarities of the American legal system and a special view of ATS's nature, objective, and setting.

Yet, on the other hand, the majority in *Unocal* was careful enough to avoid an ultimate ruling on the general issue. They restricted their holding to the facts at hand declaring that in other cases based on different facts, the application of federal common torts law principles may be appropriate.[59] The restriction of the holding matches the above-mentioned traditional methodology for the development and shaping of the federal common law encompassing international law.

B. *Recognized Modes of Participation*

Courts have recognized and further developed a number of modes of participation in ATS litigation in respect of norms which can be violated by everyone.

1. *Conspiracy*

A good example of the cautionary note that although international criminal law is the standard of reference, necessary adjustments to American law have to be made in ATS litigation is the mode of participation in conspiracy. Several courts have, without discussion, intuitively confirmed the availability of

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[56] The view taken here comes close to the one advanced by Hoffman & Zaheer, *supra* note 50, at 63–64.

[57] 376 U.S. 398, 427–32 (1964).

[58] *Id.* at 430–31.

[59] *Id.* at n. 25. They explain that the standard for aiding and abetting in international law is very similar to the standard for aiding and abetting in domestic tort law and the decision between the two may therefore not be crucial or decisive in terms of practical results. *Id.* at n. 23.

the concept of conspiracy under ATS[60] without showing any reservation as to the general applicability of the concept.[61]

However, under customary international criminal law, which recognizes conspiracy to commit genocide, and arguably, conspiracy to commit a crime of aggression, there is no general concept of conspiracy.[62] In accordance with such observance, the delegates at the Rome Conference decided not to adopt language dealing with conspiracy in the Statute of the ICC.[63]

Nonetheless, the concept of conspiracy is so deeply embedded in any kind of common law system that it would be odd to accept the fragmentary and still-underdeveloped status of international law under ATS since such acceptance would lead to a different treatment in situations which likewise deserve liability. Therefore, conspiracy as a mode of participation is a good example of this gap-filling function of federal court adjudication given the fragmentary and still partly incoherent body of international law, a concept which is well-established in any common law but not in international criminal law. If

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[60] The issue is different from conspiracy as meeting the joint action test within the meaning of 42 U.S.C. § 1983 jurisprudence for ordinary violations of international law. *See supra* Chapter Seven: Norms that Can Be Violated by State Actors Only; *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1306–07 (C.D. Cal. 2000), where Judge Lew stated that proving a conspiracy would satisfy the joint action test.

[61] *E.g., Burnett v. Al Bar Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 321 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002). *See also Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1998), which states that "assuming without deciding that ATCA confers jurisdiction over private parties who . . . conspire in human rights violations"; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000), where the Second Circuit noted that no conspiracy-based claims were advanced, i.e., that Coca-Cola had acted with the Egyptian government, and therefore, it did not explicitly hold that conspiracy claims are actionable.

[62] In particular, conspiracy is not recognized with respect to war crimes or crimes against humanity. Werle, *supra* note 51, at 166–67. He notes that under the Nuremberg Charter and subsequent jurisprudence, conspiracy did not extend to crimes against humanity and war crimes. *Id.* at 167, *citing* International Military Tribunal, Judgment of 1 October 1946, *in The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, at 449; U.S. Military Tribunal, Nuremberg, Judgment of 26 August 1947 (*Brandt et al.*, the so-called "Medical Trial"), *in Trials of War Criminals II*, at 173; U.S. Military Tribunal, Nuremberg, Judgment of 28 October 1948 (*von Leeb et al.*, the so-called "High Command Trial"), *in Trials of War Criminals XI*, at 482 et seq.; U.S. Military Tribunal, Nuremberg, Judgment of 3 November 1947 (*Pohl et al.*), *in Trials of War Criminals C*, 961 et seq.

See also the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), where the court explained in a different context that conspiracy is not a recognized concept under the laws of war. *Id.* at 2784.

[63] Werle, *supra* note 51, at 166–67.

international criminal law on participation is silent, sketchy, and fragmentary, courts should fill the regulatory gap with domestic law.[64]

In *Cabello v. Fernandéz-Larios*, the Eleventh Circuit affirmed conspiracy liability under ATS.[65] More recently, the district court in *Presbyterian Church of Sudan v. Talisman Energy* found that conspiracy could not serve as a basis for liability under ATS unless it was a recognized theory in international law.[66] The district court decided that conspiracy to commit genocide was actionable but not with respect to crimes against humanity or war crimes.[67]

2. *Command Responsibility*

In 1996[68] in *Hilao v. Estate of Ferdinand Marcos*,[69] the Court of Appeals for the Ninth Circuit, relying on the well-recognized doctrine of command responsibility in international criminal law under which military superiors can be held criminally responsible for the crimes committed by their subordinates if the former fail to control the latter,[70] affirmed that former dictator Marcos's

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[64] In the end, the outcome will be similar for the great majority of cases regardless of what law one applies to determine individual liability. The reason for this is that every field of law provides for responsibility for accomplices, conspirators, and main perpetrators although sometimes using different legal terms. *See, e.g.*, *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289.

[65] 402 F.3d 1148, 1159 (11th Cir. 2005).

[66] 453 F. Supp. 2d 633, at 663 (S.D.N.Y. 2006).

[67] *Id*. at 663–64.

[68] From the very beginning, courts were wiling to acknowledge command responsibility as a mode of participation under ATS without hesitation.

In *Xuncax v. Gramajo*, the court explained that the former Minister of Defense was aware of and supported atrocities committed by his personnel and refused to prevent such action. 886 F. Supp. 162, 172–73 (D. Mass. 1995). Similarly, in *Paul v. Avril*, the court held the defendant liable for acts committed by his staff acting within the scope of the authority granted to him. 901 F. Supp. 330, 335 (S.D. Fla. 1994). And in *Forti v. Suarez-Mason*, the court found the defendant liable where plaintiffs alleged that their torturers were all subordinates of the defendant acting pursuant to a strategy and pattern of the army unit under defendant's command. 672 F. Supp. 1531, 1537–38 (N.D. Cal. 1987).

[69] 103 F.3d 767 (9th Cir. 1996).

[70] *See generally*, Ileas Bantekas, "The Contemporary Law of Superior Responsibility", 93 *Am. J. Int'l L.* 573 (1999); Sonia Boelart-Suominen, "Prosecuting Superiors for Crimes Committed by the Subordinates: A Discussion of the First Significant Case Law Since Second World War", 41 *Va. J. Int'l L.* 747 (2001); Kirsten Keith, *Superior Responsibility Applied Before the ICTY, Humanitäre Völkerrechtsinformationsschriften* 98 (2001); Maria Nybondas, "Civilian Responsibility in the Kordic Case", 50 *Neth. Int'l L. Rev.* 59 (2003); Greg R. Vetter, "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)", 25 *Yale J. Int'l L.* 89 (2000); Zhu Wenqi, "The Doctrine of Command Responsibility as Applied to Civilian Leaders: The ICTR and the Kayishema Case", in *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* 373 (Sienho Lee & Wang Tieya eds.,

estate could be found liable based, inter alia, on the international criminal law doctrine of command responsibility as the defendant Marcos knew of the misconduct of his subordinates and failed to intervene.[71] In *Kadic v. Karadzic*,[72] the Second Circuit noted that international law imposes "an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of atrocities".[73]

Ever since, courts have confirmed in numerous cases the application of the concept for purposes of ATS.[74] For example, in 2002 in *Cabello Barrueto v. Fernandez Larios*, survivors of a Chilean official filed an action against a former Chilean military officer alleging his involvement in their torturous abuse under the Pinochet Regime.[75] The defendant did not act personally to a large degree but acted together with other soldiers in the commission of the abuses.[76] Since the defendant was of a higher rank, the court could largely rely on the well-established command responsibility under international criminal law to assume responsibility.[77]

Interestingly enough, international criminal tribunals have upheld the doctrine even in a non-military business context as long as the necessary degree of control has been established.[78]

2001); Jamie A. Williamson, "Command Responsibility in the Case Law of the International Tribunal for Rwanda", 13 *Crim. L.F.* 365 (2002).

[71] 103 F.3d at 776–78.

[72] 70 F.3d 232 (2d Cir. 1995).

[73] *Id*. at 242.

[74] For a discussion of the case law, *see Doe v. Qi*, 349 F. Supp. 2d 1258, 1329 (N.D. Cal. 2004). *See also Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), in respect of TVPA. For command responsibility under ATS/TVPA, *see* Beth Van Schaack, "Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia", 36 *U.C. Davis L. Rev*. 1213 (2003).

[75] 205 F. Supp. 2d 1325 (S.D. Fla. 2002).

[76] *Id*. at 1332.

[77] *Id*. at 1333.

[78] *See Prosecutor v. Mucic* et al., ICTY, IT-96-21, Judgment of 16 November 1998, para. 868, in respect of a director of a tea factory; *Prosecutor v. Nahimana*, ICTR , 99-52-T, Judgment of 3 December 2003, para. 970, in respect of a leading role in the management of a radio station. *See also Doe v. Lui Qi*, 349 F. Supp. 2d 1258, at 1333 (N.D. Cal. 2004), where the court explains that the doctrine encompasses political leaders and other civilian superiors in positions of authority. In ATS litigation against TNCs, command responsibility may not play any role because under domestic general principles, actions of TNC employees, whether superiors on the board or way down at the bottom of the corporate hierarchy, are generally attributed to the TNC without the specific need to establish a certain control of the superior over the subordinate. Accordingly, it is unlikely that command responsibility will play a greater role in future TNC litigation.

3. *Aiding and Abetting Liability*

As indicated above, of particular importance in TNC litigation is aiding and abetting.[79] The reason for this is that at the bottom line in any legal field, whether domestic or international, criminal or tort, the law provides for the responsibility of main perpetrators and direct participants although the terminology and concepts employed may differ substantially. This is not true to the same degree for aiding and abetting liability which captures acts which are more or less remote from the actual wrongdoing. Here, the application of different standards may actually lead to different results in terms of liability and consequently, has been heavily litigated in ATS proceedings. Furthermore, from a practical point of view, the underlying problem (from the TNC's perspective) with aiding and abetting is that it may capture behavior which is far remote from the direct wrongdoing. Hence, in ATS litigation against TNCs, one key question is whether aiding and abetting as a mode of participation recognized in international criminal law should also be a mode of participation recognized under ATS.

Courts in ATS cases have tackled this issue over a long period of time.[80]

(a) *Mehinovic v. Vuckovic*

In 2002 in *Mehinovic v. Vuckovic*, the Bosnian Muslim plaintiffs alleged that defendant Vuckovic committed acts of brutality against them in detention facilities in Bosnia-Herzegovina during the so-called "ethnic cleansing" cam-

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[79] On aiding and abetting under the ATS, *see generally* Hoffman & Zaheer, *supra* note 50, at 58; Shaw W. Scott, "Taking Riggs Seriously: The ATCA Case against Corporate Abettor of Pinochet Atrocities", 89 *Minn. L. Rev.* 1497 (2004–2005); Diskin, *supra* note 45, *passim*.

[80] As early as 1988, a British plaintiff already brought an action under ATS against various businesses for his alleged imprisonment and torture in Saudi Arabia. *Carmichael v. United States Technologies Corp.*, 835 F.2d. 109, 111 (1988). The Fifth Circuit assumed but avoided a decision on whether ATS confers jurisdiction over private parties who aid and abet in official acts of torture. The Fifth Circuit could do so because according to the decision, the record established that defendants were not involved in the imprisonment. 835 F.2d. at 113.

In 1996 in *Hilao v. Estate of Ferdinand Marcos* which involved a class action by Filipino citizens against the estate of their former president, the district court instructed the jury that a foreign leader is liable for aiding and abetting the military in torture, summary execution, and disappearance. 103 F.3d. at 776. For the decision on appeal, *see supra* accompanying text to notes 69–71.

Eight years later in *Bodner v. Banque Paribas*, descendants of Jewish customers accused French banks of participation in a scheme to expropriate assets of customers during the Nazi occupation and failure to disgorge assets which were to finance their flight from the Holocaust. 114 F. Supp. 2d 117, 121 (E.D.N.Y. 2000). The district court for the Eastern District of New York found that such participation, if proven, would amount to aiding and abetting genocide. *Id.* at 134. It therefore upheld the concept of aiding and abetting at least with respect to genocide.

paign directed against Bosnia's non-Serb population during the disintegration process of the former Yugoslavia.[81] However, in many instances, the defendant did not torture Muslims personally but with the other guards.[82] Consequently, plaintiffs advanced aiding and abetting liability theories under ATS.[83]

Accordingly, the issue was whether liability for aiding and abetting is a recognized mode of participation for purposes of ATS liability. In addressing the issue, Judge Shoob of the federal court for the Northern District of Georgia noted that the Senate report on the related TVPA comments that it applies to those who "ordered, aided and abetted" the crimes.[84] He further correctly explained that principles of accomplice liability are well-established under international law.[85] Pointing to the Statute of the ICC, the charter of the post-World War II International Military Tribunal in Nuremberg, and the statutes of the ICTY and ICTR, he found that relevant international conventions explicitly provide that those who assist in the commission of acts prohibited by international law may be held individually responsible.[86] As an example, he cited article 7(1) of the ICTY Statute, which states that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present statute [grave breaches of the Geneva Conventions of 1949, violations of laws or customs of war, genocide or crimes against humanity] shall be individually responsible for the crime.

He added that the ICTY held in *Prosecutor v. Furundzija* that secondary liability under article 7(1) requires both an *actus reus* and *mens rea* distinct from the acts and intent of the principal.[87] He reiterated the tribunal's jurisprudence by holding that the *actus reus* of aiding and abetting requires "practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime" and observed that this formulation

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[81] 198 F. Supp. 2d 1322, 1329 (N.D. Ga. 2002).

[82] *Id.*

[83] *Id.*

[84] *Id.* at 1355 *citing* S. Rep. No. 249–102, at 8–9, n. 16.

[85] *Id.*

[86] *Id.* at 1355–56. *See, e.g.*, Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, art. 25; International Military Tribunal Charter, 82 U.N.T.S. 279, art. 6; Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute"), U.N.S.C. Res. 827, U.N. Scor, 48th Sess., 3217th Mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th Mtg., U.N. Doc. S/RES/1166 (1998), art. 7(1); Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453 Mtg., U.N. Doc. S/RES/955 (1994), art. 6(1).

[87] 198 F. Supp. 2d at 1356, *citing Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, paras. 192–249.

does not require the tangible assistance of the aider and abettor.[88] As to *mens rea*, he read *Furundzija* as not requiring the accomplice to share the same wrongful intent as the principal.[89] Instead, he concluded that it is sufficient that the accomplice knows that his or her actions will assist the perpetrator in the commission of the crime.[90]

As to the case at hand, Judge Shoob held that plaintiffs have demonstrated that defendant Vuckovic aided and abetted Serb military and political forces in committing genocide, war crimes, torture, and other wrongful acts against plaintiffs. He found the evidence to suggest that Vuckovic both provided assistance and encouragement to those who directly perpetrated acts of torture and abuse against plaintiffs and that he knew that his own participation in and encouragement of these actions would assist others in committing these acts.[91] Accordingly, he found Vuckovic responsible for the acts of his associate guards.[92] For the first time, the decision established aiding and abetting liability under ATS without also relying on command responsibility principles in justifying its holding.

(b) *Doe v. Unocal*

In the *Unocal* case,[93] a California-based TNC, Unocal Corp. ("Unocal"), found itself confronted with the allegation of using forced laborers in furtherance of its gas pipeline project in Myanmar.

A military dictatorship has ruled Myanmar for several decades, turning the country into an international pariah by being one of the worst human and labor rights offenders in the world. Year after year, both the Country Report on Human Rights Practices of the United States Department of State[94] and the Annual Report of Amnesty International[95] are replete with reports of political prisoners, torture, ill treatment, forced labor, and extrajudicial executions.[96] It is common for the government to seize members of the minority groups Shan, Karen, and Karenni for forced labor to pursue infrastructure projects such

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See supra* III.A.2.

[94] *E.g.*, U.S. Department of State, *Country Reports on Human Rights Practices 2005 Burma, available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61603.htm (accessed 16 January 2005).

[95] *E.g.*, Amnesty International, *Annual Report 2005 Myanmar, available at* http://web.amnesty.org/report2005/mmr-summary-eng (accessed 16 January 2006).

[96] According to Amnesty International, more than 1300 political prisoners continue to suffer in various prisons under poor conditions such as lack of food and water, sanitation, and adequate medical treatment. *Id.*

as building roads and bridges.[97] Members of minority groups are also forced to carry equipment used by military troops on their missions throughout the countryside, and in places where there are armed minority groups, they face ill treatment and extrajudicial executions.[98] In sum, there are forced labor and other serious human and trade union rights abuses on a large scale, there is generally no freedom of association, and no democracy.

Given this background, Unocal, together with the French TNC Total, S.A., and in cooperation with the military of Myanmar, which provided security for the progress of the project, decided to go ahead with the gas pipeline project in the Tenasserim region, an area predominantly inhabited by minorities.[99] The military stationed soldiers in the Tenasserim region allegedly in accordance with its contractual obligations. For the Commercial Discovery phase, the military built military army barracks and cleared roads along the potential pipeline route. Memoranda of Unocal, dated 1 and 2 March 1995, state that ten battalions of 600 men each were in charge of protecting a ten-kilometer stretch along the pipeline route and that each survey team is guarded by 50 soldiers.[100] A Unocal employee admitted openly to the United States State Department that "the companies had hired the Burmese military to provide security for the Project and pay for this."[101] In the same year, during an armed attack on a geotechnical survey team, five Myanmar nationals were killed. With one exception, all the victims were employed by the project consortium.[102]

With the increased presence of the military in the region, allegations of severe human rights violations in the area increased including the use of forced labor for the construction of the project itself and the clearance of roads and the jungle along the pipeline route. This was facilitated by the fact that it was the army which hired the unskilled workers to provide manual labor for the construction of the pipeline.[103] The military also used laborers as military porters and to build their camps.[104] Project money was spent to pay local workers and for food rations of army personnel and local workers.[105] According to California District Court Judge Lew, the "evidence does

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[97] U.S. Department of State, *supra* note 94.
[98] *Id.*; Amnesty International, *supra* note 95.
[99] *Doe I v. Unocal*, 110 F. Supp. 2d 1294, 1298–99 (C.D. Cal. 2000).
[100] *Id.* at 1300.
[101] *See id.* at 1301.
[102] *See id.* at 1300.
[103] *See id.* at 1301.
[104] *See id.* at 1302, *citing* Richardson Decl., Ex. 52 at 29722.
[105] *Id.* at 1302, *citing* Richardson Decl., Ex. 148 at 16834–5.

suggest that Unocal knew that forced labor was being utilized and that the joint venturers benefited from the practice."[106]

On appeal, the Court of Appeals found that there is a genuine issue of fact as to whether the project hired the military to protect the pipeline construction and whether the project directed the military in its activities to a certain degree. In doing so, the court referred to the fact that Unocal representatives met almost every evening with the military as to the exact route of the pipeline and the measures to be taken for the next day.[107] In sum, the Ninth Circuit concluded that Unocal could be held liable for "aiding and abetting" forced labor, murder, rape, and torture inflicted by the Myanmar military in the course of providing security and other services for Unocal's pipeline construction project if Unocal gave "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime."[108] It thereby not only recognized aiding and abetting liability under ATS,[109] but also relied on the standard developed in *Furundzija* and its progeny.[110] The case was ultimately settled extrajudicially before a final decision could be rendered.[111]

(c) *Presbyterian Church of Sudan* Case

Presbyterian Church of Sudan v. Talisman Energy, Inc.[112] arose out of the unstable situation in Southern Sudan.

Sudan has the territorial size of Western Europe. It is a remarkably ethnically and culturally diverse State which finds itself in a constant process of disintegration into different separate states.[113] Since 1983, over two million people have died in the bloody civil war between the Muslim north and the predominantly Christian south and in the famines the war caused before it came to a preliminary end with the signing of the Comprehensive Peace Agreement on 5 January 2005.[114] The war was also a battle for the rich natural resources of the country, particularly oil, which is mainly found in the south

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[106] *Id.* at 1310.

[107] *Id.*

[108] *Id.*

[109] *See supra* discussion in III.A.2.

[110] *Id.*

[111] *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. Times, *available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm (accessed 11 September 2006).

[112] 244 F. Supp. 2d 289.

[113] For more information on Sudan and the current conflicts, *see* http://www.crisisgroup.org/home/index.cfm?id=1230&l=1 (accessed 13 October 2005).

[114] *Id.*

where most areas are controlled by the rebels.[115] The country's rich deposits of oil were first discovered by the TNC Chevron in 1979, particularly in the provinces of Nile, Unity, and Southern Kordofan.[116] It was clear that the technology of western TNCs was needed for extraction and processing because the oil deposits are of a heavy and viscous nature.[117] However, the beginning of their operations was complicated due to the bloody civil war.[118]

With respect to this case, the plaintiffs alleged that Talisman Energy, Inc. ("Talisman"), a big Canadian energy company, collaborated with Sudan in "ethnically cleansing" civilian populations surrounding oil operation fields in the south.[119] They stated:

> In exchange for oil concessions, the Government promised to clear the area around the oil fields of the local population. The oil companies agreed to invest in the infrastructure, such as transportation, roads and airfields and communication facilities, to support exploration and the Government would use that same infrastructure to support its genocidal military campaign of ethnic cleansing against the local population. Under this unholy alliance, the oil companies would be able to maximize security around the oil installations and Sudan would get the capital necessary to wage a full scale war against the South.[120]

They further supported their claim with a purported communication from the Government's Petroleum Security Office in Khartoum to a satellite office in Heglig. It reads as follows: "In accordance with directives of His Excellency the Minister of Energy and Mining and fulfilling the request of the Canadian Company…the armed forces will conduct cleaning up operations in all villages from Heglig to Pariang."[121]

The court addressed the issue extensively as the defendant put forward a substantial mass of counterarguments.

In a first line of defense, Talisman, trying to distance itself from the atrocities committed, first argued that aiding and abetting is not recognized under ATS.[122] It cited the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver* as stating that aiding and abetting theory does not provide a basis for civil liability absent an express congressional directive

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[115] *Id.*

[116] 244 F. Supp. 2d at 299.

[117] *Id.*

[118] *Id.*

[119] *Id.* Judge Schwartz stated that "Sudan's attacks on civilians have been widely acknowledged and condemned". *Id.* at 298.

[120] *Id.* at 299.

[121] *Id.* at 301.

[122] *Id.* at 322.

which is not the case for ATS.[123] In response, the court stated that Talisman's contention is incorrect and misapprehends the "fundamental nature" of ATS which provides a forum for claims based on international law.[124] It pointed to the Second Circuit's decisions in *Filártiga* and *Kadic*, which, while not addressing the issue of aiding and abetting, state that courts need to look at international law to determine whether a cause of action under ATS exists.[125] *Central Bank of Denver*, in the court's opinion, analyzed whether domestic securities law provides a civil cause of action for aiding and abetting and must therefore be distinguished.[126] He found that this line of cases, and not the more general analysis provided by Talisman, are decisive under the maxim of *lex specialis derogat lex generalis*, noting that U.S. courts in the above-presented cases have consistently permitted ATS suits to proceed based on theories of aiding and abetting.[127]

In a second line of defense, after arguing that ATS does not contemplate actions based on claims of aiding and abetting, Talisman stated that international law does not provide a legal basis for aiding and abetting claims in this case.[128] Although Talisman acknowledged that "international law recognizes theories of complicit liability," it argued that plaintiffs failed to allege that Talisman provided assistance to Sudan with the intention of facilitating a violation of the law of nations. Talisman further argued that its acts in "maintaining roads and extending landing strips are too distant causally from the alleged injuries inflicted by Sudan to be imputed to Talisman".[129] However, Judge Schwartz noted that the complaint did more than declare that Talisman maintained roads and extended landing strips, but instead alleged, for example, that "[Sudan] has used the Heglig field, with Talisman's knowledge, on a regular basis for military purposes, including bombing and strafing attacks on civilians". He explained that Talisman cites no authority other than the declarations of its international law experts for the contention that such acts cannot entail liability and that in the opposite, the concept of complicit liability for aiding and abetting is well-developed in international criminal law. He pointed to the Statute of the International Military Tribunal, the body that tried Nazi war criminals, stating that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all

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[123] *Id.* Defendants cited 511 U.S. 164, 181 (1994).
[124] *Id.*
[125] *Id.* at 320.
[126] *Id.* at 321.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 322.

acts performed by any persons in execution of such a plan";[130] the statutes of the ICTY and the ICTR which similarly establish criminal liability for those who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime";[131] and moreover, the Statute of the ICC similarly recognizes complicit liability.[132]

With regard to the level of aid exactly required in international law, Judge Schwartz explained that as reflected in the judgments of the ICTY, it appears

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[130] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, 82 U.N.T.S. 279, art. 6. Allied Control Council Law No. 10, used to prosecute German war criminals domestically, created criminal liability not only for principals who committed acts of genocide or war crimes but also for those who were connected with any plans or enterprises involving the commission of such crimes. *See* William A. Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices", 83 *Int'l Rev. Red Cross* 439, 442 (June 2001).

[131] *See supra* note 86.

[132] Article 25(3) of the ICC Statute states:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
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> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
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> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Id. Major human rights instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, recognize complicity. *See, e.g.*, Schabas, *supra* note.

to have settled on a requirement that assistance be "direct and substantial."[133] Relying on *Furundzija*, he added that similarly, "the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[134] In addition, he declared that the ICTR has similarly held that the *actus reus* of aiding and abetting is constituted by "all acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime."[135] Again citing *Furundzija*, he stated that while the assistance must be substantial, it "need not constitute an indispensable element, that is, a conditio sine qua non for the acts of the principal",[136] and citing ICTY, he added that participation in a crime is substantial if "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed."[137] Moreover, he recognized that the ICTY added that providing certain means to carry out crimes constitutes substantial assistance even if the crimes could have been carried out some other way.[138] Accordingly, he held that at this stage, plaintiffs have sufficiently pleaded that Talisman encouraged and supported ethnic cleansing in Southern Sudan in the vicinity of its operations.[139]

(d) *Apartheid* Case

Soon after the Supreme Court's decision in *Sosa*, the issue of liability for aiding and abetting under ATS was reopened.

In *In re South African Apartheid Litigation*, a consolidated class action, individual victims of the system of the South African apartheid system sued TNCs which took an active role and profited from the system of apartheid in South Africa until the abolition of white supremacy to hold them liable under ATS.[140] Each of the defendant-TNCs did business with the government

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130, at 442. *Cf. Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment of 7 May 1997, paras. 662–69

[133] 244 F. Supp. 2d at 323, *citing Prosecutor v. Tadic, supra* note 132, paras. 691–92. *See also Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment of 16 November 1998, para. 326; *Prosecutor v. Furundzija, supra* note 87, paras. 223, 245; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment of June 25, 1999, para. 61.

[134] 244 F. Supp. 2d at 323, *citing Prosecutor v. Furundzija, supra* note 87, para. 235.

[135] *Id.* at 324, *citing Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment of 27 January 2000, para. 126.

[136] *Id.*, *citing Prosecutor v. Furundzija, supra* note 87, para. 209.

[137] *Id.*, *citing Prosecutor v. Tadic, supra* note 132, para. 688.

[138] *Id. Cf. Prosecutor v. Tadic, supra* note 132, para. 677.

[139] 244 F. Supp. 2d at 324. The case was later dismissed on factual grounds. 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

[140] 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

of South Africa during the times of apartheid.[141] They profited from the system of suppression that provided cheap labor.[142] In addition, many of their products supplied to the government were employed to promote and maintain the system of apartheid. For example, the infamous passbook system under which Africans were required to carry these passbooks containing information on identity, ethnic group, and employer in order to gain access to urban areas, was made available to the government due to IBM's technology;[143] the cars from which South African police forces shot African demonstrators were armored by DaimlerChrysler; the military kept its machinery going through oil supplied by Royal Dutch/Shell. Moreover, the government took loans and capital at preferred conditions from UBS and other banks.[144] Therefore, plaintiffs claimed that the TNCs aided and abetted the system of apartheid in South-Africa at the time and are therefore liable under ATS.

At the outset, citing literally a passage from *Sosa*, Judge Sprizzo declared that plaintiffs need to show that either aiding and abetting international law violations or "doing business" in apartheid South Africa are violations of a norm of international law "accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms".[145]

The plaintiffs pointed, as in previous cases, to the statutes and jurisprudence of the ICTY and ICTR, but Judge Sprizzo told them that these are not binding sources of international law.[146] He repudiated international documents plaintiffs relied upon in establishing that international law prohibits aiding and abetting apartheid by virtue of doing business.[147] From the viewpoint of domestic law, he deemed the Supreme Court case *Central Bank of Denver* applicable. In that case, the Supreme Court held that where Congress has not explicitly provided for aider and abettor liability, the courts should not infer such liability.[148] He explicitly rejected the path taken by *Presbyterian Church of Sudan* which he deemed "dubious at best" in a civil context.[149]

While Judge Sprizzo is correct that international law does not recognize the concept of aiding and abetting apartheid by merely doing business (otherwise, every black worker in South Africa would have been criminally liable by virtue of working, helping prolonging and stabilizing the system, which is

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[141] *Id.*
[142] *Id.*
[143] *Id.* at 544.
[144] *Id.* at 545. These loans may have prolonged the maintenance of apartheid.
[145] *Id.* at 549 *citing Sosa v. Alvarez-Machain*, 124 S. Ct. at 2761–62.
[146] *Id.*
[147] *Id.* at 552–54.
[148] *Id.* at 550.
[149] *Id.*

an *argumentum ad absurdum*),[150] with this notable exception, international criminal law recognizes a general concept of aiding and abetting. Judge Sprizzo should have restricted his ruling to the issue of aiding and abetting apartheid by doing business because for the resolution of the case at hand, there was no need to reopen the issue and expand the ruling to that extent. Indeed, Judge Sprizzo's reasoning raises many questions.

First, Judge Sprizzo seemed to imply that the *Sosa* standard does not only apply to the substantive law norm violated but also to any mode of participation, at least in the case of secondary liability, i.e., aiding and abetting. This is debatable. In any case, it must be noted that the Supreme Court's ruling in *Sosa* was restricted to the actionability of a given substantive norm of international law and did not reach the issue of direct or vicarious liability. The issue of what norm of international law are actionable through ATS is different from the issue of what rules to apply on direct and indirect liability once the norm at stake has been found actionable.[151] Given the strictness of the *Sosa* standard resulting in a very limited number of actionable torts under ATS, there is no further need to install a second safety valve. And even if it is applied, it would satisfy the *Sosa* test because the specificity requirement in this context must be read in a more lenient way. Rules on participation are, by their very nature, more of a general nature, i.e., imprecise compared to that of the respective substantive norms which they complement.

Second, Judge Sprizzo's reliance on *Central Bank of Denver* is misplaced. As explained in *Presbyterian Church of Sudan*, *Central Bank of Denver* can be distinguished in two respects. Denver was based on the Securities Exchange Act of 1934 while ATS claims are based on international law. The Securities Exchange Act explicitly provided for liability in circumstances where persons "directly or indirectly" commit a violation of section 10(b), the language of

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[150] He further countered that many major powers, including the U.S., Great Britain, Germany, France, and Japan did not ratify the International Convention on the Suppression and Punishment of the Crime of Apartheid but did not mention that these powers did not do so for reason of supporting apartheid but because other approaches towards the white regime in South Africa were deemed more suitable.

[151] See also the statement of Judge Woodlock of the district court of Massachusetts in *Xuncax v. Gramajo* in respect of the issue of whether international law must provide for a cause of action for the individual in ATS cases (since *Sosa* was finally settled):

> While it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles.

886 F. Supp. 162, 180 (D. Mass. 1995). The remarks were also cited by the court in *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 410 (S.D.N.Y. 2002).

which led the Supreme Court to the conclusion that aiding and abetting liability is not available, while ATS is totally silent on participation.[152]

Third, speaking of "innovative"[153] aiding and abetting liability overlooks the historical context of the enactment of ATS in 1789. At the time, aiding and abetting was recognized in British common law and likewise in U.S. common law.[154] And this recognition was by no means limited to criminal law.[155] There exists evidence that ATS was enacted to encompass liability for aiding and abetting: In a 1795 memorandum, Attorney General Bradford expressly stated that individuals "committing, aiding, or abetting" violations of international law would be liable under ATS.[156]

Moreover, putting together the difference in terms of strictness of the two tests applied by the courts to determine participation in a violation of international law giving rise to liability, the relatively difficult to meet color of law jurisprudence for normal violations of international law[157] and the easier to meet standard of aiding and abetting creates a coherent picture. It is reasonable to require a stronger degree of foresight and caution for TNCs not to be involved or to contribute to infringements of international criminal. As a consequence, it is perfectly sound that the aiding and abetting standard may be easier to meet than the color of law-requirement.

Lastly, Judge Sprizzo's decision seems to entertain some apprehension that extensive liability under ATS may result. This apprehension, if true, is not justified. Within international criminal law, it is well-established that mere silent approval is insufficient to incur liability.

The oldest case in this category is the *Synagogue Case*[158] decided by a German court in the British Occupied Zone. The accused, a long-time Nazi Party member and local leader of the SA (Schutzstaffel), a paramilitary unit of the party, was present most of the time at a synagogue destroyed by Nazi activists.[159] He did not design, plan, order, or in any way physically participated in the destruction of the *gotteshaus*.[160] The appellate court affirmed the conviction for crime against humanity. The court ruled that by virtue of his

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[152] *See* Diskin, *supra* note 45, at 829.

[153] 346 F. Supp. 2d at 550.

[154] *Cf.* 4 William Blackstone, *Commentaries on the Laws of England* 2201 (1765) (William Carey Jones ed., 1916).

[155] For a historic analysis, *see* Diskin, *supra* note 45, at 822.

[156] *See* Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).

[157] *See supra* Chapter Seven: Norms that Can Be Violated Only by State Actors.

[158] *Entscheidungen des Obersten Gerichtshofes fuer die Britische Zone,* I Entscheidungen in Strafsachen 53 (1949).

[159] *Id.* at 55.

[160] *Id.* at 56.

high authority within the local unit of the Nazi organization, the presence of the accused alone provided moral support and psychological encouragement to the other Nazi activists in the commission of the crime.[161] The case can be read as establishing the principle of responsibility for everyone who supports a crime as an approving spectator.[162] The limits of individual accountability for presence at the scene of the crime were discussed in the so-called *Pig Cart Case*[163] resolved by the same court. The accused who was in civilian clothes was called by a uniformed SA member together with other spectators to follow a march of the SA which subjected left-wing and Jewish German citizens to public humiliation.[164] His acquittal was affirmed on appeal.[165] The tribunal emphasized that his marching could not be interpreted as subjective and objective approval of the crime.[166]

The ICTR and ICTY completely followed the line of reasoning of the war trials. In *Prosecutor v. Akayesu*,[167] involving a major in a Rwanda commune who witnessed extensive merciless violence and brutal killings of civilian Tutsis, the court determined that Akayesu "aided and abetted the…acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises".[168] Similarly, in *Prosecutor v. Furundzija*,[169] the interrogating local commander of the special unit of the paramilitary forces of the Croat Community in Bosnia-Herzegovina during the disintegration of the former Yugoslavia was present in the room or in the vicinity while another soldier was raping a female witness. The court stressed that the "accused's presence and continued interrogation of [the victim] encouraged [the actual perpetrator] and substantially contributed" to the war crimes.[170] Finally, in *Prosecutor v. Aleksovski*, the silence of a prison warden in Bosnia-Herzegovina was interpreted by the court as a silent approval of the beatings and abuses of the prisoners by the guards and the warden was accordingly convicted for aiding and abetting the violence against the

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[161] *Id.* at 55.

[162] *See Prosecutor v. Furundzija, supra* note 87, para. 206. The accused in the *Synagogue Case* was convicted as a co-perpetrator. *Supra* note 158, at 55.

[163] Strafsenat. Urt. v. 14 Dez. 1948 g. L u. a. StS 37/18; Entscheidungen, *supra* note 158, at 229.

[164] Strafsenat. Urt. v. 14 Dez. 1948 g. L u. a. StS 37/18, 230.

[165] *Id.* at 234.

[166] *Id.*

[167] *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998.

[168] *Id.* at para. 693.

[169] *Prosecutor v. Furundzija, supra* note 87.

[170] *Id.* at 273, approved in *The Prosecutor v. Ingace Bagilishema*, Case No. ICTR-95-1A-T, ICTR T.Ch.I, 7 June 2001, para. 34.

inmates.[171] However, as the trial chamber revealed in *Prosecutor v. Bagilishema*, all precedents dealing with presence involved the potential participation of an approving spectator.[172] In none of these cases was the court confronted with the issue of whether constant presence of a TNC in a country can be considered as providing moral support for the commission of criminal acts. Also, all those convicted under this concept were government officials or, as in the *Synagogue Case*, local leaders of a semi-state-run organization. In other words, providing moral support through mere presence is insufficient if the presence is not combined with a badge of authority.[173] Accordingly, there is no mere bystander liability for private actors such as TNCs in international criminal law of which the U.S. business community needs to be afraid of. As a consequence, such fears are not justified. Business presence of a TNC in a market where the government violates human rights does not amount to aiding and abetting in international law under ATS.

Accordingly, given these shortcomings of Judge Sprizzo's reasoning, his approach was not adopted in the recent *Bowoto v. Chevron* case.[174] It differentiated *Central Bank of Denver* on the ground that Securities Act, as opposed to the ATS, does not refer to international law.[175] In the meantime, district courts likewise decided to follow the *Talisman* precedent in all ATS judgments against TNCs and recognized, in principle, the concept of aiding and abetting under ATS.[176]

Thus, it does not come as a surprise that in the appeal of the *Apartheid Case*, the Court of Appeals for the Second Circuit reversed the district court's decision as to aiding and abetting. Pointing to the above-mentioned sources, the Nuremberg Charter, the Rome Statute, and the law and practice of the ICTR and the ICTY, the Court of Appeals recognized that aiding and abetting is well-founded in international law and meets the *Sosa* standard.[177]

(e) *Cabello* and *Aldana*

After *Sosa*, the Court of Appeals for the Eleventh Circuit likewise affirmed liability for aiding and abetting under the ATS. In *Caballo v. Fernandez-Larios*,

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[171] ICTY, T.Ch. I, 25 June 1999.

[172] *Bagilishema, supra* note 170.

[173] Kriangsak Kittichaisaree, *International Criminal Law* 242 (2001).

[174] *Bowoto v. Chevron Corp.*, 2006 WL 2455752 (N.D. Cal. 2006).

[175] *Id.* at 4.

[176] *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 281 (E.D.N.Y. 2007); *Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457, 463–64 (S.D.N.Y. 2006).

[177] *Khulumani v. Barclay National Bank*, 504 F.3d 254, 260 (2d Cir. 2007). *See also Bowoto v. Chevron Corp.*, WL 2007 2349341, at 6–7 (N.D. Cal. 2007); Chapter Seven: Norms that Can Be Violated Only by State Actors, accompanying text to n. 182.

the Eleventh Circuit held that the defendant Chilean military officer could be held liable for aiding and abetting torture and extra-judicial killing if he "substantially assisted some person or persons who personally committed or caused wrongful acts" and "knew that his actions would assist in the legal or wrongful activity at the time he provided the assistance".[178] The Eleventh Circuit readopted this holding in *Aldana v. Del Monte Fresh Produce, N.A., Inc*.[179] Thus, aiding and abetting liability appears to be firmly established under ATS.

IV. *Conclusions*

There are a few norms of international law that can be violated by actors regardless of the private or official nature of their conduct. As a consequence, TNCs may be liable irrespective of whether or not they cooperated with State actors in the violation as long as the elements of the norms are met.

So far, federal courts in ATS litigation have identified genocide, war crimes, forced labor, and terrorist attacks as being applicable regardless of whether there is State involvement or not. In contradiction to current international law, crimes against humanity has not been recognized as not requiring State action.

Since ATS is silent on modes of participation, courts need to undertake judicial-lawmaking for purposes of ATS as acknowledged by the Supreme Court's categorization of international law as federal common law.

As to the methodology to develop suitable rules, in accordance with the path taken by the Supreme Court in *Banco Nacional de Cuba*, courts should look at international and federal precedents on the subject.

For the time being, courts have recognized liability for conspiracy, command responsibility, and aiding and abetting under ATS.

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[178] 402 F.3d 1148, 1158 (11th Cir. 2005).

[179] 416 F.3d 1242, 1247–48 (11th Cir. 2005).

Part IV
Defenses and Limitations

Chapter Nine

Corporate Shield

I. *Introduction*

Economically, there exists only one business for a TNC, such business operating on a worldwide scale. Legally, however, the picture is different. In most cases wherein plaintiffs attempt to point at corporate wrongdoing under ATS, the plaintiffs will not face a single legal entity but a group of subsidiaries, affiliates, and partners spread over different continents led by a parent functioning as a global headquarter.[1] Typically, the corporation that directly committed the crimes, whether formally part of the TNC via ownership of its stocks or not, incorporated in the country where the violations of international law occurred is the obvious defendant as long as personal jurisdiction over it can be exercised by a U.S. court.

This chapter examines the availability of the defense of corporate shield due to specific allocation of substantive liability under ATS within corporate groups or networks operating on a worldwide basis.[2] Part I analyzes the issue of how to hold the parent corporation liable for the acts of its subsidiaries under ATS in the absence of direct participation by the parent corporation. Part II examines the parallel issue of how to hold a parent corporation liable under ATS for the acts of its business partner-corporations which do not officially form part of the former's corporate group. From the viewpoint of human rights activists, even if personal jurisdiction can be exercised over the foreign subsidiary,[3] the optimal outcome would be to hold the parent company directly liable for reason of efficiency: The lead corporation of a group has deeper pockets, and public concern attracted and media mileage obtained from a court proceeding and thereby, deterrence of corporate misconduct, is

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[1] On the law and concepts relating to TNCs, *see generally* Peter Muchlinski, *Multinational Enterprises and the Law* (1995).

[2] For a brief overview, *see* Beth Stephens et al., *International Human Rights Litigation in US Courts*, 320–23 (2008).

[3] This is usually the exception rather than the norm. *See infra* Chapter Ten: Lack of Personal Jurisdiction. This is one more reason to hold the American parent corporation liable.

expected to be at its highest if the company heading a corporate group finds itself liable under ATS.

II. Bowoto *Case: Liability for Acts of Subsidiaries*

In *Bowoto v. Chevron*, the parties agreed in October 2001 to a bifurcated discovery which is in its first phase, limited to the issue of the responsibility of the American parent companies.[4] In phase I, the problem was – from the plaintiff's perspective – how to expand any potential liability of the foreign subsidiary to the parent corporations, the facts of which will be determined in phase II of the discovery. At the end of phase I, the TNC defendants moved for summary judgment since plaintiffs were not able to present a triable issue of fact supporting defendants' liability.[5] Consequently, Judge Illston of the federal court of the Northern District of California provided a deeper discussion of parent company liability under ATS.[6]

A. *Factual Background and Context*

The underlying facts arose from incidents related to Chevron's business activities in Nigeria.[7] As to the first incident, plaintiffs alleged that Chevron Nigeria ("CNL") recruited Nigerian police and military to shoot and fire weapons at people staging a protest at one of CNL's oil platforms against Chevron's environmental practices.[8] As to the second and third incidents, plaintiffs contended that CNL personnel, together with the Nigerian military, opened fire from helicopters and trucks on villagers, killing several people and injuring others, and in once case, set fire on a building with livestock.[9]

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[4] 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004).

[5] *Id.* at 1234.

[6] In *Royal Dutch Petroleum Co. v. Wiwa*, 2002 WL 319887 (S.D.N.Y. 2002), filed against the TNC Shell which also relates to oil production in Nigeria, the issue of indirect parent liability was also raised. Here, the court could avoid resolving the issue because the facts alleged by plaintiffs could be interpreted as amounting to direct participation by the parent companies in the wrongdoing of the subsidiary, and it could therefore focus exclusively on direct liability of the parent. The court held that plaintiffs have sufficiently pleaded facts in support of their claim of joint action and have demonstrated that defendants acted under the color of law. *Id.* at 13. Nonetheless, in the accompanying footnote, the court added that plaintiffs have also adequately pleaded facts which establish an agency relationship. *Id.* at n. 14. This should be considered mere obiter dictum.

[7] 312 F. Supp. 2d at 1233.

[8] *Id.*

[9] *Id.*

In respect of all three incidents, plaintiffs asserted that by providing the Nigerian military access to CNL equipment and personnel to facilitate operations, furnishing intelligence and other information to the military, meeting with the military to assist in planning and coordinating raids and terror campaigns, and financially supporting the military, CNL violated plaintiffs' human rights through summary executions, torture, and other cruel and inhuman acts together with Nigeria's military and police for the purpose of suppressing plaintiffs' protests concerning Chevron's environmental practices in Nigeria.[10]

Again, as indicated above, holding the Nigerian company CNL liable in a federal court under ATS would have been difficult since a U.S. court may lack personal jurisdiction over foreign companies with only virtual contact with U.S. territory.[11] Structurally, the TNC Chevron is headed by the parent company ChevronTexaco Corporation ("CTX"), (which was renamed in 2005 to Chevron), and ChevronTexaco Overseas Petroleum ("CTOP") which is a wholly-owned subsidiary of CTX.[12] At the time of the first incident, CTOP held 90 percent of CNL directly, and the remaining 10 percent was held by another wholly-owned subsidiary.[13] Accordingly, plaintiffs in Chevron asserted that the American defendants, CTX and CTOP, are indirectly liable for the acts of its subsidiary CNL in the three incidents and sued only them.[14]

B. *Cornerstone Concept of Limited Liability*

At the outset, Judge Illston cited the Supreme Court's holding in *United States v. Bestfoods* which is a leading precedent on issues of limited liability and piercing in federal law.

In *Bestfoods*, the Supreme Court interpreted a statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")[15] which imposes liability for costs of cleaning up industrial waste generated by polluting facilities. The Supreme Court used the opportunity to explain that "[i]t is a general principle of corporate law deeply ingrained in our legal system that a corporation is not liable for the acts of its subsidiaries."[16]

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[10] *Id.*

[11] On these issues, *see infra* Chapter Ten: Lack of Personal Jurisdiction.

[12] 312 F. Supp. 2d at 1233.

[13] *Id.*

[14] *Id.* Plaintiffs also advanced the theory that defendants are also liable for their own acts in the incidents. However, regarding direct liability, the court held that plaintiffs did not provide any evidence. *Id.* at 1240.

[15] *See* 42 USC §§ 9601–9675. The statute is generally referred to as CERCLA.

[16] 312 F. Supp. 2d at 1234, *citing* 524 U.S. 51, 68 (1998). The Supreme Court held that unless the parent company is the operator of the site concerned within the meaning of the statute,

Indeed, as the Supreme Court correctly implied, it is common knowledge in American law (as well as in any developed legal system) that a corporation is a juridical person separate and distinct from its shareholders.[17] Whenever a corporation concludes a contract, commits a tort, or fulfils statutory conditions, the legal entity, not the investors, whether individuals or parent companies, incurs the obligations and holds rights and entitlements.[18] As a consequence,

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responsibility could only be imposed by recourse to traditional, narrowly tailored piercing the corporate veil doctrines. *Id*.

[17] *See, e.g.*, Edwin Merrick Dodd, "The Evolution of Limited Liability in American Industry", 61 *Harv. L. Rev*. 1351 (1948).

From the beginning of the 19th century, industrialists, whose power and influence grew parallel with the size of their factories, pushed heavily for the granting of limited liability for manufacturing companies which were already common for corporations with public purposes such as bridges, canals, turnpikes, or financial institutions such as banks and insurance companies. Edwin Merrick Dodd, *American Business Corporations until 1860*, 365 (1954). Over time, the lobbyists won and states gradually began enacting statutes which provided for limited liability for manufacturing companies. New Hampshire started in 1816. Connecticut followed in 1818, and joined by Maine in 1923. Phillip I. Blumberg, "Limited Liability and Corporate Groups", 11 *J. Corp. L*. 573, 593 (1986). With its adoption by the state legislature of Massachusetts in 1830, at that time the most industrialized of all the states, after a long, heated, and bitterly fought political struggle between those who believed that the advantage of limited liability should be open to all kinds of business and those who thought that the privilege should be granted only to corporations with public purposes, limited liability celebrated its final breakthrough. Dodd, *supra* note 17, at 377–84. Then Governor Lincoln fought bitterly for the introduction of limited liability for the manufacturing industry. He pointed to the flight of capital from Massachusetts to other states which already provided for limited liability and the low value of stocks in the market and for collateral purposes. *Id*. at 380. At the end of the development stood the general recognition of shareholder immunity from the debts incurred by the corporate entity. Nina A. Mendelson, "A Control-Based Approach to Shareholder Liability for Corporate Torts", 102 *Colum. L. Rev*. 1203, 1211 (2002). Today, § 6.22(a) of the Model Business Corporation Act states that a shareholder has to "pay the consideration for which the shares were authorized to be issued". Section 6.22(b) clarifies that a shareholder is "not personally liable for the acts or debts of the corporation except that he becomes personally liable by reason of his own acts or conduct".

Ever since, it is commonplace for new corporations to be incorporated motivated by the desire to limit liability in case of the corporation's financial distress. Given the statutory possibilities offered to entrepreneurs, such desire generally constitutes a perfectly legal and legitimate business decision. Stephen B. Presser, "Piercing the Corporate Veil 1–5" (1991). Public opinion and jurists, in particular, have been celebrating limited liability as the "greatest single discovery of modern times", Maurice Wormser, *The Disregard of Corporate Fiction and Allied Corporate Problems* 2 (1927), *quoting* President Butler of Columbia University, which deserves "a place of honor with Watt and Stephenson, and other pioneers of the Industrial Revolution", Paul Halpern et al., "An Economic Analysis of Limited Liability in Corporation Law", 30 *U. Toronto L.R*. 117, 118 (1980), *quoting* The Economist, 18 December 1926.

[18] *Cf.* Phillip I. Blumberg, "Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Judicial Entity", 24 *Hastings Int'l & Comp. L. Rev*. 297, 301

unless shareholder-parent corporations are liable for other reasons, such as improperly interfering with the operation of the subsidiary-corporation resulting in direct liability, they do not face the risk of being liable for the obligations of the corporation and its creditors are therefore restricted to the subsidiary's assets to satisfy their respective credits: In sum, this restriction to the subsidiary's assets is the natural result of the concept of limited liability which ensures that the potential loss of a shareholder, whether an individual or a corporation, is restricted to the amount of his or its capital investment.[19] Accordingly, as a general rule, if human rights are violated by a subsidiary, the parent company does not face liability under ATS.

Classically, two major justifications, not specifically addressed by Judge Illston in *Bowoto*, can be cited in favor of limited liability.[20] First is the economic

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(2001), who correctly notes that the concept of separate legal personality and limited liability are actually different."

[19] For the relationship between the concept of limited liability and the concept of a separate legal entity, *see* Blumberg, *id*.

[20] In recent times, despite its being deeply embedded in American corporate law, its high standing in American culture, and the afore-mentioned major justifications, the concept of limited liability has come under attack particularly with regard to torts cases where it shields the parent or sister company from obligations of the affiliated corporation incurred through wrongful conduct, as it is true in ATS tort cases against corporations. Generations of scholars have taken the position that courts and legislatures should pay tribute to the distinction between tort and contract creditors. *See, e.g.*, Bernard F. Cataldo, "Limited Liability with One-Man Companies and Subsidiary Corporations", 18 *L. & Contemp. Probs*. 473, 477 (1953); Robert W. Hamilton, "The Corporate Entity", 49 *Tex. L. Rev*. 979, 984–85 (1971); *Note: Should Shareholders Be Personally Liable for the Torts of Their Corporations*, 76 *Yale L.J*. 1190 (1967); Alan Schwartz, "Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and Remote Risk Relationship", 14 *J. Legal Stud*. 689, 716–17 (1985); David W. Lebron, "Limited Liability, Tort Victims and Creditors", 91 *Colum. L. Rev*. 1565 (1991); Henry Hansmann & Reinier Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts", 100 *Yale L.J*. 1879 (1932–34). The underlying argument is that creditors deserve less protection than tort creditors. After all, they freely chose their business partners, no one forced them to do business with the corporation, and no one forced them into a contract. Holding the shareholder liable therefore appears to grant the contract creditor more than he actually bargained for. Franklin A. Gevurtz, "Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil", 76 *Or. L. Rev*. 853, 859 (1997). In any event, contract creditors can protect themselves by demanding higher prices or additional security. In this manner, market forces ensure the more efficient allocation of business risks. Lebron, *supra* note 20, at 1584. Conversely, the tort creditor is a victim of the tortious conduct of the corporation, generally not having accepted the consequences of limited liability. Furthermore, tort law principles such as product liability and vicarious liability aim at the internalization of costs. The compensation provided to victims should be part of and reflected in the price of the goods or services sold. In this manner, tort law creates incentives for the producer and service provider to minimize costs and maximize profit by implementing risk-reducing measures. This policy is partly

rationale which posits that by allowing efficient risk-shifting, limited liability encourages investments and accordingly speeds up economic development.[21] Without limited liability, risk-averse investors might be deterred from investing if their personal assets are potentially threatened by creditor claims.[22] With limited liability, a cautious shareholder can invest and diversify his or her portfolio even though he or she does not take part in the management of the corporations, which leads to the emergence of an adequately funded capital market.[23] At the same time, creditors of the corporation can demand higher prices or extra security to compensate for the additional risks. Thus, at least in the contract context, limited liability results in a win-win situation.[24] Second is the democratic rationale whereby limited liability is aimed at keeping the costs of market entry low in order to encourage small-scale entrepreneurs and attract low-class and middle-class investors.[25] Without immunity from creditor claims, it was feared that only the very rich could afford the risk of investing in corporate business.[26] The widespread participation in business granted to everyone the opportunity to become wealthy and enriched over the decades large parts of the population through ownership in prospering and expanding corporations.

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undermined by limited liability, which may provoke corporations to engage in overly risky operations, and thus allows enterprises to externalize costs. Halpern et al., *supra* note 17, at 143; Frank H. Easterbrook & Daniel R. Fischer, "Limited Liability and the Corporation", 52 *U. Chi. L. Rev*. 89, 117 (1985); Mark J. Roe, "Corporate Strategic Reaction to Mass Tort", 72 *Va. L. Rev*. 1, 40–42 (1986); Lebron, *supra* note 20, at 1584–85. At least with regard to closely-held corporations, the additional loss cannot be offset by additional gain from the promotion of the capital market. Whether society still gains an overall benefit from the increased economic activity in the tort context is a matter of hot debate. *See* Hansmann & Kraakman, *supra* note 20, *passim*; Lebron, *supra* note 20, *passim*. Assuming for the sake of argument that it does, one still has to justify why the costs of subsidizing such industries should be borne by tort victims and not by the society as a whole. Halpern et al., *supra* note 17, at 117; Easterbrook & Fischer, *supra* note 20, at 110.

[21] David H. Barber, "Piercing the Corporate Veil", 17 *Williamette L. Rev*. 371, 373 (1981).

[22] Robert B. Thompson, "Piercing the Corporate Veil", 76 *Cornell L. Rev*. 1036, 1040 (1991).

[23] Easterbrook & Fischer, *supra* note 20, at 90. *See generally* Joseph Grundfest, "The Limited Future of Unlimited Liability: A Capital Markets Perspective", 102 *Yale L.J.* 387 (1992).

[24] For torts claims, see the discussion below.

[25] *Slee v. Bloom,* 20 Johns. 669 (N.Y. 1822); Presser, *supra* note 17, at 1–15. Numerous scholars overlook this traditional rationale for limited liability.

[26] Presser, *supra* note 17, at 1–15.

C. *Exceptions and Bypasses to the General Rule*

In *Bowoto*, Judge Illston textually put the accent on the restricted scope of the most direct exception to the doctrine of limited liability: the doctrine of piercing the corporate veil.[27]

1. *Piercing the Corporate Veil*

Repeating a common theme reiterated by courts regardless of what test they are exactly applying, Judge Illston explained that "only in unusual circumstances" do courts "disregard the corporate form . . . where such disregard is necessary to prevent injustice to a person or entity that would be harmed by refusing to impose liability on the basis of the corporate structure".[28]

Indeed, the doctrine of piercing the corporate veil is an equitable concept which constitutes a judicial exception to limited liability.[29] Judges disregard the separate legal entity of the corporation and hold the individual shareholders or parent company responsible for the corporation's debts in accordance with their notions of justice and honesty.[30]

As a remedy largely based on individual discretion, judges proceed with extreme caution. Since piercing not only disregards a fundamental statutory provision but also trumps the underlying rationale of encouraging investment as explained above, courts impose formidable obstacles to recovery against the shareholders, whether individuals or another corporation, restricting liability to the most extreme factual situations. The basis for holding the parent company liable is the abuse of the corporate form by the parent company. Since the insulation from the corporation's creditors was created for legitimate business operations, the argument goes, it should not be misused for an illegitimate purpose.[31]

As to the content of the tests applied to distinguish instances in which to pierce from others in which such claim should be rejected, Judge Illston

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[27] 312 F. Supp. 2d at 1235.

[28] *Id*.

[29] The name of the doctrine can be traced back to an article by Maurice I. Wormser, who not only shaped the terminology of the concept but also had a great influence on its development. Maurice I. Wormser, "Piercing the Veil of Corporate Entity", 12 *Colum. L. Rev*. 496 (1912).

[30] Presser, *supra* note 17, at 1–7.

[31] Compare the statements of Maurice Wormser:

> Fictions are invented and instituted for the advancement and promotion of justice, and will be applied for no other purpose. No sound reason can be perceived why the principles applicable to fictions in general should not apply to the fiction that the corporation is a person in the eye of the law. . . . [T]his fiction like every other fiction, must be employed with common sense and applied as to promote the ends of justice.

Wormser, *supra* note 17, at 10, 24.

openly acknowledged the uncertainty of the exact concepts.[32] Like others before him,[33] he openly admitted that the tests employed by courts to hold parent companies liable "has not been a model of clarity."[34]

One main standard employed by courts to allow recovery in the context of intra-group liability is commonly referred to as the "alter ego" doctrine which was developed by Californian courts.[35]

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[32] 312 F. Supp. 2d at 1235.

[33] Traditionally, judges as well as scholars have complained about the failed attempts of courts to capture the doctrine in a formulation which provides guidance for judges in later cases. Famous in this respect is Judge Cardozo's warning of the "mists of metaphor". *See Berkey v. Third Avenue Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58 (1926). And Robert Charles Clark's cynical criticism that corporate veil cases "are unified more by the remedies sought – subjecting to corporate liabilities the personal assets directly held by shareholders – than by repeated and consistent application of the same criteria for granting the remedy." *See* Robert Charles Clark, *Corporate Law* § 2.4, 73 (1986).

[34] 312 F. Supp. 2d at 1235.

[35] The second main standard applied in intra-group liability cases in American law can be traced back to the book *Parent and Subsidiary Corporations* published by New York lawyer Frederick J. Powell in 1931. Three conditions are required under this standard. The first condition is met if the parent company completely controls and dominates the subsidiary, otherwise known as the instrumentality test. Frederick J. Powell, *Parent and Subsidiary Corporations* (1931). According to Powell, this can be assumed if either formal requirements of incorporation are not followed or the officers do not manage or operate the subsidiary in its own interest. *Id.* at 4. The second condition requires that the parent used the subsidiary to commit a fraudulent, wrongful, or unjust act against the complainant or the fraud or wrong test. *Id.* The last requirement calls for an unjust loss or injury on the side of the plaintiff caused by the defendant. The first requirement has provided the name for the whole standard under which it is commonly referred to – the instrumentality test. In the landmark case *Lowendahl v. Baltimore*, the New York Supreme Court adopted the instrumentality test in 1937. 287 N.Y.S. 62 (1937). Since that time, the great majority of courts have relied on this standard in determining whether to pierce the corporate veil or not. The court stated the test as follows:

> [W]e may say that in any case, except agency, estoppel, or direct tort, three elements must be proved:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect of the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own, and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.
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> 287 N.Y.S. at 76.

In *Bowoto*, Judge Illston referred to both standards. He clarified that despite the different tests, the formulations are generally similar and many courts do not distinguish between

The alter ego test as such requires that the two corporations function as one entity in fact.[36] The language of this test can be traced back to the landmark decision *Minifie v. Rowely* decided by the Supreme Court of California in 1922:

> Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: first, that the corporation is not only influenced and governed by that person, but there is such unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under particular circumstances, sanction a fraud or promote injustice.[37]

Federal law has been largely drawing from Californian law in this respect; given the state's competence for corporate law in general, it is clear that state courts can look back to a greater history of experience and cases.[38]

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the two of them. 312 F. Supp. 2d at 1237. Indeed, although formulated in a slightly different manner, the two approaches do not differ with regard to analysis, application, and result. *See Consumer's Co-Op of Walworth County v. Olsen*, 419 N.W.2d 211, 217–18 (Wis. 1988); *Transamerica Leasing v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000); *De Casto v. Sanill, Inc.*, 198 F.3d 282 (1st Cir. 1999); *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); *Oxford Furniture Cos., Inc. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118 (11th Cir. 1991); *United Electrical, Radio & Machine Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080 (1st Cir. 1992). Frequently, courts cite both standards in one sentence and perceive them as interchangeable. *Cf.* Phillip Blumberg, 3 *The Law of Corporate Groups, Substantive Law*, § 6.03, n. 13 (1987).

In *Bowoto*, Judge Illston, referring to a precedent of the Court of Appeals for the Third Circuit, remarked that the only remaining difference across jurisdictions may be whether fraudulent intent is necessary for overlooking the separate legal entity. 312 F. Supp. 2d at 1237, *citing Pearson v. Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001).

[36] *See, e.g., PRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1393 (9th Cir. 1984); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 422 (5th Cir. 1980); *United States v. Dean Van Lines, Inc.*, 531 F.2d 289, 291 (5th Cir. 1976); *Riddle v. Leuschner*, 335 P.2d 107, 110–11 (Cal. 1959); *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985); *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*, 333 P.2d 802 (Cal. App. 1958).

[37] 187 Cal. 481, 487 (1922).

[38] *Cf.* Kent A. Halkett, "Piercing the Mystique of the Alter Ego Doctrine", 29 *L.A. Law*. 12, 12–13 (2006).

In *Bowoto*, the issue of whether state law or federal common law on piercing applies under ATS arose. 312 F. Supp. 2d at 1236. The parties to the dispute avoided a deeper clash on this issue. *Id*. Judge Illston noted that in *Bestfoods*, the Supreme Court noted the uncertainty created by divergent views from several jurisdictions in respect of statutes other than ATS but did not rule on the issue in respect of CERCLA as it had not been presented before the district or Circuit court. *Id*. The Supreme Court noted that there is "significant disagreement

Accordingly, in the *Bowoto* case, plaintiffs argued that defendants are the alter ego of CNL because they knew of and approved CNL's use of and payments to the Nigerian military.[39]

Judge Illston restated the general jurisprudence by declaring that officers of the parent company may supervise the subsidiary's activities without incurring liability.[40] He recognized acts such as regular reporting of the subsidiary, establishment of general procedures and policies throughout the TNC, and overseeing the financial situation of the subsidiaries as not triggering parent liability.[41] He further relied on *Bestfoods* to reiterate that officers of the parent company may simultaneously act for the subsidiary.[42]

As to the precise applicable test, he stated that the alter ego test requires a determination whether "(1) there is such a unity of interest between the corporate formalities that they do not function as separate personalities and (2) failure to disregard the separate nature of the corporate entities would result fraud in incorporation" and elaborated that some courts further demand a fraudulent element in incorporation.[43]

Many writers on liability frequently suggest that piercing the veil if the shareholder is a corporation is of a lesser evil compared to holding an individual shareholder liable.[44] One may assume that the potential for deterrence to investment is significantly lower as the parent company itself still enjoys

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among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing." 524 U.S. at 68. After the Supreme Court's holding in *Sosa v. Alvarez-Machain* that ATS claims belong to federal common law, the issue should be settled in favor of federal law.

Judge Illston avoided making a ruling by holding that the tests are similar, and thus, the issue has no practical significance in terms of result. 312 F. Supp. 2d at 1236. Nonetheless, he cited the *Seymour* decision of the Ninth Circuit as representative of the federal one, which comes very close to the alter ego test practiced in Californian courts, and decided to apply federal law as it can find. *Id., citing Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979).

[39] 312 F. Supp. 2d at 1246.

[40] *Id*. at 1235.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 1246–47, *citing Doe v. Unocal Corp*., 248 F.3d 915, 926 (9th Cir. 2001); *Laborers Clean-up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984).

[44] *E.g., Notes: Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 *Harv. L. Rev*. 1122 (1958), which states: "Transfer of liability from a corporation to an individual deprives the latter of limited liability, transfer from one corporation to another merely prevents the ultimate individual stockholders from subdividing their risks, but leaves them personally insulated." *Id*. at 1130. *See also* Easterbrook & Fischer, *supra* note 20, at 110–11. *Cf.* Lebron, *supra* note 20, at 1612, et seq.

the privilege of limited liability and personal assets of individual shareholders are not at stake. After all, in other words: no real person gets hurt; the stockholding corporation is merely deprived of a possibility to subdivide business operation risks.[45] It thus appears less vicious to impose unlimited responsibility on corporate shareholders than on individual ones.[46]

Nonetheless, the common lawyer's perception is that stakes for piercing within a corporate group are almost insurmountable. No matter what exact formulation of the test is applied, generally in the practical application, if a parent company decides to facilitate or expand its business by acquisition or establishment of a subsidiary, courts will accept the decision made by the management and refuse to hold the parent company liable for the wrongful acts of the subsidiary. Indeed, an empirical study undertaken by Robert B. Thompson evaluating 3800 cases from 1985 to 1996 wherein plaintiffs attempted to pierce the corporate veil has revealed that from a statistical point of view, courts are even more reluctant to disregard the corporate entity when the shareholder is itself a corporation as opposed to an individual.[47] The reason for this is most likely that corporate groups get the best legal advice available and thus, they fulfil the necessary technical corporate law formalities, the ignorance of which by individual single entrepreneurs invite the courts to similarly disregard the separate legal entity. Nonetheless, in limited instances, whenever the parent company abuses the corporate subsidiary, it will be held responsible. Thus, whenever the parent corporation holds out the subsidiary as a mere instrumentality or department of its business without regard to legal separation, the plaintiffs succeeded in arguing for the disregarding of the legal separation.[48] In the words of the courts, dominion and control must be so complete that the subsidiary corporation may be said to have no will, mind, or existence of its own, and to be regarded as a mere department of the business of the stockholder.[49]

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[45] *Notes: Liability of a Corporation for Acts of a Subsidiary or Affiliate, supra* note 44, at 1130; Easterbrook & Fischer, *supra* note 20, at 110–11. *Cf.* Lebron, *supra* note 20, at 1612, et seq.

[46] *Notes: Liability of a Corporation for Acts of a Subsidiary or Affiliate, supra* note 44, at 1130; Easterbrook & Fischer, *supra* note 20, at 110–11. *Cf.* Lebron, *supra* note 20, at 1612, et seq.

[47] Robert B. Thompson, "Piercing the Corporate Veil within Corporate Groups: Corporate Shareholders as Mere Investors", 13 *Conn. J. Int'l L.* 379, 385 (1999).

[48] R.A. Horton, "Liability of Corporation for Torts of Subsidiary", 7 *A.L.R.* 1343 (1966). As a general guideline, courts are highly reluctant to disregard the separate entity if the parent itself treated the subsidiary as a separate entity. If it did not, courts are inclined to pierce.

[49] *Cf. United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

While the line is easy to draw theoretically, the problem is that control by a shareholder is not only an economic reality which is true for every parent company but also an entitlement given by law to the owner and a governance tool in corporate law. Control by the shareholder-parent company is even a desirable result. Therefore, only in the extreme cases where such control amounts to excessive domination can the parent company be held liable for the tortious acts of the subsidiary.[50] Over the decades, courts have been shaping various factors which allow the determination of the degree of control of the stockholding company necessary to pierce the corporate veil.[51] Neglect of

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[50] *See, e.g., Johnson v. Flowers Indus., Inc.,* 814 F.2d. 978, 980 (4th Cir. 1987); 768 F.2d at 691.

[51] Starting with Powell, *supra* note 35, at 9, various scholars have devoted considerable efforts to provide checklists of relevant criteria. The collection of Cathy S. Krendl & James R. Krendl, "Piercing the Corporate Veil: Focusing on Inquiry", 55 *Denv. L.J.* 1, 52–55 (1978), amounts to 31(!) factors which have a tendency to maintain the concept of separate entities in a given case, namely: (1) the shareholder is not a party to the contractual or other obligation of the corporation; (2) the subsidiary is not undercapitalized; (3) the subsidiary does not operate at a deficit while the parent is showing a profit; (4) the creditors of the companies are not misled as to which company they are dealing with; (5) creditors are not misled as to the financial strength of the subsidiary; (6) the employees of the parent and subsidiary are separate and the parent does not hire and fire employees of the subsidiary; (7) the payroll of the subsidiary is paid by the subsidiary and the salary levels are set by the subsidiary; (8) the labor relations of the two companies are handled separately and independently; (9) the parent and the subsidiary maintain separate offices and telephone numbers; (10) separate directors' meetings are conducted; (11) the subsidiary maintains financial books and records which contain entries related only to its own operations; (12) the subsidiary has its own bank account; (13) the earnings of the subsidiary are not reflected on the financial reports of the parent in determining the parent's income; (14) the companies do not file joint tax returns; (15) the subsidiary negotiates its own loans or other financing; (16) the subsidiary does not borrow money from the parent; (17) loans and other financial transactions between the parent and subsidiary are properly documented and conducted on an arm's length basis; (18) the parent does not guarantee the loans of the subsidiary or secure any loan with assets of the parent; (19) the subsidiary's income represents a small percentage of the total income of the parent; (20) the insurance of the two companies is maintained separately and each pays its own premium; (21) the purchasing activities of the two corporations are handled separately; (22) the two companies avoid advertising as a joint activity or other public relations which indicate that they are the same organization; (23) the parent and the subsidiary avoid referring to each other as one family, organization, or as divisions of one another; (24) the equipment and other goods of the parent and subsidiary are separate; (25) the two companies do not exchange assets or liabilities; (26) there are no contracts between the parent and the subsidiary with respect to purchasing goods and services from each other; (27) the subsidiary and the parent do not deal exclusively with each other; (28) the parent does not review the subsidiary's contracts, bids, or other financial activities in greater detail than would be normal for a shareholder who is merely interested in the profitability of the business; (29) the parent does not supervise the manner in which the subsidiary's jobs are

corporate formalities, commingling of assets, and intertwining of operations are frequently considered by courts in this respect.[52]

However, these factors are almost never fulfilled in respect of corporate groups which are advised by the best corporate lawyers in their respective countries. Not surprisingly, in *Bowoto*, Judge Illston held that even applying the less stringent test which does not require fraud in incorporation, plaintiffs have not submitted evidence which demonstrates the injustice resulting from the maintenance of separate legal entities. Indeed, the mere inability to recover their losses does not suffice in this respect as this is inherent in the concept of limited liability.[53] As a consequence, Judge Illston did not pierce the corporate veil.[54]

2. *Application of Enterprise Principles to ATS?*

Aware of the very high threshold of piercing the corporate veil under the traditional, narrowly-tailored doctrines, plaintiffs further attempted to rely on a separate ground for exception to the concept of limited liability: integrated enterprise theory.[55]

Integrated enterprise theory rejects legal fragmentation into a set of monad-style corporations and treats a corporate group headed by a parent corporation as one single business. Under integrated enterprise theory, courts have discarded the formalistic view of corporate law in favor of a stress on the economic reality (of corporate groups doing one business through numerous companies).[56]

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carried out; (30) the parent does not have a substantial veto power over important business decisions of the subsidiary and does not itself make such crucial decisions; and (31) the parent and subsidiary are engaged in different lines of business. Footnotes omitted.

[52] Robert Charles Clark went so far as to contend that many piercing cases, if not all, can be explained and resolved under the law of fraudulent conveyance. Clark, *supra* note 33, § 2.4. Self-dealing in the face of bankruptcy is one major background of piercing cases, and an approach merely founded on fraudulent conveyance cannot capture situations in which assets or products are shifted between affiliated members of one group below market price to increase the net profit of the whole group. Such may be economically reasonable and not undertaken in fraud of creditors in bankruptcy. Courts have always emphasized the commingling or stripping of assets, siphoning, or comparable manipulation as an important indicator of the lack of a separate corporate entity justifying the grant of limited liability. *AT & T Global Information Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857 (S.D. Ohio 1998); *Joseph R. Foard Co. v. Maryland*, 219 F. 827 (4th Cir. 1914); *Houston Oil & Minerals Corp. v. SEEC, Inc.*, 616 F. Supp. 990 (W.D. La. 1985). As to corporate informalities, *See* Blumberg, *Substantive Law, supra* note 35, § 10.09.

[53] 312 F. Supp. 2d at 1247.

[54] *Id.*

[55] *Id.* at 1237.

[56] *See id.*

In this respect, plaintiffs were able to point to two judgments decided by the Court of Appeals for the Third Circuit in respect of the Worker Adjustment Retraining Notification Act ("WARN")[57] and the Ninth Circuit under Title VII of the Civil Rights Act of 1964[58] in which both circuits actually upheld integrated enterprise principles with regard to the statutes at stake.[59] Since its emergence, the integrated enterprise theory has been equally adopted by courts under the Labor Management Relations Act,[60] the Age Discrimination in Employment Act,[61] the Americans with Disabilities Act,[62] the Fair Labor Standards Act,[63] by the Department of Labor regulations for the Family Medical Leave Act,[64] and also in some cases under the above-mentioned CERCLA.[65] For example, WARN obliges employers to provide workers with 60 days' notice prior to a plant closing or a mass layoff and allows various remedies for workers if the required notification does not occur.[66] Very often, however, the plant closing coincides with the demise or bankruptcy of the employer-corporation. In this context, worker-plaintiffs have successfully attempted to seek damages not from the debt-laden or bankrupt corporations but their prospering affiliated next-to-kin.[67] Under these standards, courts look at four labor-related characteristics of affiliated operations: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control to determine a single employer.[68] Judge Illston correctly noted that as a consequence under these standards, it is significantly easier for plaintiffs to hold parent companies responsible for the acts of their subsidiaries in disregard of the high thresholds of piercing under state corporate laws.[69]

The underlying rationale of the courts is the belief that without taking economic realities into consideration in the application of the statute, the latter is largely unable to solve the problems that Congress, in enacting such

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[57] *Pearson*, 247 F.3d 471.
[58] *Kang v. U. Lim*, 296 F.3d 810 (9th Cir. 2002).
[59] 312 F. Supp. 2d at 1237.
[60] *See International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co., Inc.*, 50 F.3d 770 (9th Cir. 1995).
[61] *See Frank*, 3 F.3d 1357.
[62] *See EEOC v. Chemtech Int'l Corp.*, 890 F. Supp. 623 (S.D. Tex. 1995).
[63] *See Takacs v. Hahn Auto. Corp.*, 1999 WL 33117265 (S.D. Ohio 1999).
[64] See 29 C.F.R. § 825.104(c)(2).
[65] *Supra* note 15.
[66] 29 U.S.C. § 21201.
[67] *Pearson*, 247 F.3d at 477.
[68] *See, e.g.*, *Radio & Television Broad. Techs. Local Union 1264 v. Broadcast Serv. of Mobile*, 380 U.S. 255, 256, 85 S.Ct. 876, 13 L. Ed. 2d 789 (1965)
[69] 312 F. Supp. 2d at 1237.

statute, wanted to remedy. Courts have accepted the rationale in respect of special statutes for the furtherance of specific non-corporate interests under which judges did not feel restrained by classic corporate law principles as much as normally. [70]

[70] Notably, there is case law in ordinary torts law, on which Judge Illston is silent, in which courts may have shown sympathy for enterprise theory principles. The *Amoco Cadiz* case may possibly constitute a very rare exception which some are inclined to interpret as an expression of enterprise liability in torts law. *See* Sarah Joseph, *Corporations and Transnational Human Rights Litigation* 141 (2004); *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 AMC 2135 (N.D. Ill. 1984). At dawn of 16 March 1978, the M/C Amoco Cadiz, a supertanker of 230,000 deadweight tons, met a severe storm and was grounded off the Brittany coast of France with a full cargo of crude oil while on its way from Kargh Island in the Persian Gulf to Rotterdam in the Netherlands. James W. Bartlet III, "In re Oil Spill by the Amoco Cadiz – Choice of Law and a Pierced Corporate Veil Defeat the 1969 Civil Liability Convention", 10 *Mar. Law*. 1 (1985). The reason was the total failure of the steering system combined with the failed attempts of the Pacific, a salvage tug boat which was by chance close to the Amoco Cadiz at that time, to tow the vessel away from the shore to the sea. 1984 AMC at 2139, 2141–52. The breaking apart of the oil vessel resulted in one of the greatest oil spills in human history covering 18 miles wide and 80 miles long, damaging over approximately 180 miles of the French Coast. Beth Van Hanswyk, "The 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reform in United States Law", 22 *Int'l Law*. 319, 333 (1988). Six months and national efforts by France were needed to finish the clean-up. *In the Matter of Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1285 (7th Cir. 1992). The environmental catastrophe had a lasting impact on the ecology, the economy, and the people of Brittany, a major fishing and tourist region in Europe. *Id.*

In a consolidated litigation, Judge Frank J. McCarr of the United States District Court for the Northern District of Illinois was confronted with the tort claims of the French plaintiffs including the Republic of France, groups of departments, municipalities, businesses and individuals located in Brittany against the Amoco Transport Company ("Transport"), a Liberian corporation which was the registered owner of the vessel, and Amoco International Oil Company ("AIOC"), a Delaware corporation which operated the tanker including maintenance, repair, and training of the crew, and Standard Oil of Indiana ("Standard"), now Amoco, an Indian parent corporation which owned both Transport and AIOC. The affiliated members of the Standard Group constituted a large integrated petroleum and chemical empire operating on a worldwide basis. 1984 AMC at 2136. Surprisingly enough, Judge McCarr's decision on liability held Standard and its subsidiaries jointly and severally liable for the damages incurred by the plaintiffs. *Id.* at 2195.

With regard to Transport, the court ruled that the owner had a non-delegable duty to ensure the seaworthiness of the tanker and the company had failed this duty to control and supervise the maintenance, repair, and crew training of the Amoco Cadiz. *Id.* at 2193. AIOC was held responsible under the theory that a party who operates and completely controls a vessel is obliged to undertake everything to ensure the adequate condition of the ship and its crew, and AIOC negligently performed this duty. *Id.* at 2191.

Other writers go one step further in openly demanding the introduction of enterprise principles on a more general basis, not necessarily restricted to specific statutes. Phillip I. Blumberg, has, throughout his academic life, argued the adoption of "enterprise principles" as opposed to "entity law".[71] Underlying the enterprise view is the emphasis on actual economic realities as opposed to legal fictions. Since TNCs conduct business on a worldwide

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As to the parent company, Judge McCarr found Standard responsible for its own negligence as well as that of AIOC. The court declared briefly without further explanation:

> 43. As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities, AIOC and Transport.
>
> 44. Standard exercised such control over its subsidiaries AIOC and Transport that those entities would be considered to be mere instrumentalities of Standard. Furthermore, Standard itself was initially involved in and controlled the design, construction, operation and management of the Amoco Cadiz and treated that vessel as if it were its own.

In effect, the decision can be read as establishing the principle that vertically integrated oil multinationals which compete on the world market are liable for the tortious behavior of their subsidiaries if and to the extent the subsidiaries are treated as mere necessary departments of one big enterprise such as the purchase and owning of ships or their operation. In the academic literature, views diverge as to whether the decision is based on the doctrine of piercing the corporate veil, *see* Bartlett III, *supra* note 70, at 17, or on pure enterprise tort principles, William A. Klein & John C. Coffee, Jr., *Business Organization and Finance* 141 (2000). Early case reviews suggest the former. In addition, the "instrumentality" is usually associated with the piercing doctrine. On the other hand, given the bedrock principle of limited liability, it does not seem reasonable to assume that a court would pierce the corporate veil without actually declaring it. The outcome of the case is even more surprising considering the fact that Illinois law has a constant reputation of imposing a high barrier for piercing. *See* Presser, *supra* note 17, § 2.14. Thus, it seems more convincing to read the judgment based on a strict notion of the assumption of duty by the parent. In other words, torts duties cannot be evaded by mere legal separation of departments of one single business. In any event, the decision remained insular and the chances of the concept of "enterprise liability" overlooking the legal separation within a TNC are very low, if not zero. For some very limited exceptions, *see* Phillip Blumberg, "The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities", 28 *Conn. L. Rev.* 295, passim (1996), where he depicts the "integrated enterprise" approach in federal labor, employment, and discrimination law, in which enterprise principles have prevailed over the formalistic entity approach.

[71] Blumberg has written extensively on the legal problems involving corporate groups. *See* 1 *The Law of Corporate Groups, Procedural Law* (1983); 2 *The Law of Corporate Groups, Bankruptcy Law* (1985); *The Law of Corporate Groups, Substantive Law*, *supra* note 35; 4 T*he Law of Corporate Groups, Statutory Law: General* (1989); 5 *The Law of Corporate Groups, Statutory Law: Specific* (1992) (with Kurt A. Strasser); 6 *The Law of Corporate Groups, Statutory Law: State* (1995) (with Kurt A. Strasser); 7 *The Law of Corporate Groups, Enterprise Law In Commercial Relationships* (1998) (with Kurt A. Strasser); *The Multinational Challenge to Corporation Law* (1992).

basis through a network of interconnected corporations based on a common strategy and purpose under the supervision and coordination of the parent company, in other words, act as one unit, according to his approach, every legal entity of a corporate group should be liable for any obligation incurred by any affiliated member.[72] He declares that many of the common arguments in favor of limited liability do not apply in the context of a parent-subsidiary relationship.[73] As the parent company is typically not the absent outsider to the subsidiaries' business and who needs additional protection, the parent instead is, in practice, very often and at least to some degree, involved in the operation of the company it owns. And the usual concern of increased agency costs does not constitute a problem as it does with individual investors.[74] The problem of controlling all departments of a business is independent of whether a business compartment is incorporated or not. Furthermore, according to Blumberg, when the subsidiary is owned 100 percent, the efficiency of the capital market is not impaired by unlimited liability.[75] Finally, while Blumberg concedes that limited liability might still encourage investment, he nonetheless declares that in an economically integrated group where the business is already undertaken but further extended or fragmented, the discouragement of investments appears negligible.[76] Thus, he concludes that in such cases, limited liability should not be available for the parent corporation.[77]

In *Bowoto*, despite these scholarly assertions, Judge Illston took a rather strictly precedential stance on the issue. He stressed that the integrated enterprise theory is predominantly used in labor-law related areas and in

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[72] Blumberg, *Substantive Law, supra* note 35, §§ 6.01–6.10, 13.01–13.06.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 624–25.

[77] *Id.*, § 5.01. *See also* Jonathan M. Landers, "A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy", 42 *U. Chi. L. Rev.* 589 (1975), who undertakes to broaden the liability of related companies within the existing legal corporate order in the context of bankruptcy. He points to the variety of incentives in creating several corporations for one business. *Id.* He stresses the fundamental assumption that the owner of a business enterprise wishes to maximize profits as much as possible whether the business is operated as a single corporation or is fragmented in a number of related companies. *Id.* at 591. In his opinion, since the interest of owners is to gain the entire profit of the enterprise, capital, personal, or logistic resources may be transferred from one entity to another since the gain of one unit is only relevant as part of the overall gain. *Id.* In other words, the subsidiary will be run differently as if it were a single-operated corporate enterprise. According to his approach, this is legitimate and legal as it creates overall net benefits for society. *Id.* at 592. However, in the event of bankruptcy, the law equally has to treat the whole corporate group as a single entity and held responsible for the debts of the related company as an exception to limited liability. *Id.* at 652.

some cases, to environmental liabilities, but that in each of these cases, courts clarified that the underlying statute was passed by Congress to remedy a specific purpose the achievement of which would be undermined by sticking to traditional corporate law doctrine.[78] He continued by remarking that he had been unable to find one single case applying the integrated enterprise theory in a corporate human rights litigation context.[79] Having said these and based on the lack of precedent, he rejected the theory under ATS without further discussion.[80]

In effect, he repudiated any discussion of integrated enterprise theory. He did not examine the new issue of whether ATS would fit into this category of special federal statutes which were designed for a remedial purpose the application of which requires the acceptance of an enterprise approach as opposed to an entity approach.[81] This is so although Congress, with the enactment of the Torture Victim Protection Act, has sent a clear signal of support for human rights litigation and allegations of corporate human rights violations in developing countries are common and widespread. The point can be made that without accepting enterprise as opposed to entity principles in light of the reality of a TNC doing business on a worldwide, the purpose of ATS to bring U.S. subjects in line with international law, just like in the historic paradigms of piracy and mistreatment of ambassadors,[82] would largely fail.

It remains to be seen how other courts would handle the issue in the future.

3. *Agency Principle*

Plaintiffs further advanced agency principles to hold the defendants liable. Agency, by its definition is not related to corporate law as such.[83] Owner-

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[78] 312 F. Supp. 2d at 1237–38.

[79] *Id.*

[80] *Id.*

[81] It appears that as a first instance judge, he did not want to expound on the issue in a case of first impression.

[82] *See supra* Chapter One: Actionability Standards.

[83] *The Restatement 2d of the Law of Agency* § 14 M explains:

> A corporation is not the agent of one person, or of a number of persons, who can direct its conduct because holding a majority of its voting shares of stock. Likewise, a corporation does not become the agent of another corporation merely because the other has stock control. The policy which permits individuals to do business by the organization of corporations permits corporations, authorized to do so, to do business in the same way and with the same immunities from liability. However a corporation may become an agent of an individual or of another corporation, as it does when it makes a contract on the other's account. Thus a subsidiary may become an agent for the corporation which controls it, or the corporation may become the agent of the subsidiary. In some

ship of shares, shared employees, the establishment of the subsidiary for a limited purpose, and the furnishing with capital by the parent company are irrelevant because the imposition of responsibility rests on contract – not corporate law – concepts. In this dogmatic sense, it is not an exception to the concept of limited liability in the strict logical sense since it presupposes the consent of the principal, the parent company.[84] Judge Cardozo avowed this bypassing to the rule of limited liability a long time ago, declaring that "dominion may be so complete, interference so obtrusive, that by general rules of agency the parent will be a principal and the subsidiary an agent."[85] However, servant-type agency requires under common law a consensual relationship between the principal and the agent, stating that the latter shall be the agent of the former, and the acts of the agent shall be subject to the control of the principal.[86] Thus, the acts of the representative are deemed the acts of the principal.[87] Consequently, if parent corporation A expressly, orally or in writing, agrees with corporation B on an agency relationship with A as the principal, A is legally responsible for obligations incurred by B within the scope of the agency.[88]

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situations, a court may find that the subsidiary has no real existence or assets, that its formal existence is to cloak a fraud or other illegal conduct. As in a similar situation in which an individual is the offender, it may be found that the parent company is the real party to a transaction conducted by the illusory subsidiary and responsible for its transactions as a principal.

[84] *The Restatement (Second) of the Law of Agency*, Appendix S 14M, Reporter's Notes at 68 (1958), states:

> It is useful to distinguish situations in which liability is imposed on a parent because of the existence of the agency relation, in our common-law understanding of that relation, from cases in which the corporate veil of the subsidiary is pierced for other reasons of policy. Unfortunately, however, the courts have not always observed the distinction between these two separate bases for parent's liability. When liability is fastened upon the parent it is said that the subsidiary is a "mere agent". The result has been a weakening and muddying of the term "agent" and a failure by courts to state the real reasons for their decision.

[85] *Berkey*, 155 N.E. 58, 61 (C.A.N.Y. 1926). Practically however, the parent company of a corporate group is liable if the subsidiary is the agent of the former. That is why agency is frequently discussed within a piercing context in decisions as well in scholarly work. *E.g., id.* at 61.

[86] *The Restatement of the Law of Agency (Third)* (Tentative Draft) § 1.01 defines agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

[87] *Id.*

[88] *The Restatement of the Law of Agency (Third)* § 2.04 (Tentative Draft No. 2) (doctrine of respondeat superior). Again, this situation functions independent of corporate structures

The law allows the consensual relationship to be inferred from the factual circumstances.[89] However, since the purpose of a subsidiary is commonly to insulate its parent from potential liability, courts are reluctant to hold that the common law requirements of an agency relationship are met in cases involving a TNC.[90] The reason put forward by judges and scholars is that the naive application of agency principles would render almost every parent-subsidiary relationship into a principal-agent relationship, and the concept of limited liability would be severely undermined.[91]

Declaring that whether an agency relationship exists is normally a question of fact,[92] Judge Illston explained that he would read the alleged facts of the case for indicia that the CNL was in fact an agent of the defendant and acted within the scope of this agency.[93] In holding so, he considered five factors. First, he focused on the content and degree of communication between CNL and defendants. According to Judge Illston, evidence produced by plaintiffs did not establish that actual decisions were made in the U.S. by the defendants but an "extraordinarily close relationship" between the parents and the subsidiaries during and prior to the alleged incidents existed.[94] For example, phone calls on the days of the alleged incidents were at its height since years and defendant's security, international, and public affairs staff was the contact

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as long as control is existing which could be based on contractual non-corporate relationships.

[89] *Id.* at § 1.03 declares that "[a] person manifests assent or intention through written or spoken words or other conduct."

[90] Critical in respect of the chances of success is Blumberg, *supra* note 18, at 307–08.

[91] *New York Trust Co. v. Carpenter*, 250 F. 668, 674 (6th Cir. 1918), holding that the rule of limited liability is "swallowed up" in the exception; *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); *Bendix Corp. v. Adams*, 610 P.2d 24, 32–33 (Ala. 1980). *See* Judge Cardozo in *Berkey*, 244 N.Y. at 95, who said "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice."

[92] 312 F. Supp. 2d at 1241, *citing Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978). As to the legal standard, interestingly enough, plaintiffs advanced not only precedents on substantive agency but also relied on procedural ones under a test frequently employed by courts to gain jurisdiction over a foreign-incorporated parent company. *Id.* at 1243. For details on the procedural test, *see infra* Chapter Ten: Lack of Personal Jurisdiction. This test does not depend so much on domination as the substantive agency test but more on the dependency of the parent on the subsidiary's actions or business. Again, under this agency test, acts of the subsidiary can be attributed to the parent (to gain jurisdiction over the latter). 312 F. Supp. 2d at 1243. Defendants criticized this. *Id.* Judge Illston recognized this but found these cases "instructive" as to when an agency relationship between a parent corporation and a subsidiary exists. *Id.*

[93] 312 F. Supp. 2d at 1243.

[94] *Id.*

point for CNL during the alleged incidents.[95] At one point, the absence of a CNL official during negotiations with protestors (later attacked by the military) was excused because of necessary discussion with the Chevron management in the United States.[96] Second, he noted the close monitoring of CNL activities through the Upstream Asset Development Process and the Integrated Design Team which were composed of personnel from the defendants and CNL which he deemed to be beyond normal subsidiary control.[97] Chevron itself expressed its commitment to monitor daily business operations of its subsidiaries.[98] Third, although mindful of the irrelevance of parallel management personnel of the subsidiary and the parent (alone), Judge Illston noted that this factor, combined with others, speaks out for the finding that agency is warranted.[99] Fourth, relying on the agency test for jurisdictional purposes, he emphasized the importance of the subsidiary's business for the parent since 20 percent of defendants' earnings were accounted for by CNL's production, and the "engine" of Chevron's growth was the international, not the national, energy production. Fifth, in the opinion of Judge Illston, other evidence also pointed to the direction that an agency relationship existed. Chevron's annual report of 1997 already elaborated on the danger that local unrest and protest against its oil production operations in Nigeria may bring production to a halt and ruin profits and that it has already affected the operations.[100] CNL submitted daily drilling reports to the parent which mentioned community unrest and the opposition of the local population.[101] Four days following an incident, a group of CNL and Chevron officials announced together that oil production has been restored.

In sum, Judge Illston concluded that the facts submitted, when taken together, are such that a reasonable juror could find that CVX and CTOP exercised more than the usual degree of control which a parent exercises over its subsidiary, and therefore, CVX and CTOP were CNL's principal and that CNL's alleged actions were within the scope of such agency relationship.[102] Accordingly, the motion to dismiss was rejected accordingly.

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[95] *Id.*
[96] *Id.* at 1244.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 1245.
[101] *Id.*
[102] *Id.*

4. *Ratification*

Moreover, in *Bowoto*, since agency can be created not only by prior consent but also by later ratification of the acts of the agent by the principal, plaintiffs further argued that such ratification had occurred via Chevron's media campaign and cover-up of the alleged incidents.[103] They were able to point to contradictory statements about CNL's involvement in the violent attacks which suggested that the parent attempted to hide the truth from the public.[104] And indeed, Judge Illston found this to be an independent claim regardless of the above agency construct.[105] As a consequence, Judge Illston dismissed the motion for summary judgment of the defendants and allowed the discovery to proceed.[106]

III. Sinaltrainal *Case: Liability for the Acts of Business Partners*

Compared to the *Bowoto* case, *Sinaltrainal v. Coca-Cola Co.* addressed a much more lenient form of business relationship between two or more corporations other than stock ownership.[107]

A. *Factual Background and Context*

In this case, members of a Colombian paramilitary forces unit shot a leader of the Colombian union Sinaltrainal when he resumed work in the morning allegedly because he attempted to organize the workers at the bottling plant.[108] That same night, the unit also set on fire a local union building and two days later, assembled all workers of the plant and told them that unless they resign from the union, they would face the same fate as the union leader.[109]

The bottling plant was owned by Bebidas y Alimentos ("Bebidas"), a Colombia bottling company which performs bottling services under an agreement with Coca-Cola USA.[110] Coca-Cola USA is a Delaware company with headquarters in Atlanta, Georgia.[111] Coca-Cola Colombia, a wholly-owned subsidiary of Coca-Cola USA with offices in Bogota, Colombia, manufactures

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[103] *Id.* at 1247.
[104] *Id.* at 1248.
[105] *Id.*
[106] *Id.* at 1250. As of October 2008, the case was still pending.
[107] 256 F. Supp. 2d 1345 (S.D. Fla. 2003). The dismissal of the case was confirmed in *In re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006).
[108] 256 F. Supp. 2d at 1348.
[109] *Id.* at 1350.
[110] *Id.* at 1348.
[111] *Id.* at 1350.

and distributes Coke products to Bebidas and all other bottlers in Colombia.[112] Coca-Cola USA is head of the Coco-Cola Group, making all necessary business decisions and communicates and enforces its directives to Colombian bottlers through the medium Coca-Cola Colombia.[113] Bebidas is privately owned and not formally part of the Coca-Cola Group.[114]

The general background of the dispute is that very often, TNCs do not only own the subsidiaries incorporated in other countries but also outsource production to other companies incorporated in a foreign country which commit the human rights violations. In such cases, the foreign companies are not even formally part of the TNC even though factually, its dependence on the TNC may even be larger than for a corporation which forms part of the corporate group.

B. *Plaintiffs' Strategy*

Before the court, plaintiffs were forced to allege that the level of control exercised by Coca-Cola USA over its bottling partner Bebidas rendered the latter the alter ego or agent of the former.[115]

C. *Judge Martinez's Reasoning*

Judge Martinez of the federal district court of the Southern District of Florida refused to adopt the plaintiffs' argument in respect of the two Coca-Cola companies after an examination of the Bottler's Agreement between these two companies and Bebidas.[116] He underscored that the Bottler's Agreement was a standard typical franchise agreement which gave Coca Cola no general right or duty to control or examine all aspects of the plant's operation.[117] Instead, it stipulated for limited although economically vital rights regarding the protection of its product in the market place, such as quality control, use of trademark, package, etc., over the Coca-Cola bottler Bebidas.[118] The court remarked that the agreement did not impose upon Coca-Cola "a duty to monitor, enforce or control labor policies at Bebidas".[119] Since the plaintiffs did not adequately plead that the actual involvement of Coca-Cola in the

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 1349.
[116] *Id.* at 1354.
[117] *Id.*
[118] *Id.*
[119] *Id.*

operation went beyond what was officially recorded in the agreement,[120] the court ultimately dismissed the case against the Cola-Cola companies.[121] The action was permitted to continue against Bebidas and its directors.[122]

This reasoning confirms the proposition that it is even more difficult to overcome the separate legal personality of corporations and hold TNCs liable for the wrongs committed by their private commercial contractual partners which are not part of the corporate group in terms of share ownership and control.[123]

IV. *Conclusions*

In the absence of direct participation by the parent corporation, corporate fragmentation of a TNC's business can pose a substantial obstacle to liability under ATS as the law's focus is on the individual company and not, as is true in economics, on the whole TNC enterprise which consists of a worldwide network of corporations doing business based on one common strategy.

In this situation, the concept of limited liability may preclude any liability under ATS on the part of shareholder-parent corporations for the wrongdoing of their subsidiaries in other countries.

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[120] *Id.*

[121] *Id.* at 1360.

[122] *Id.*

[123] Nonetheless, the filing of an action under ATS in such an instance may result in some positive results for the human rights movement, such as boycotts.
In the case of Coca-Cola, due to the allegations against the company, more than ten U.S. universities as of today, including New York University, the biggest private university in the world, and the renowned University of Michigan, have joined a boycott against Coke products which will continue unlimitedly unless the TNC decides to investigate the facts underlying the alleged events. *See* Kirsten Grieshaber, "Studenten meutern gegen 'Killer-Coke' ", Spiegel Online, *available at* http://www.spiegel.de/unispiegel/studium/0,1518,393574,00.html (accessed 3 February 2006). It is contended that as of today, seven worker representatives have been killed working in Coca-Cola bottling worldwide. *Id.* While the direct economic harm of the boycotts maybe negligible, the indirect impact due to the harm done to its image in a market where competition is not based on quality but on lifestyle, as even Coca-Cola admits, may be significant and therefore, may result, even though not openly conceded, in a re-evaluation of its business relationship and consumer conduct throughout the world. *Id.* In the meantime, another action was filed against Coca-Cola. Recently, to increase pressure and attention from the public, another action against Coca-Coal was filed relating to the alleged systematic intimidation and torture of Turkish truck drivers delivering Coke products in Turkey. See the official file on the website of the International Labor Rights Fund, *available at* http://www.laborrights.org (accessed 14 February 2006).

The doctrine of limited liability however, is subject to exception and bypasses.

The doctrine of piercing the corporate veil constitutes such exception. Yet, since corporate groups typically follow corporate formalities, finding a court willing to pierce the corporate veil within a TNC is, under normal circumstances, unlikely in ATS cases as shown in the *Bowoto* case.

The two bypasses are realistic means to hold the parent corporation liable if, as evidenced in *Bowoto*, the subsidiaries are not fully staffed and equipped and therefore, need to make decisions in close connection with the parent corporations. One promising way to hold a parent company liable under ATS (other than direct involvement of the latter) is the attribution of the subsidiary's acts to the parent company based on agency relationship. Such relationship can be inferred from the facts, in particular, if the court is willing to merge the more lenient test for agency for jurisdictional purposes with the one for substantive law. Another suitable option is the subsequent ratification of the subsidiary's acts by the parent company, an option to which a TNC sued under ATS is similarly vulnerable when the TNC usually reacts strongly to accusations made by the mass media regarding violations of international law, e.g., recourse to violence.

If the foreign company does not even form part of the corporate group but simply does business with the TNC, the hurdle in ATS cases becomes almost insurmountable as exemplified in the *Sinaltrainal* case. In these cases, pressure on the parent corporation may only be exercised indirectly through media coverage and boycotts.

Chapter Ten

Lack of Personal Jurisdiction

I. *Introduction*

A primary question that ATS plaintiffs filing actions against TNCs face is the question of which corporation in the corporate group to sue. Usually, a TNC sets up a subsidiary or affiliate to directly undertake the project in the country where the alleged violations of international law took place. Such subsidiary or affiliate should be, under normal circumstances, the obvious defendant. However, for various reasons, like direct involvement, actual knowledge, deeper pockets, or more media mileage, plaintiffs want to hold the parent company or another corporation within the group also liable. Accordingly, most, if not all, ATS cases against TNCs implead the parent company or another important company within the group as a defendant. Given the foregoing background and the fact that globally, a substantial number of parent companies heading TNCs are not American corporations in the sense that they were not incorporated or do not hold their headquarters in the U.S.,[1] the next question that arises is whether procedurally, U.S. courts have jurisdiction over foreign parent companies and other corporations within the group incorporated or based outside the U.S., i.e., whether defendants can rely on the lack of personal jurisdiction as a defense.[2]

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[1] Capital ownership is not used here to define whether a corporation is "American" or not since most TNCs are publicly held and determining the actual percentages of ownership by nationalities would be quite difficult and always changing.

[2] The exercise of jurisdiction and the full application of its civil procedure and substantive law has been a matter of hot diplomatic and legal debate between the U.S. and its trading partners since many decades. *See* Hanns Prütting, "Ein neues Kapitel im Justizkonflikt USA—Deutschland", in *Festschrift für Erik Jayme* 709 (Heinz-Peter Mansel ed., 2004). In particular, the possibility of punitive damages, class actions, and extensive discovery has raised concerns abroad. *Id.* at 712–13. However, the situation has not changed over the years due to American hegemony based on historic, economic, psychological, and political-military factors. *Id.* For plaintiffs in ATS cases, the advantages granted to plaintiffs (other than ATS itself providing a forum for human rights litigation) in the American legal system is the very reason to file a case in the U.S. and not in other developed countries. Recent attempts to draft a Hague Judgment Convention which would allow the worldwide enforcement of

This chapter analyzes the defense of lack of personal jurisdiction over the TNC defendants in ATS proceedings against TNCs.[3]

Part II presents the *Unocal* case wherein the oil and gas parent company Total S.A., incorporated in France, which directs the Total Group, was a defendant. Part III analyzes the *Wiwa* case, wherein the Royal Dutch Petroleum Co., incorporated in the Netherlands, and the British Shell Transport and Trading Company, P.L.C., incorporated in Great Britain, which, together, head a global group of energy and petrochemical companies, were defendants.[4] Both cases shed some light on the underlying issues.

II. *Total's Reliance on Lack of Personal Jurisdiction*

The *Unocal* case involved the alleged use of forced labor in the construction of a natural gas pipeline in Myanmar. Total S.A. ("Total"), the French company controlling the Total oil and gas exploration and production group, was a defendant together with an American corporation, the Unocal Corporation ("Unocal"). In 1998, Judge Paez of the District Court for the Central District of California granted Total's motion to dismiss for lack of personal jurisdiction although from the viewpoint of substantive torts law and the allegations of the parties, Total had a deeper and more active involvement in the project and its human rights implications than its co-venturer Unocal, which is based in California, the forum state.[5] The plaintiffs appealed.

At the outset, since ATS itself is silent on personal jurisdiction,[6] the Ninth Circuit turned to rule 4(k)(1)(A) of the Federal Rules of Civil Procedure

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civil judgments in exchange for a restriction of assertion of personal jurisdiction, failed. *See* Beth Van Schaack, "In Defense of Civil Redress: The Domestic Enforcement of Human Rights in the Context of the Proposed Hague Judgments Convention", 42 *Harv. Int'l L.J.* 142 (2001). On the possible inclusion of a "human rights clause" which would have allowed the continued broad exercise by U.S. courts of jurisdiction in ATS cases, *see id.* at 182–200.

[3] For a brief overview, *see* Beth Stephens *et al., International Human Rights Litigation in US Courts*, 249–51 (2008).

[4] Both cases reached the level of the Court of Appeals. For a third decision on the district court level, *see infra* note 81.

[5] In accordance with Fed. R. Civ. P. 12(b)(2). *Doe I v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1185–86 (C.D. Cal. 1998). In respect of the American defendant Unocal Corp., the case was ultimately settled by the parties in 2005. *See* Marc Lifsher, "Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline", *L.A. Times, available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm (accessed 11 September 2006).

[6] Rule 4(k)(1)(D) of the Federal Rules of Civil Procedure authorizes personal jurisdiction of federal courts to the extent authorized by a (special) federal statute. ATS does not provide for personal jurisdiction as envisaged by rule 4(k)(1)(D).

to determine whether it has personal jurisdiction over Total.[7] Rule 4 of the Federal Rules of Civil Procedure establishes the territorial limits of personal jurisdiction in U.S. federal courts. Rule 4(k)(1)(A) provides that a federal court may exercise jurisdiction over a defendant outside the boundaries of the state in which it is sitting if the laws and statutes of the state allows jurisdiction.[8] Thus, a federal court confronted with ATS claims needs to rely on the state's law on personal jurisdiction where the federal court is sitting with regard to the court's right to hear and decide a case.

Accordingly, in the *Unocal* case, the Ninth Circuit had to consult the statute of the state in which the first instance court was residing, i.e., California.[9] Generally speaking, the applicable state laws on personal jurisdiction (known as long-arm statutes since they expand the court's traditional jurisdiction over foreign defendants outside the respective state's territorial limits)[10] fall into

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[7] In addition, the Ninth Circuit also turned to rule 4(k)(2) of the Federal Rules of Civil Procedure. This rule prescribes that if a defendant is beyond the jurisdictional reach of any state of the Union but has sufficient contacts to the United States as a whole, the contacts are summed up for jurisdictional purposes. Federal Rules of Civil Procedure 4(k)(2) (1993) states as follows:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving the summons…is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of courts of general jurisdiction of any state.

United States v. Swiss American Bank, Ltd., 191 F.3d 30, 38–42 (1999). The amendment was initiated by the Supreme Court decision in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), where the court determined the gap in procedural law. Before rule 4(k)(2), federal courts applied state law when federal law was silent. As a consequence, defendants with insufficient contacts to one single state but sufficient contacts with the United States could escape jurisdiction and liability. *See Swiss American Bank, Ltd.*, 191 F.3d at 40. However, the demands of due process still apply.

In accordance with the general jurisprudence, the Ninth Circuit briefly explained that mere listing in various U.S. stock exchanges and promotion of the sale of its shares do not subject Total to the jurisdiction of U.S. courts and were insufficient as sole direct contacts with the U.S. *Doe I v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001).

[8] The wording of Federal Rules of Civil Procedure 4 (k)(1)(A) is as follows: "Service of a summons or filing of a waiver of service is effective to establish jurisdiction over the person of a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located".

[9] *Unocal*, 248 F.3d at 922. In *Unocal*, the Ninth Circuit pronounced that due process is met when a non-resident defendant has "certain minimum contacts with the forum" so that the maintenance of the suit is not offensive to traditional notions of "fair play and substantial justice", citing the Supreme Court's decision in *International Shoe Co. Id.* at 923, *citing International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). For the due process issues, see below.

[10] Jurisdictional statutes which reach across the state's borderlines into another state or country in order to subject a person or corporation to its jurisdiction are frequently referred to as "long-arm statutes".

two basic categories. The first category provides for jurisdiction by the state's courts "on any basis not inconsistent with the Constitution of this state or of the United States."[11] California belongs to this category. The second category, which is less blatant but not significantly less extensive and to which the great majority of states belong, do not fully reach the constitutional limits by enumerating the situations where courts can assert jurisdiction over defendants who do not reside in the forum state.[12] This kind of statutes specifies in detail the type and quality of contact required to trigger jurisdiction but such enumeration is not meant to be exclusive.[13] Most states assert jurisdiction through their long-arm statutes if the corporation is "doing business"[14] within the borders of the state. Usually, the business activity determined must be "continuous and systematic".[15] In *Unocal*, as stated, the Ninth Circuit therefore applied Californian procedural law on the point.

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[11] CCP § 410.10.

[12] Haimo Schack, *Einführung in das U.S.-amerikanische Zivilprozessrecht* 24 (2003).

[13] *Id.*

[14] *E.g.*, Procedural Code of New York, § 302:

> § 302 Personal jurisdiction by acts of domiciliaries.
>
> (a) Acts which are the basis of jurisdiction. As to the cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real estate within the state.

See generally Harald Müller, *Die Gerichtspflichtigkeit wegen „doing business"* (1992). As a general rule, the same rules apply to the assertion of jurisdiction whether the defendant resides in another state of the United States or in a foreign country. *See Restatement of the Law (Second), Conflict of Laws* § 10.

[15] *E.g., Perkins v. Benguet Consol. Min. Co.*, 72 S. Ct. 413, 418 (1952) upholding a "doing business" provision under Ohio Procedural Law stating that the "amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case."

A. *Specific Jurisdiction*

The Ninth Circuit started to determine whether it can exercise specific jurisdiction over the defendant Total.[16] In Californian as well as in federal civil procedure, the category of specific jurisdiction embraces situations in which the defendant has engaged in a forum-related, substantial, and continuous activity but the dispute does not arise out of that conduct. The Ninth Circuit applied a three-part test in evaluating a defendant's contacts so as to determine whether specific jurisdiction is available as formulated in the state of California. The three-part test requires that

> (1) [t]he nonresident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws[;] (2) [t]he claim must be one which arises out of or results from the defendant's forum-related activities [; and] (3) [e]xercise of jurisdiction must be reasonable.[17]

1. *Purposeful Availment*

The first part of the test, typically referred to as "purposeful availment", requires that the defendant must have performed "some type of affirmative

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Commentators emphasize that what behavior a court will declare to be substantial to justify personal jurisdiction is hard to predict and differs from state to state. *E.g.*, Gary B. Born, *International Civil Litigation in United States Courts* 104 (1996). The Second Circuit stated: "The problem of what contacts with the forum state will suffice to subject a foreign corporation to suit there on an unrelated cause of action is such that the formulation of useful general standards is almost impossible and even an examination of the multitude of decided cases can give little assistance." *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 211 (2d Cir. 1990). One author goes further to argue that in cases against foreign corporations, the "doing business" interpretation is guided by the wanted result. Schack, *supra* note 12, at 27. In many decisions, relatively minor amounts of money sufficed. Schack talks of tens of thousands of dollars as sufficient to find minimum contacts. *Id*. at 27.

[16] Generally, American courts distinguish between specific and general jurisdiction over a defendant. The distinction between specific and general jurisdiction can be traced back to the Supreme Court decision, *Helicopteros Nationales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984). Generally across the nation, state statutes on procedural rules have adopted this dichotomy of categories. Professor Twitchell sought to substitute the common terminology with dispute-blind and dispute-specific jurisdiction. Mary Twitchell, "The Myth of General Jurisdiction", 101 *Harv. L. Rev.* 610, 613 (1988). This undertaking failed.

On the distinction between general and specific jurisdiction, *see* Geoffrey C. Hazard *et al., Pleading and Procedure: State and Federal* 175, 205–09 (1999). The equivalent in German legal terminology are "*allgemeiner Gerichtsstand*" and "*besonderer Gerichtsstand*". *Cf. Othmar Jauernig, Zivilprozeßrecht* §§ 4–5 (2003).

[17] *Unocal*, 248 F.3d at 922, *citing Gordy v. Daily News, L.P.*, 95 F.3d 829, 831–32 (9th Cir. 1996).

conduct which allows or promotes" its business in the forum.[18] In the case of Total, the Ninth Circuit held that its contractual relations with Unocal do not amount to purposeful availment. First, it found that execution of a contract by the resident party Unocal with an out-of state party, Total, alone is not sufficient[19] to trigger jurisdiction over the out-of state party since a contract is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction."[20] Further, Total presented evidence that (a) the contracts were entered into through fax or telephone or in meetings held in Asia, France, and Bermuda; (b) the contracts are governed by the laws of England, Bermuda, or Burma; (c) that the oil subject of the project will go to Thailand and possibly, to Burma but not to the U.S.; and (d) all the contracts relate to the pipeline project in Burma and have no relation to the forum state.[21]

2. *Relation between Claims and Contacts*

Although the plaintiffs already failed to meet the first part of the test, the court went on to discuss the second part of the test where courts apply the "but for" test to determine whether the claims arise out of forum-related actions. Stated differently, the court must determine "whether plaintiffs' claims would have arisen but for Total's contacts with California."[22] The court found that the plaintiffs were unable to present any evidence showing that without Total's dealings with Unocal in California, the project would not have pushed through.[23] On the contrary, the Ninth Circuit found that even

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[18] *Id*. at 924, *citing Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990), earlier citation omitted. In respect of purposeful availment, the Supreme Court has clarified that

> [t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 112 (1987).

[19] 248 F.3d at 924, *citing McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 816, n. 9 (9th Cir. 1988), earlier citation omitted.

[20] *Id., citing Burger King v. Rudzewicz*, 471 U.S. 462, 478–79 (1985).

[21] *Id*.

[22] *Id., citing Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995).

[23] *Id*. at 925.

without Unocal's participation in the project, Total could proceed since it is not undercapitalized and had already agreed to undertake the project even before seeking out other potential partners.[24]

3. *Reasonableness*

Considering that plaintiffs were unable to meet the first and second parts of the test to determine the availability of specific jurisdiction, the Ninth Circuit found no reason to determine whether the third part of the test, reasonableness, is met.[25] Accordingly, the Ninth Circuit concluded that it had no specific personal jurisdiction over Total.[26]

B. *General Jurisdiction: Agency Test for Jurisdiction*

Next, the Ninth Circuit turned to the issue of determining whether it can obtain general jurisdiction over Total. General jurisdiction addresses cases in which the defendant's activity in the forum may be sporadic but the cause of action arises out of those dealings. In principle, "general jurisdiction" allows a court to adjudicate any claim against a defendant, while specific jurisdiction is restricted to the adjudication of claims which are related to or arise out of a defendant's contact with a forum.[27] Similar to specific jurisdiction, the Ninth Circuit declared that for general jurisdiction, one must satisfy the due process determination set out by the Supreme Court[28] and applied a bifurcated test which asks first, that the defendant must have the necessary contacts with the forum state and second, that the exercise of jurisdiction would be reasonable.[29] Plaintiffs pointed Total's contacts with the Californian forum through its subsidiaries.[30] Given this situation, the Ninth Circuit first had to determine whether the subsidiaries' contacts can be attributed to Total. The Ninth Circuit reiterated the general rule that the corporate structures are to be respected and that mere existence of a parent-subsidiary relationship does not authorize the court to exercise personal jurisdiction over the

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Born, *supra* note 15, at 77–78. Naturally, in ATS cases where the violations of international law were committed outside the United States by TNCs, specific jurisdiction generally does not play a significant role. Instead, plaintiffs have to rely on the general jurisdiction of a federal court.

[28] 248 F.3d at 925, *citing Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414, *quoting International Shoe*, 326 U.S. at 326.

[29] *Id., citing Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 (9th Cir. 1993), *citing Asahi Metal Indus. Co.*, 480 U.S. at 107.

[30] *Id.*

parent based on the subsidiaries' contacts with the forum.[31] However, the Ninth Circuit declared that one can establish personal jurisdiction over the parent company based on the contacts of the subsidiaries to the forum if the latter acts as agent of the former.[32]

Indeed, in ATS cases, in which plaintiffs may face the situation where the defendant is a foreign corporation which has no direct contacts with the forum or with the United States in general, the agency test for jurisdiction may allow the exercise of jurisdiction over a foreign corporation in an ATS litigation under certain circumstances. This test does not amount to common law agency but rests on separate standards and is not invoked in majority of American jurisdictions but acknowledged by courts of major jurisdictions such as the Ninth Circuit and New York.[33] A clear-cut definition of "agency" for jurisdictional purposes does not exist in most state laws.[34] Courts often start their discussion by stating that they have "focused on the realities of the relationship in question rather than the formalities of agency law".[35] By and large, courts tend to apply a less formal and more lenient definition of agency for jurisdictional purposes than for liability purposes.[36] Courts frequently focus on the scope of duties performed by the agent under the so-called "but for-test" by asking whether in the absence of the agent, the principal/parent company would have conducted the activities itself.[37] This test was developed by the Court of Appeals of New York in *Frummer v. Hilton Hotels Int'l Inc.*[38] which was later followed by the Second Circuit in *Gelfand v. Tanner Motors Tours Ltd.*[39] In *Frummer*, the plaintiff brought an action in New York against Hilton U.K., a British company, to seek compensation for alleged injuries incurred in

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[31] *Id., citing Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985).

[32] *Id.* at 926, *citing El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996). The plaintiffs also attempted to pierce the corporate veil to attribute the subsidiaries' acts. *Id.* However, this was blatantly rejected by the Ninth Circuit. Piercing, whether for jurisdictional or substantive law purposes, happens very rarely in the United States as in other developed countries as long as corporate formalities have been followed. *See supra* Chapter Nine: Corporate Shield.

[33] Phillip Blumberg, "Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems", 50 *Am. J. Comp. L.* 493, 499 (2002).

[34] Born, *supra* note 15, at 163.

[35] *CutCo Indus., Inc. v. Naughton*, 806 F.2d. 361, 366 (2d Cir. 1986).

[36] *See Reiner v. Durand*, 602 F. Supp. 849, 851 (S.D.N.Y. 1985).

[37] *Cf.* Jay C. Carlisle, "Second Circuit 2000–2001 Personal Jurisdiction Developments", 21 *QLR* 15, 23–24 (2001).

[38] 19 N.Y.2d 533 (1967). Note that majority of ATS cases and cases filed in the U.S. with foreign defendants are filed in New York.

[39] 385 F.2d 116 (2d Cir. 1967).

the bathtub of the defendant's hotel in London.[40] The Court of Appeals held that under New York law, jurisdiction could be exercised as the defendant was doing business in New York as a Hilton reservation service, a non-profit organization owned in common by the defendant, and Hilton International, the parent company, had a New York office, bank account, and phone number and performed for the defendant Hilton U.K. and for other hotels of the Hilton Group reservation services such as advertising, solicitation of business, acceptance and confirmation of reservations, and public relations with travel agencies and the business society.[41] In *Gelfand*, the plaintiff brought an action in New York against various corporate members of the Tanner Group for injuries sustained when a wheel of the defendants' bus where plaintiff sat on a ride to the Grand Canyon in Arizona broke.[42] The Second Circuit, relying on *Frummer*, found jurisdiction under New York law due to a sales representative seated in New York whose work generated 3/7 of its business on the tour to the Grand Canyon totaling more than $120,000 per year in bookings.[43] Following the *Frummer* approach, the Second Circuit evaluated the importance of the activities conducted by the supposed agent for the supposed principal.[44] Moreover, it is generally true and not restricted to the jurisdiction of New York that the fact of parent-subsidiary relationship is a significant criteria in the determination of agency relationship.[45] While agency-principal relationships have been assumed in the absence of any affiliation, courts commonly state that the greater the degree of corporate affiliation, the more likely is the exercise of jurisdiction based on agency principles.[46]

In *Unocal*, the Ninth Circuit, relying on its own case law, announced that under the agency test, a plaintiff must show that the subsidiary serves as the parent company's representative performing services sufficiently important

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[40] 19 N.Y.2d at 535.

[41] *Id*. at 537.

[42] 385 F.2d at 118.

[43] *Id*. at 120–21. The court stated:

> In the context of the Frummer case, we take this to mean that a foreign corporation is doing business in New York "in the traditional sense" when its New York representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform the substantially similar services.

[44] *Id*. at 121.

[45] Born, *supra* note 15, at 170.

[46] *Id*. at 164.

to the parent that if the parent had no representative to undertake them, the parent's own officials would perform "substantially similar services".[47]

As to Total's operational subsidiaries, the Ninth Circuit deemed plaintiffs unable to present specific evidence that in the absence of such subsidiaries, Total itself would undertake the petrochemical and chemical operations undertaken by the operating subsidiaries. The bench considered Total's statements in its annual reports about its U.S. subsidiaries including a statement that its "US Unit" would allow it to "expand its marketing network and produce higher value-added specialty products in the United States" as not justifying a finding that without its operational subsidiaries as representatives, Total itself would perform their activities since it is a common business practice for corporate groups to consolidate the activities of subsidiaries into the parent company's report.[48]

As to two U.S. holding companies of Total which hold the stock of the California operating companies, the Ninth Circuit further held that these holding companies cannot be considered agents of Total since (a) they did not perform any role in finding Total's subsidiaries acquired in California or anywhere else in the U.S. or in effecting such acquisitions, and (b) they merely held stocks of the operating companies and did not perform any service or activity for Total so as to qualify them as agents.[49]

Given that the contacts of Total's subsidiaries, both operating and holding, could not be imputed to Total according to the Ninth Circuit, it concluded that Total does not have such contacts with the forum that would justify the court's exercising personal jurisdiction over Total and affirmed the dismissal of the case by the district court in respect of Total.[50] This case looks like a manual for TNC legal advisers on how to structure corporate and transactional activities of foreign TNCs so as to avoid or defend against an ATS litigation. However, it is also instructive for ATS plaintiffs as to what level of evidence they need to sustain their case beyond the motion to dismiss stage. In addition, this case supports one of the statements of this book that ATS cannot police TNCs' violations of international law worldwide and that other countries need to set up similar laws or other mechanisms to address such violations.

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[47] 248 F.3d at 928, *citing Chan v. Society Expeditions, Inc.,* 39 F.3d 1398, 1405 (9th Cir. 1994).
[48] *Id., citing Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995).
[49] *Id*. at 929–30.
[50] *Id*. at 931.

III. *The Lenient Agency Test in* Wiwa

The *Wiwa* case involves alleged human rights violations in connection with oil exploration in the Nigerian oil delta.[51]

A. *Factual Background and Context*

Together, the two defendants, the parent corporations Royal Dutch Petroleum Co. ("Royal Dutch"), incorporated and headquartered in the Netherlands, and Shell Transport and Trading Co., P.L.C. ("Shell Transport"), incorporated and headquartered in the United Kingdom, were directing and controlling the Royal Dutch/Shell group, "a vast, international, vertically integrated network of affiliated but formally independent oil and gas companies",[52] inter alia, Shell Petroleum Inc., a Delaware corporation which owns all shares of Shell Oil Company ("SOC") which has extensive operations in New York.[53] While neither defendant had extensive direct contacts with New York, both were directly or indirectly listed at the New York Stock Exchange and conducted incidental activities such as filing documents and reports with the Securities and Exchange Commission and the employment of transfer agents and depositories for their shares.[54] In addition and different from the case of Total, the parent companies had direct links to a unit of a subsidiary based in New York. This unit was the Investor Relations Office ("IRO") of SOC. The IRO devoted all of its time to the defendants' business and its sole business purpose was performing investor relations services on behalf of the defendants. The defendants fully reimbursed SOC for all the expenses of the IRO amounting to over $500,000 per year.[55] The office managed and organized the exchange of information with financial analysts, investors, and potential investors in the parent companies Royal Dutch and Shell Transport. Thus, it was not merely performing activities incidental to the parent companies' listing in the New York Stock Exchange. In addition, no meeting was scheduled and comparable decision made without the approval of the defendants in Europe.[56] At first instance, the district court held that the activities of the IRO on the defendants' behalf in New York were both attributable to the defendants under

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[51] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *cert. denied, Royal Dutch Petroleum Co. v. Wiwa*, 532 U.S. 941 (2001).

[52] *Id.* at 92.

[53] *Id.* at 93.

[54] *Id.*

[55] *Id.*

[56] *Id.*

the agency test for jurisdictional purposes and sufficient to confer personal jurisdiction over the foreign defendants.[57]

B. *Agency Analysis*

Since the first instance court was in New York, according to rule 4(k)(1)(A) of the Federal Rules of Civil Procedure, New York law on the point applied. On appeal, in line with procedural precedents, the Second Circuit summarized that New York law requiring the "continuous presence and substantial activities" in order to satisfy the requirement of doing business do not necessarily need to be conducted by the foreign corporation itself.[58] In certain circumstances, the court stressed, jurisdiction has been affirmed based on activities performed in New York by an agent for a foreign corporation[59] and formulated the New York doctrine of procedural agency as authorizing a court to hear and decide a case over a foreign defendant

> when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available.[60]

The Second Circuit further reiterated that neither a formal agency relationship is necessary nor must the defendant exercise direct control over his agent, but that the "agent must be primarily employed by the defendant and not engaged in similar services for other clients."[61] That having been said, under the above-mentioned but for-test for personal jurisdiction developed in *Frummer* and *Gelfand*, the Second Circuit stressed that the IRO, although nominally part of SOC, devoted all of its time and logistics to the parents' business, sought the defendants' approval on important decisions, and defendants fully funded the office's expenses (including salary, rent, electricity, mailing costs, etc.), and accordingly rejected the view of the defendants that the office was not an

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[57] 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. 1998).

[58] 226 F.3d. at 95.

[59] *Id.*

[60] *Id., citing*, inter alia, 19 N.Y.2d at 537; 385 F.2d at 120–21. Under New York law, while neither formal agency-principal relationship (*cf. New York Managers, Inc. v. M.V. Topor-1*, 716 F. Supp. 783, 785 (S.D.N.Y 1989)) nor the exercise of direct control over the agent (*cf. Palmieri v. Estefan*, 793 F. Supp. 1182, 1194 (S.D.N.Y 1992)) is required, the agent may not be engaged in similar services for other clients. *Cf. Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 481 (1958).

[61] 226 F.3d at 95.

agent of the defendants.[62] It further held that, given the size and importance of the U.S. capital market for huge publicly-traded TNCs, the activity of public relations towards the investor community in the United States is sufficiently important to be performed by the European parent companies themselves if no agent were available.[63] It explained that the IRO was of "meaningful importance to the defendants".[64] Here, the point can be made that the court applied a rather lenient reading of the *Frummer* and *Gelfand* but for-test which may come close to a "facilitation" test.[65]

C. *Incidential to Stock Listing?*

Moreover, the Second Circuit rejected the contention of the defendants that the activities of their IRO were merely incidental to its listing at the New York Stock Exchange by clarifying earlier case law as not holding that activities that are necessary to maintain a listing do not count but rather, alone as such, are insufficient to confer jurisdiction but are to be considered as an important fact if combined with other factors.[66] In addition, the decision did not agree with the corporate defendants that the office's activities were quantitatively insufficient to justify jurisdiction.[67] It referred to traditional criteria for the assertion of jurisdiction under New York law,

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[62] *Id*. at 95–96.

[63] *Id*. at 96. Critical in general, Markus Rau, "Domestic Adjudication of International Human Rights Abuses and the Doctrine of Forum Non Conveniens", 61 *ZaöRV* 177–97 (2001). Once again, it is beyond dispute that stock listing as such is deemed insufficient to transfer *in personam* jurisdiction. *Id*. at 97, *citing Pomeroy v. Hocking Valley Ry. Co*., 218 N.Y. 530, 536 (1916); *Fowble v. Chesapeake & Ohio Ry. Co*., 16 F.2d 504, 505 (S.D.N.Y. 1926); *Grossman v. Sapphire Petroleums Ltd*., 195 N.Y.S.2d 851, 852–53 (N.Y. Supp. 1959). Similarly, courts have held that a mere passive website is considered inadequate to assert jurisdiction. *See* Richard E. Kaye, Annotation, "Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction under Long-Arm Statutes and Due Process Clause", 81 *A.L.R.5th* 41, § 3 (2000).

[64] 226 F.3d at 96.

[65] Carlisle, *supra* note 37, at 23–24.

[66] 226 F.3d at 97. Related hereto, with regard to internet presence, it appears well accepted by courts that mere passive website advertising does not suffice to assert jurisdiction. *See* Stephen J. Newmann, "Proof of Personal Jurisdiction in the Internet Age", 59 *Am. Jur. Proof of Facts* 3d 1, § 8 (2002); Kaye, *supra* note 63. On the topic of internet and *in personam* jurisdiction, *see generally* Michele N. Breen, "Personal Jurisdiction and the Internet", 8 *Seton Hall Const. L.J.* 263 (1998); Richard Philip Rollo, "The Morass of Internet Personal Jurisdiction", 51 *Fla. L. Rev*. 667 (1999); Carly Henek, "Exercises of Personal Jurisdiction Based on Internet Web Sites", 15 *St. John's J. Legal Comment.* 139 (2000).

[67] 226 F.3d at 98–99.

> for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests[68]

and ruled that the IRO, whose activities were attributable to the defendants, met these criteria.[69]

D. *Fairness Test*

Finally, the court repudiated the claim of a due process clause violation by the defendants.

The exercise of personal jurisdiction became a concern in the 19th century. Historically, like in all common law countries, personal jurisdiction of state courts in the U.S. was based on the notion of sovereignty.[70] Since a state has exclusive power over all persons within its territory, it could provide for binding judgments over all persons living within the territory.[71] With the

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[68] *Id.* at 98, *citing* as examples, *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985); *Frummer*, 19 N.Y.2d at 537.

[69] *Id.* at 99.

[70] Justice Holmes declared in a landmark decision that "[t]he foundation of jurisdiction is physical power". *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

[71] Generally, this kind of jurisdiction was referred to as "personal". Mary Kay Kane, *Civil Procedure* 10, 39 (1996). Personal jurisdiction refers to territorial jurisdiction in respect of a natural or legal person. The conventional terms for territorial jurisdiction over property are *in rem* or *quasi in rem*. *See* Geoffrey C. Hazard *et al., Pleading and Procedure: State and Federal* 175 (1999). The classic expression of such understanding was provided by Joseph Story, *Commentaries on the Conflict of Laws* § 539 (1841):

> Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for, otherwise, there can be no sovereignty exerted, upon the known maxim: Extra territorium jus dicenti impune non partetur … no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions.

The Supreme Court cited Story's classic formulation and acknowledged the underlying territorial approach in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). *See also Rose v. Himely*, 8 U.S. 241, 277 (1808), in which the court refused to recognize a foreign prize court's judgment on the grounds that the foreign court lacked personal jurisdiction. Correspondingly, the court in *D'Arcy v. Ketchum*, 52 U.S. 165 (1850), ruled that the full faith and credit clause did not require a state court to enforce a judgment by another state court that lacked personal jurisdiction over the debtor.

The *Restatement (Second) of the Law of Judgments* § 4 (1982), provides the following introductory comment (a) to the concept of personal jurisdiction:

> The relevance of territorial boundaries to the exercise of jurisdiction by states within the federal union, and by courts of this country within the international community,

emergence of the industrial era, the increasing number of people moving between states and countries and the constant rise of corporations doing business on a regional, national, or even international level, the natural limits of this theoretical foundation became visible where the parties did not concede the court's power to hear a case.[72] More and more, states affected by the business conduct of foreign corporations undertook regulatory efforts to regulate such behavior often by way of judicial proceedings.[73] These efforts inevitably challenged the traditional concept of personal jurisdiction that only persons served with process within the state can be subject to court proceedings.[74] It is within this background that the Supreme Court, after a long series of decisions foreshadowing the change, handed down its well-known decision in *International Shoe Co.* in 1945.[75] Responding to the needs of the time, the

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> arises from the fact that the states and nations are defined as political and legal entities in terms of their geographical boundaries. Since these entities are legally defined in terms of geographical place, the geographical location of a transaction is significant in determining whether a court of such an entity may properly exercise jurisdiction in a particular controversy. … Accordingly, territorial jurisdiction was defined in terms of presence of the person or thing involved in the litigation.

[72] Schack, *supra* note 12, at 27.

[73] Born, *supra* note 15, at 73.

[74] However, until today, service with process (transient jurisdiction) suffices to trigger personal jurisdiction. In this respect, the territoriality principle has been maintained. Transient jurisdiction as such is also common in other common law countries as it is a British heritage. When Great Britain acceded to the Brussels Convention, it had to follow the convention's prohibition on transient jurisdiction. *See* Beth Van Schaack, "In Defense of Civil Redress: The Domestic Enforcement of Human Rights in the Context of the Proposed Hague Judgments Convention", 42 *Harv. Int'l L.J.* 142, 154, n. 71. (2001). As of date, transient jurisdiction has only played a role in ATS cases against individuals. *Cf. Filártiga v. Peña-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980), in which transient personal jurisdiction was exercised with respect to the defendant who was in the United States with an expired visitor's visa; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1536 (N.D. Cal. 1987), in which transient personal jurisdiction was upheld where defendant was served while in custody and awaiting an extradition hearing; *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995), in which transient personal jurisdiction was exercised when defendant Karadzic was served with process in New York where he stayed upon the invitation of the United Nations; *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1193 (S.D.N.Y. 1996), in which transient personal jurisdiction was affirmed when defendants Ghanaian military officials stayed temporarily in the United States; *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409, at 6 (S.D.N.Y.), in which transient personal jurisdiction was found where defendant was served while in the United States attending a session of the United Nations. However, although it is a possible option, no CEO of a foreign TNC visiting U.S. territory, e.g., for business reasons, has been served with process in an ATS case.

[75] 326 U.S. at 316. *See also* Kane, *supra* note 71, at 48–49; Joseph W. Glannon, *Civil Procedure* 3–4 (2001).

decision significantly expanded the possibility of personal jurisdiction compared to the historic understanding, providing thereby the necessary scope of development for a timely exercise of a state court's jurisdiction. The two-pronged test enunciated followed a due process of law approach under the Fifth and Fourteenth Amendments to the U.S. Constitution. The first prong looked at whether the defendant had sufficient "minimum contacts" with the forum state.[76] The second prong asked whether traditional notions "of fair play and substantial justice" are offended by the assertion of jurisdiction.[77] Applying the test to the case at hand, the Supreme Court found that International Shoe, which was a company headquartered in Missouri, could be constitutionally subjected to court jurisdiction in Washington in an action to collect contributions to a state unemployment compensation fund.[78] Thereby, the court relied on the fact that the defendant had commissioned a dozen salesmen in Washington to solicit orders for its products.[79]

In addressing the due process argument in *Wiwa*, the Second Circuit reasoned that the contacts with New York through the listing at the New Stock Exchange and the activities of the IRO went beyond the minimal as shown above and litigation in New York for such global players as defendants with their resources did not amount to a significant burden because of the following factors: (a) defendants lead a "vast, wealthy, and far-flung business empire" operating in most parts of the world and concededly, have enormous resources at their disposal; (b) they have a physical presence in New York and are the parent companies of one of the U.S.'s largest corporations, which has a very significant presence in New York; (c) they have little or no problem with the language; (d) on previous occasions, they have litigated in the U.S.; and (e) they maintain a four-decade long relationship with one of the U.S.'s leading law firms.[80]

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[76] 326 U.S. at 316.

[77] *Id*. In the *World-Wide Volkswagen* decision, the Supreme Court further emphasized the dual function of the test:

> The concept of minimum contacts…can be seen to perform two related, but distinguished functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980). *See* Kane, *supra* note 71, at 49–50.

[78] 326 U.S. at 316.

[79] *Id.* at 321–22.

[80] 226 F.3d at 99.

E. *Result*

In effect, the Second Circuit seemed to accept a rather lenient reading of the agency test for procedural purposes.[81] Moreover, after *Wiwa*, any defense strategy of a TNC based on due process appears without merit and fruitless. Their size, wealth, and reach exclude any fairness argument according to the Second Circuit. As a consequence, the due process argument was rejected.[82] The decision of the lower court was confirmed in respect of personal jurisdiction.[83]

IV. *Conclusions*

Generally, actions against foreign, non-American corporations, particularly the large number of European and Japanese (parent) companies, based on ATS do not succeed because the courts usually cannot find the required

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[81] Such view is confirmed by a more recent district court decision involving alleged gross human rights violations related to oil exploration activities in Sudan and filed against Talisman Energy, Inc., the largest independent oil producer in Canada with headquarters in Calgary, Alberta, whose stocks are also listed at the New York Stock Exchange. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 299 (2003).

Judge Schwartz of the district court for the Southern District of New York adopted *Wiwa*'s reading of the agency test for jurisdictional purposes by deciding that stock listing at the New York Stock Exchange combined with very close ties of the defendant to wholly-owned New York subsidiaries suffice to fulfill the "doing business" requirement under New York law. As in *Wiwa*, the wholly-owned subsidiaries were Rigel and Fortuna. Plaintiffs alleged that Fortuna was treated as a mere department, that Rigel and Fortuna conduct 100% of their business for the defendant, that Talisman personnel dominates the boards of the subsidiaries, that Fortuna's business address is the same as Talisman's, that Fortuna allegedly has no separate financial standing, and Talisman posts corporate bonds for Fortuna. *Id.* In addressing the defendant's arguments, he explained that Talisman is correct in citing *Wiwa* that a New York Stock Exchange listing is not enough to find jurisdiction but overlooks *Wiwa*'s holding that "it is not that activities necessary to maintain a stock exchange listing do not count, but rather that, without more, they are insufficient to confer jurisdiction" and found here the aforementioned links to the forum. *Id.* at 330. Accordingly, Judge Schwarz for the Southern District of New York assumed personal jurisdiction over the parent company again under New York's procedural agency test. *Id.* The case is still pending.

On the other hand, in the absence of specific circumstances present in Wiwa, personal jurisdiction may be still difficult to establish. In *Baumann v. DaimlerChrysler* AG, 2007 WL 486389 (N.D.Cal) relating to crimes of the Argentine military regime of 1976 to 1983, the district court for the Northern District of California did not find personal jurisdiction under the agency test. It held that Mercede-Benz USA was not the agent of the parent company as distribution is not a task that but for the existence of the subsdiary, the parent company would have to undertake itself. *Id.* at 3.

[82] 226 F.3d at 99.

[83] *Id.* at 92.

minimum contacts to the forum state that trigger personal jurisdiction over the defendants and thus, are not in a position to hold them responsible for violations of international law overseas. This was exemplarily visible in the *Unocal* case in which the action against Unocal's French co-venturer, TNC Total S.A., was dismissed. Typically, it is hard to circumvent the corporate structure of a TNC with a foreign parent company.

Yet, in quite a number of instances, a solution can be found as shown by the ruling in the *Wiwa* case by the Second Circuit. Under New York's lenient agency test for jurisdictional purposes, listing at the New York Stock Exchange combined with other substantial links with a U.S. subsidiary or a department thereof reaching beyond mere ownership or control of a subsidiary suffices to establish a connection to the American legal forum to provide personal jurisdiction to a federal court. Under this agency test, the contacts to the forum of the agent or subsidiary is attributed to the foreign parent company. A key issue in the determination of agency for jurisdictional purposes is the importance of the agent's acts for the principal or parent company. In *Wiwa*, it was an investor relations office in New York which received direct input and direction from the parent companies incorporated in Europe for its business: informing, enmeshing, and canvassing institutional investors. It is possible to read the Second Circuit's decision as adopting an even more liberal reading of the procedural agency test in ATS cases than in usual cases if the defendant is a parent company of a major TNC. The reason for this is that for true global players, their vast size, resources, and logistics combined with the fact that they constantly afford extensive legal advice from the world's biggest law firms in New York, any possible due process concerns vanish. In this respect, further developments have to be awaited. For those foreign parent corporations beyond the reach of personal jurisdiction of a federal court, there is all the more reason that other countries should follow the model of the ATS and enact comparable statutes in their respective countries for their respective TNCs.[84]

[84] Admittedly, the chances of such a development are, however, rather slim.

Chapter Eleven

Forum non Conveniens

I. *Introduction*

A U.S. district court which has personal jurisdiction over the TNC defendant in an ATS case may still abstain from proceeding further with the case in favor of adjudication in a foreign forum based on the discretionary doctrine of *forum non conveniens*.[1] The doctrine is unknown in most civil law systems where the jurisdiction of the court either exists or not and which excludes any discretion on the part of the judge as to the actual exercise of jurisdiction over a defendant against whom a suit has been filed.[2] Although historically,

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[1] *See generally* Claude Blum, *Forum Non Conveniens* (1979); David W. Robertson & Paula K. Speck, "Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions", 68 *Tex. L. Rev.* 937 (1990); Christopher Speck, "The Continued Use of Forum Non Conveniens: Is It Justified?", 58 *J. Air. L. & Com.* 845 (1993); Linda J. Silberman, "Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard", 28 *Tex. Int'l L.J.* 501 (1993); Donna Solen, "Forum Non Conveniens and the International Plaintiff", 9 *Fla. J. Int'l L.* 343 (1994); Kevin M. Clermont & Theodore Eisenberg, "Exorcising the Evil of Forum Shopping", 80 *Cornell L. Rev.* 1507 (1995); Christoph Dorsel, *Forum Non Conveniens* (1996); Douglas W. Dunham & Eric F. Gladbach, "Forum Non Conveniens and Foreign Plaintiffs in the 1990s", 24 *Brook. J. Int'l L.* 665 (1998–1999); Haimo Schack, *Internationales Zivilverfahrensrecht*, para. 493 (2002).

The term "*forum non conveniens*" itself was introduced to the American legal system by Paxton Blair in a Columbia Law Review article in 1929. Paxton Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law", 29 *Colum. L. Rev.* 1 (1929). In said article, Blair stated that in dismissing actions based on judicial discretion for reason of comity or convenience, American courts in fact apply the doctrine of *forum non conveniens* even though not employing the term. *Id.* at 2. As a result, courts already struggling with the weight and application of various interests in asserting jurisdiction readily incorporated the doctrine into jurisprudence. Dorsel, *infra* note 1, at 46–47.

[2] Alejandro M. Garro, "Forum Non Conveniens: 'Availability' and 'Adequacy' of Latin American Fora from a Comparative Perspective", 35 *U. Miami Inter-Am. L. Rev.* 65 (2003–2004).

In the U.S., starting in the 19th century, maritime cases presented the simplest expression of a competent court's discretionary power to hear a case paving the way for the later emergence of the doctrine of *forum non conveniens* in the American legal system. Aric K. Short, "Is The Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human

the legal origins date back to the early 17th century,[3] in the United States,[4] the Supreme Court laid down the legal framework of the doctrine in three

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Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1017 (2001). In the *Belgenland* case, involving a collision of foreign vessels on the high seas, the Supreme Court acknowledged such discretionary power in maritime cases between foreigners. *The Belgenland, Jackson et al. v. Jensen*, 114 U.S. 355, 365 (1885). The court restricted its holding by emphasizing the need to determine whether the dispute would be governed by the law of the country to which the litigants belong, in which case, it is not "expedient" to try the case. *Id*. at 363, 365–66.

[3] *See* Edward L. Barett, Jr., "The Doctrine of Forum Non Conveniens", 35 *Cal. L. Rev*. 380 (1947); Alexander M. Bickel, "The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty", 35 *Cornell L.Q.* 12 (1950). In the beginning, the doctrine was named "*forum non competens*". *See, e.g.*, *Col. Brog's Heir* (unreported), 6 Dict. of Dec. 4816 (Scot. Sess. Cas. 1639); *Anderson v. Hodgson & Ormiston*, 11 Dict. of Dec. 4779, 4779–80 (Scot. Sess. Cas. 1747). It addressed the question of a Scottish court's power to hear a dispute where the litigants were non-residents. *Cf. Vernor v. Elvies*, 11 Dict. of Dec. 4788 (Scot. Sess. Cas. 2d Div. 1610), wherein the court refused to exercise jurisdiction in a dispute between two English citizens solely doing business in Scotland without intention to remain or settle. After some time, the decisions shifted to the issue of discretionary declination of jurisdiction over cases although jurisdiction was clearly existent. *See John Palmer Parker & Mandatory v. Royal Exchange Assurance Co.*, 8 D. 365, 369 (Sess. Cas. 1846), which states: "There may be cases in which, although the jurisdiction is undoubted, courts may stay proceedings, in order that the parties may try the question in the tribunals of another country, which are more fitted for the determination of the same". *See also Longworth v. Hope*, 3 M. 1049, 1053 (Sess. Cas. 1865), stating: "The plea has received a wider signification, and is frequently stated in reference to cases in which the Court may consider it more proper for the ends of justice that parties should seek their remedy in another forum". In 1926, the House of Lords, in upholding a dismissal based on *forum non conveniens*, offered the most elaborated version of the doctrine under Scottish Law. *La Société du Gaz du Paris v. La Société Anonyme de Navigation "Les Armateurs Français"*, 1926 Sess. Cas. H.L. 13. In England, on the other hand, courts were reluctant to grant discretion based on the appropriateness of a proceeding to a judge who is competent to hear a case for a long time. It was only in the very rare cases when the plaintiff's choice of forum amounted to an "abuse of process" that courts dismissed an action. *See St. Pierre v. South American Stores*, 1 K.B. 382, 398 (1936). Thus, compared to their Scottish counterparts, English judges were accorded minimal discretion. By the 1970s, the House of Lords softened the criteria for dismissal and introduced a more liberal approach allowing a greater discretion to the courts confronted with various considerations. *See The Atlantic Star*, A.C. 436 (1974); *MacShannon v. Rockware Glass Ltd.*, A.C. 795 (1978); *Spiliada Maritime Corp. v. Canultex Ltd.*, 3 W.L.R. 972 (1986). Lord Chancellor Cave clarified the doctrine as calling for dismissal if "after giving consideration to the interests of both parties and the requirements of justice, it appears that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court." *La Société du Gaz du Paris*, 1926 Sess. Cas. H.L. at 16–17. In the same decision, Lord Sumner formulated the appropriate object of the doctrine as "to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends." *Id*. at 22.

[4] With respect to alternative legal fora in the United States, it forms part of statutory law and remains judge-made only as to disputes with foreign or international elements. *See* U.S. 62 Stat. 937 (1948); 28 U.S.C. § 1404.

landmark decisions: *Gulf Oil v. Gilbert*,[5] *Koster v. Lumbermens Mut. Cas. Co.*,[6] and *Piper Aircraft v. Reyno*.[7] In these decisions, the court enunciated a two-pronged test.[8] As a threshold level, courts have to determine the availability and adequacy of the supposed alternative forum. In the affirmative, the court goes to the second level to weigh the private interests of the parties to a dispute and the public interest of the court and society in respect of the litigation using a multi-factor balancing test to see whether they favor trial in the alternative forum in light of the deference to the plaintiff's choice of forum.[9] While the doctrine went unobserved for many decades, the doctrine has become increasingly important in recent years[10] because since the 1990s, there has been a continuous increase in the number of foreign plaintiffs who commenced actions in the United States in product liability cases.[11] By and large, American courts employed the doctrine of *forum non conveniens* as a shield to limit the increasing use of the American legal system by foreign plaintiffs.[12] The generally accepted explanation for this phenomenon is that foreign plaintiffs will likely file their suits in the U.S. in order to take advantage of the procedural and substantive law advantages available to plaintiffs and that in response, American courts tend to dismiss such cases based on *forum non conveniens* to prevent forum shopping.[13]

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[5] 330 U.S. 501 (1947).

[6] 330 U.S. 518 (1947).

[7] 454 U.S. 235.

[8] Dunham & Gladbach, *supra* note 1, at 673.

[9] *Id.*

[10] Phillip Blumberg, "Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems", 50 *Am. J. Comp. L.* 493, 501 (2002).

[11] Dunham & Gladbach, *supra* note 1. One well-known and media-attracting example belonging to this wave of litigation reaching U.S. courts involved the action brought by numerous women from all over the world, including Australia, Canada, and England, against U.S. producers for design and manufacturing defects related to breast implants. *See In re Silicone Breast Implants Products Liability Litigation*, 887 F. Supp. 1469, 1471–72 (N.D. Ala. 1995).

[12] Dunham & Gladbach, *supra* note 1, at 666. All of these product liability cases shared a common set of features: (a) the plaintiffs were not U.S. residents and the injury occurred abroad; (b) the defendants were, in general, American TNCs; (c) the claims were based on product liability theories; and (d) in these actions, forum non conveniens issues were discussed at the behest of defendants. *Id.*

[13] *Id.* at 703. The doctrine of *forum non conveniens* in its current stage of development serves two purposes. One purpose is to prevent international forum shopping by plaintiffs. On the problem of forum shopping in the United States, *see generally* Clermont & Eisenberg, *supra* note 1. Various features of the American legal system, inter alia, laymen jurors, contingency fees, and the generous discovery system render American courts more attractive to plaintiffs than most of their counterparts in other countries. In the United States, unlike majority of other States, the Seventh and Fourteenth Amendment to the U.S. Constitution guarantee a right to trial by jury in majority of civil cases. Fleming James *et al., Civil Procedure* 411–13

This chapter explores the extent to which the defense of *forum non conveniens* can restrict ATS litigation against MNEs. Given the almost unlimited

(1992). Since juries consist of laymen with different views and backgrounds as opposed to legal professionals, they are more inclined to award judgment to a plaintiff particularly in a suit against a huge corporation. Gary B. Born, *International Civil Litigation in United States Courts* 4 (1996). In addition, they are also more likely to award higher damages. *Id*. Also, contingency fees reduce the risk of litigation since even in the worst case scenario, plaintiffs do not lose a dime. David Boyce, "Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno", 64 *Tex. L. Rev.* 193, 199 (1985). Moreover, various rules of procedure favor plaintiffs in comparison to other legal systems. Generous pleading standards allow plaintiffs to enter the court room with rather vague claims. Born, *infra* note 13. The easy availability of pre-trial discovery enables plaintiffs to start with little evidence and to acquire more evidence step by step, thereby building up their case slowly. In most civil law countries, a discovery system does not even exist. The extremely high costs of discovery at the same time increase the defendants' willingness to negotiate and settle. *Id*. Furthermore, class actions admitted in U.S. courts decrease the cost of litigation for the individual plaintiff and enable large groups of persons to sue in an American forum even though the monetary interest in suing in the U.S. by an individual plaintiff is minor. Richard L. Marcus & Edward F. Sherman, *Complex Litigation* 295 (1992). Lastly, besides procedural gains in suing in the United States because jurisdictional requirements can be easily fulfilled, plaintiffs can manipulate the outcome of the case by choosing the forum with the most favorable substantive law on their dispute. Daniel J. Dorward, "The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs", 19 *U. Pa. J. Int'l Econ. L.* 141, 149–50 (1998). In this way, the doctrine constitutes a counterbalance and safety valve to the overly broad personal jurisdiction granted to U.S. courts.

The other purpose is to protect already overloaded court dockets from choking with burdensome litigation and prevent the subsidization by American taypayers of disputes with no connection to the U.S. especially when valuable judicial resources are scarce and expensive. Robert S. De Leon, "Some Procedural Defenses for Foreign Defendants in American Securities Litigation", 26 *J. Corp. L.* 717, 730 (2001); Fleming James & Geoffrey C. Hazard, *Civil Procedure* § 2.28, at 107 (1985).

Chief Judge Pointer of the U.S. District Court of the Northern Division of Alabama expressed this concern in *In re Silicone Gel Breast Implants Products Liability Litigation* involving products liability claims asserted by citizens of Australia, Canada, England, and New Zealand against a breast implant manufacturer as follows:

> Another public interest factor supporting dismissal relates to the burden that litigation of these foreign claims would impose on courts in this country. In just these few actions, more than 1,000 foreign claimants are joined as named plaintiffs, and more than 100,000 others are included as members of a putative class. … [I]t is clear that many, many trials involving this "common evidence" will be needed—with the time required of such evidence at each trial consuming weeks or even months.

887 F. Supp. at 1477. Similarly in *Islamic Republic of Iran v. Pahlavi*, involving the attempt of the Chomeini Regime to gain control over the former monarch's financial assets outside Iran, the court pointed out that "[t]he action does not bear a substantial nexus to the State of New York and seeks to burden New York courts and taxpayers with an action involving billions of dollars in assets located throughout the world, with the gravamen of the lawsuit being allegations as to the foreign monarch's rule over the past several decades." 473 N.Y.S.2d 801, 802 (1984).

discretion of district court judges[14] and the fact that reversals of dismissals based on the doctrine are rare, the examination largely focuses on the little guidance given by Courts of Appeals.

Part II scrutinizes the first prong of the test employed by courts addressing the doctrine of *forum non conveniens* under which a court determines the availability and adequacy of the proposed foreign forum. Part III evaluates the second prong of the test under which courts balance a variety of private and public interest factors. In an ATS case, an already work-overloaded judge would typically ask the foreign plaintiff why he decided to employ a U.S. court to address his claim.

II. *The Foreign Court as an Available and Adequate Alternative*

Jota v. Texaco[15] was the first ATS case which was dismissed on *forum non conveniens* grounds and which was appealed.

A. *Availability of the Foreign Court*

In this case, indigenous people living in Ecuador sought remedies for alleged environmental destruction and the resulting personal injuries caused by

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From a legal realist's viewpoint, the courts' reaction is to be found in the unuttered (judicial) belief that the mere fact that the defendant is American or U.S.-based should not allow the plaintiff to take recourse to the American legal system. Instead, plaintiffs should, like everyone else in plaintiff's country of origin who are similarly situated, seek remedies in his home jurisdiction where the injury occurred. *See* C. Ryan Reetz & Pedro J. Martinez-Fraga, "Forum Non Conveniens and the Foreign Forum: A Defense Perspective", 35 *U. Miami Inter-Am. L. Rev.* 1 (2003–2004), who gives a legal realist's account of the way courts apply the doctrine to achieve what they view as a fair result.

[14] *See Piper Aircraft v. Reyno*, 454 U.S. 235, 251 (1981). With regard to appellate review, the Supreme Court emphasized the discretion of the district courts in applying the doctrine of *forum non conveniens* and restricting appellate reversal to situations "when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference". *Id.* Thus, in practice one needs to proceed on a case-by-case basis since a lot depends on the individual judge assigned to a case and his views, attitudes, and preferences, and general principles cannot be derived out of district court decisions. Similarly cautious in respect of generalizations are Sarah Joseph, *Corporations and Transnational Human Rights Litigation* 87–88 (2004); Armin Rosencranz & Richard Campell, "Foreign Environmental and Human Rights Suits against US Corporations in US Courts", 18 *Stan. Envtl. L.J.*, 145, 180 (1999). In effect, it seems more accurate and more reflective of the jurisprudential reality to speak of certain tendencies within courts than of hard-bound black letter law.

[15] 157 F.3d 153 (2d Cir. 1998).

Texaco's oil operations.[16] It was the companion action of *Sequihua v. Texaco*[17] which rested on the same facts but the claims of which were not based on ATS but exclusively on ordinary torts law. In *Sequihua*, TNC corporate defendants moved to dismiss on the basis of *forum non conveniens* as did defendants in *Jota*.[18]

In *Sequihua*, under the first criteria of the test's first prong, Chief Judge Norman of the federal district court for the southern district of Texas correctly stated that the defendant must show first that an available forum exists.[19] Based on two affidavits of former Ecuadorian Supreme Court justices provided by defendants, he described Ecuadorian courts as an available alternative which maintains its independence and owns a body of tort law which provides remedies for tortious conduct. Indeed, the first criterion of the first prong asks whether the defendant is amenable to process in the other forum.[20]

1. *Dismissal Subject to Conditions*

In doing so, courts routinely condition dismissals on the waiver of the applicable statute of limitations[21] and agreement to submission to foreign jurisdiction.[22] At first instance in the *Jota* case, Judge Rakoff of the federal district court for the southern district of New York simply adopted the reasoning in *Sequihua* and equally dismissed the action based on *forum non conveniens*.[23] Judge Rakoff declared that he fully agrees with the reasons stated "so well" in *Sequihua*.[24] However, the district court did not condition its dismissal on a commitment by Texaco to submit to the jurisdiction of Ecuadorian courts and plaintiffs appealed.[25] On appeal, the Second Circuit declared the *Jota* action

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[16] *Id.*

[17] 847 F. Supp. 61 (S.D. Tex. 1994).

[18] *Id.* at 63.

[19] 847 F. Supp. at 64. The starting point of any *forum non conveniens* inquiry is the determination of whether an alternative forum exists. *See Piper*, 454 U.S. at 254, n. 22.

[20] 847 F. Supp. at 64.

[21] *Feenerty v. Swiftdrill, Inc.*, 706 F. Supp. 519, 524 (E.D. Tex. 1989); *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 908–09 (S.D.N.Y. 1986).

[22] *See, e.g., De Melo v. Lederle Lab.*, 801 F.2d 1058, 1061 (8th Cir. 1986). If the defendant does not follow the court order, a contempt action is an instrument of practical enforcement of the conditioned dismissal. William L. Reynolds, "The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts", 70 *Tex. L. Rev.* 1663, 1667 (1992). Sometimes, a court may require the new forum to act promptly (*see Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822 (2d Cir. 1990)) or base its decision on the condition of the defendant's consent to pay any judgment (*Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Circuit 1990).

[23] *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

[24] *Id.* at 627.

[25] *See id.*

different from *Sequihua* because in the case at hand, the only defendant was Texaco, an American corporation, and not its Ecuadorian counterparts or subsidiaries and as such, not subject to the jurisdiction of Ecuadorian courts.[26] Therefore, the court ruled that the alternative forum was not available for plaintiffs, or at the very least, the district court improperly failed to condition its dismissal on a commitment by Texaco to submit to the jurisdiction of Ecuador.[27] The decision was therefore reversed.[28] On remand, Texaco again moved to dismiss based on *forum non conveniens*, and this time, Judge Rakoff, after a thorough discussion of the subject, granted the motion again.[29] This time, the appeal was not successful,[30] confirming the well-known fact that district court judges enjoy overly broad discretion on whether to exercise or not to exercise jurisdiction based on the doctrine of *forum non conveniens*.[31]

2. *Retaliatory Legislation*

When *Jota* was remanded, Judge Rakoff also had to tackle a separate and relatively new issue.[32] Plaintiff argued that Law No. 55 passed by Ecuador in 1998 prevents any further litigation in Ecuador.[33] Law No. 55 orders an interpretation of articles 27 to 30 of the Ecuadorian Code of Civil Procedure to the effect that Ecuadorian courts are precluded from accepting and exercising jurisdiction once the plaintiff has implemented his decision to file a suit in a foreign court.[34] The Ecuadorian statute forms part of the so-called retaliatory legislation in some countries the courts of which had been declared a more convenient legal forum in numerous U.S. court decisions in respect of the doctrine of *forum non conveniens*.[35] In negating the availability of an alternative forum, such legislation is specifically aimed at undermining the doctrine of *forum non conveniens* in U.S. courts.[36] The background behind these retaliatory legislation is that in most of these countries, the doctrine of *forum non conveniens* does not form part of procedural law and the discretionary rejection of

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[26] *Jota v. Texaco*, 157 F.3d 153, 159 (2d Cir. 1998).
[27] 157 F.3d at 158.
[28] *Id.*
[29] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, *passim* (S.D.N.Y. 2001).
[30] *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).
[31] *See supra* text accompanying note 14.
[32] *Aguinda*, 142 F. Supp. 2d at 546.
[33] *Id.*
[34] Garro, *supra* note 2, at 78–79.
[35] For details on the legislative movement, *cf.* Winston Anderson, "Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation", 10 *J. Transnat'l L. & Pol'y* 183 (2001); Henry Saint Dahl, "Forum Non Conveniens, Latin America and Blocking Statutes", 35 *U. Miami Inter-Am. L. Rev.* 21 (2003–2004); Garro, *supra* note 2, at 78–81.
[36] Joseph, *supra* note 14, at 96–97.

an action by a court which is otherwise competent strikes against the core of procedural codes of civil law countries where jurisdiction either exists or not and once established, cannot be denied based on the discretion of the district court. With many countries providing for retaliatory legislation, the doctrine of *forum non conveniens* may face another serious setback in the near future in ATS cases. Indeed, in the latest ruling in the *DBCP* litigation, the dispute with Dow Chemical involving the use of the pesticide dibromochloropropane or DBCP in banana plantations in Central America, Africa, and Southeast Asia causing alleged sterilization of plantation workers (not based on ATS), the district court found that Costa Rica, Honduras, and the Philippines were unavailable fora since all of them have enacted legislation which precluded jurisdiction if litigation had been previously started in another forum.[37] In *Jota*, Judge Rakoff was able to avoid a ruling on the issue. He argued first that the Ecuadorian statute does not apply retroactively to cases filed before 1998, and second, he expressed doubts as to whether the statute applies even after the dismissal of the case in the US since in his understanding, the statute's purpose is merely to force plaintiffs to proceed with their cases in one single forum and not in several fora.[38]

B. *Adequacy of the Forum*

A general statement of the Second Circuit in *Wiwa v. Royal Dutch Petroleum Co*.[39] involving human rights violations in connection with oil extraction in the Nigerian River Delta, although more of a hortatory nature and despite the fact that the decision is generally well-known for its balancing of interests' reasoning, relates to the second criterion of the test's first prong: adequacy. The *Wiwa* decision of the Second Circuit contains strong wording which suggests that courts in future cases will analyze the respective facts with less latitude towards the defendant as in the ordinary product liability cases. The Second Circuit declared:

> One of the difficulties that confront human rights victims of torture under the color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in courts of other nations. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert

[37] 219 F. Supp. 2d 719, 728, 735, 741 (E.D. La. 2002).
[38] 142 F. Supp. 2d at 546.47.
[39] 226 F.3d 88 (2d Cir. 2000).

> outrageous conduct on the part of the other nation, such suits may embarrass the government of the nation in whose courts they are brought.[40]

Such reasoning is particularly remarkable since in respect of adequacy of the alternative court, the Supreme Court has held that "[i]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all… the district court may conclude that dismissal would not be in the interest of justice."[41] If so, it may not be an adequate forum. The Supreme Court further explained that "dismissal would not be appropriate

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[40] *Id*. at 106. A variation of this argument can be found in the first ATS case in which the doctrine of *forum non conveniens* was addressed and rejected. The background of the case *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997), was a business relationship. The American photographic equipment manufacturer asserted that its employee was wrongfully imprisoned on a criminal charge by Bolivian authorities upon the influence of the Bolivian product distributor when Kodak attempted to terminate the distributorship agreement. The dispute was nailed down to the decisive question of whether the alleged corruption of the Bolivian legal system deprived the plaintiff of an adequate alternative forum. As to private interest factors to be balanced, the court found that the business relationship existed in Bolivia, almost all documents had to be translated to English and extensive expert testimony on Bolivian law was required, favoring the Bolivian legal forum. *Id*. at 1183–84. It further stressed that the fact of reduced possibilities for plaintiffs under the Bolivian discovery system alone is not sufficient to outweigh the *forum non conveniens* argument. *Id*. at 1184. Similarly, as to public interest factors, the court emphasized that the entire business relationship took place in Bolivia. *Id*. Analyzing *forum non conveniens* precedent, the court stated that it was unable to find a single judgment which fully accepted the corruption argument as sufficient to rebut the *forum non conveniens* claim. In the opposite, many judges rejected the argument in toto. Two arguments for the reluctance of judges in this field were presented. Firstly, the court noted that it is not its business to decide or judge the effectivity and integrity of another sovereign nation particularly since a certain degree of fault and corruption is inherent in every legal system. *Id*. Secondly, the court declared that if a party voluntarily chooses to live or to do business in a foreign country, such party necessarily accepts the natural conditions of life, law, and politics in such country even though the possibilities, compared to Western standards, are limited. *Id*. at 1185. Having stressed the foregoing, the court explained why this case is different. Not only was the plaintiff able to present credible American and Bolivian information on the extreme disintegrity of the Bolivian system but that the whole claim was based on the concrete and specific exercise of undue influence by the defendant on the Bolivian judicial system resulting in the imprisonment of the Kodak employee in this particular case at hand. *Id*. at 1185–87. It is only in this special situation that defendants did not meet their burden to show that for this plaintiff against this defendant, an adequate forum in the form of Bolivian courts existed. *Id*. at 1187. Accordingly, the court denied the defendant's motion to dismiss. *Id*. U.S. State Department Human Rights Reports appear influential in this regard. *Cf*. Joseph, *supra* note 14, at 91; *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000), in which the Second Circuit allowed district courts to use such reports to evaluate the adequacy of the forum in light of corruption.

[41] *Id*.

where the alternative forum does not permit litigation of the subject matter of the dispute."[42] The Supreme Court emphasized that such a finding is limited to exceptional circumstances.[43] As a consequence, courts find foreign fora inadequate only in very rare cases. Differences in discovery,[44] lack of a right to a jury trial,[45] delay in trying the case,[46] or differences in the available relief[47] do not render the foreign forum inadequate. However, and only exceptionally, courts may deny the availability of an adequate forum and refuse to dismiss the action if the alternative does not offer a reliable and functioning judicial system to the plaintiff or if the life of the plaintiff is at stake in case of return to the other country,[48] the country concerned is marred by riots and civil chaos,[49] the alternative forum is behind the iron curtain in a communist country,[50] or the foreign currency regulations preclude the possibility to take an award out of the country.[51]

Abdullahi v. Pfizer involving alleged medical experimentation without the patient's consent is so far the last case in which a Court of Appeals had a possibility to consider the issue of adequacy under the doctrine of *forum non conveniens* in an ATS case targeting a TNC.[52] It dealt with medical testing by the pharmaceutical TNC Pfizer in Nigeria which allegedly had no adequate consent from the Nigerian patients which was similarly dismissed based on the doctrine of *forum non conveniens* by the district court.[53] While the district court found the Nigerian courts to be adequate, after the dismissal of the case in the United States, the action pending in a Nigerian court was also dismissed. On appeal, the plaintiffs argued, disputed by Pfizer, that the Nigerian judge declined exercising jurisdiction for "personal reasons" and had adjourned trial for an indefinite period of time. While the Court of Appeals was unable

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[42] *Id.*

[43] *Id.*

[44] *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991).

[45] *Id.*

[46] *Broadcasting Rights Int'l v. Société du Tour de France, S.A.R.L.*, 708 F. Supp. 83 (S.D.N.Y. 1989).

[47] *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987).

[48] *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 860 (S.D.N.Y. 1983), dealing with Iran after the Islamic Revolution.

[49] *Walpex Trading v. Yaciminientos Petroliferos*, 712 F. Supp. 383, 393 (S.D.N.Y. 1989), which occurred in Bolivia.

[50] *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 293 F. Supp. 892, 907f (S.D.N.Y. 1968), which occurred in the German Democratic Republic.

[51] *Hatzlachh Supply Inc. v. Savannah Bank of Nigeria*, 649 F. Supp. 688 (S.D.N.Y. 1986).

[52] 2002 WL 31082956 (S.D.N.Y.). For more details on the case, *see supra* Chapter Three: Civil and Political Rights.

[53] 2002 WL 31082956.

to resolve the factual issues, it required the district court to determine what precipitated the dismissal in Nigeria and to evaluate whether such influences the court's *forum non conveniens* analysis.[54]

It further stated explicitly that although cases are rare in which a forum court is found inadequate, the district court itself had mentioned the numerous State Department and United Nations reports which generally doubted the capability of the Nigerian legal system and described the prevailing corruption therein even after the transition of Nigeria from a military dictatorship to democracy. Accordingly, the case was vacated and remanded for further proceedings.[55] Later, the district court dismissed the case based on the doctrine of forum non conveniens again by concluding that the plaintiffs did not submit specific evidence to show that the Nigerian judiciary would be biased against its own citizens in "the kind of controversy here at issue".[56]

From the reasoning in *Wiwa* and in *Abdullahi* on appeal, the conclusion can be drawn that in ATS cases, courts seem more inclined to categorize human rights cases as falling into the narrow category of instances in which other fora had been found inadequate compared to ordinary torts litigation.[57] Even if the alternative forum is not found to be inadequate in future ATS cases in accordance with the courts' professed reluctance to do so and the minimal showing that is formally required to establish adequacy, plaintiffs in ATS cases are well-advised to continue to argue that both procedural and substantive differences between the U.S. legal system and the foreign legal system render the latter inadequate. Although these arguments may fail in respect of adequacy, it may nonetheless affect the judges' perception of fairness and given their broad discretion under the doctrine of *forum non conveniens*, may accordingly influence the concerned court's overall approach, interpretation, and balancing of factors.[58]

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[54] 77 Fed. Appx. 48, 53 (2d Cir. 2003).

[55] *Id*.

[56] *Abdullahi v. Pfizer, Inc.*, WL 1870811, at 15–18 (S.D.N.Y. 2005). See also the related case *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005), where the forum was likewise found adequate. *Id*. at 504.

[57] *Cf. Baumann v. DaimlerChrysler*, WL 486389 (N.D. Cal. 2007), where Argentina was found to be an adequate forum.

[58] *See Reetz & Martinez-Fraga, supra* note 13, at 11. They state that judges may be predisposed to believe that U.S. litigation is, as a matter of principle, fairer than litigation abroad. First, foreign rules, frameworks, and legal concepts may appear strange and unfamiliar to a lawyer trained in the U.S. *Id*. Accordingly, plaintiffs should make every effort to explain that litigation in the foreign forum is "unfair".

III. *Balancing of Private and Public Interests*

The Second Circuit addressed the second prong of the test in the aforementioned *Jota* and *Wiwa* cases under which courts balance a variety of private and public interest factors to determine whether the foreign court is, overall, in a better position to resolve the dispute.

A. Jota *Case*

In the *Sequihua* case, the findings of which were, as previously mentioned, adopted in *Jota* in the district court's decision, Judge Norman also considered in the second prong of the test the private and public interests he deemed relevant including the plaintiff's choice of forum.

1. *District Court Approach*

The approach taken by the court is typical and representative of the great number of decisions which are dismissed each year at the district court level to prevent forum shopping and the congestion of court dockets.[59] Within this general framework and despite a certain lack of coherence due to weak judicial review on appeal, courts have shaped over the years a bundle of criteria for balancing private and public interests in order to determine the forum which will be most convenient and will best serve the ends of justice and whether the presumption favoring the plaintiff's chosen forum can be overcome. In this process of balancing, no single factor is dispositive and as already emphasized above, that district court judges enjoy a broad range of discretion.[60]

(a) Private Interest Considerations

In *Jota*, Judge Rakoff first turned to private interest considerations. Generally, private interests considered by the courts serve as a protective shield for the parties to the dispute, particularly the interest of the defendant. The defendant is shielded against the profound disadvantages that can result from the plaintiff's choice of a forum which is foreign to the defendant.[61]

In *Sequihua*, Judge Norman explicated that although plaintiff have chosen the Texas forum, the choice of a foreign plaintiff is entitled to less deference than the selection of a home plaintiff.[62] Indeed, residency or correlatively,

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[59] On the purposes of the doctrine, *see supra* accompanying text to note 12.

[60] *See supra* accompanying text to note 14.

[61] Dorsel, *supra* note 1, at 71. Courts often use terms such as "oppression", "vexation", "harassment", "trial convenience", "fair trial", or "ends of justice" to express such concerns. *Id.*

[62] 847 F. Supp. at 64.

citizenship, is a relevant factor in the process of balancing.[63] The closer the ties of a plaintiff to the forum where the case is pending, the more likely the court will refuse to dismiss the action. The Supreme Court in *Piper Aircraft Co. v. Reyno* observed that a plaintiff's choice of forum deserves more deference if he chooses to litigate in his home forum since it is reasonable to assume convenience in this forum and that if the plaintiff is a foreigner, the assumption is less reasonable and thus, deserves less deference.[64] Conversely, a motion to dismiss based on *forum non conveniens* is more likely to be granted if only the defendant is a resident or citizen of the U.S. In practice, if the plaintiff is a citizen or a resident of the U.S., courts generally give great weight to the fact that a holding of inconvenience deprives the plaintiff of access to court in his own country. If both plaintiff and defendant are neither residents nor U.S. citizens, unless there are special circumstances supporting otherwise, the likelihood of dismissal as a general rule is immense.[65]

As to other private interests involved in *Sequihua*, Judge Norman stressed that all evidence and compulsory process would be present in Ecuador, the cost of bringing witnesses to Texas would be much higher, and that a view of the premises would be possible only in Ecuador.

These are all legitimate factors in *forum non conveniens* balancing. The place or location of the events which gave rise to the action in question is indeed a major aspect which courts take into consideration. The underlying assumption for this factor is the relative ease and accessibility of sources of proof due to the court's geographical proximity. The court may nevertheless deny convenience of its forum even if the necessary evidence is not available where the events took place.[66] Similarly, if the place of commission of the tort is incidental to the claim in the sense that it could have equally occurred somewhere else, the weight of this factor is rather low.[67]A related equally important factor the importance of which cannot be underestimated is the accessibility of sources of proof. Judges are more than willing to liberate themselves from cases which

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[63] The plaintiff in *Piper Aircraft Co. v. Reyno* was an alien. 454 U.S. 235. The case referred to, however, held that residency rather than citizenship should be decisive. *Pain v. United Technologies Inc.*, 637 F.2d 775,797 (D.C. Cir. 1980). Thus, the term "foreigner" is not without ambiguity. In the aftermath, courts have considered both factors. *Empresas Lineas Maritimas Argentinas v. Schichau-Unterweser, A.G.*, 955 F.2d. 368, 373 (5th Cir. 1992); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 390 (5th Cir. 1983), on citizenship; *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 341 (8th Cir. 1983), on residency.

[64] 454 U.S. at 255–56.

[65] *Fuentes v. Sea-Land Services*, 665 F. Supp. 206, 210–11 (S.D.N.Y. 1988).

[66] *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506 (S.D.N.Y. 1982); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992). The relative inconvenience of the alternative forum does not suggest the convenience of the forum chosen by the plaintiff.

[67] *Canada Malting Co. v. Paterson Steamships*, 285 U.S. 413 (1932).

would unduly burden themselves and delay the completion of the dispute. In *Gulf Oil Corp. v. Gilbert*, the Supreme Court declared that

> important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of the willing, witnesses; the possibility of view if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[68]

In addition in *Sequihua*, Judge Norman remarked that the enforcement of any U.S. judgment in Ecuador would be questionable.[69] It is true that if, at the time of the proceeding, it is already obvious that a potential judgment of a U.S. court will not be enforceable abroad, exercising jurisdiction may constitute a waste of money-consuming resources. Thus, non-enforceability is raised as an argument to dismiss on the ground of *forum non conveniens* in case the plaintiff is dependent on the enforceability of judgment abroad.[70]

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[68] 330 U.S. at 508. Moreover, the chances that a motion to dismiss will be granted decrease proportionately with the progress of the trial. The grant of *forum non conveniens* at a late stage of a proceeding would waste the time and resources invested in discovery and trial preparation undermining the very purpose of the doctrine to provide an efficient and convenient administration of the dispute within a reasonable time frame. Thus, if the party concerned fails to file a timely motion to dismiss as the case proceeds, courts have ruled that the presumption against *forum non conveniens* greatly increases. *Lony v. E.I. Du Pont de Neumours & Co.*, 935 F.2d 604, 614–15 (3d Cir. 1991); *In re Crash Disaster near New Orleans*, 821 F.2d 1147, 1166 (5th Cir. 1987).

[69] 847 F. Supp. at 65.

[70] *Broadcasting Rights Intern. Corp. v. Société de Tour de France, S.A.R.L.*, 675 F. Supp. 1439, 1446 (S.D.N.Y. 1987); *Transunion Corp. v. Pepsico, Inc.*, 640 F. Supp. 1211, 1213 (S.D.N.Y. 1986); *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508.

What the Supreme Court stated in *Piper Aircraft Co. v. Reyno* that the possibility of a change of law "ordinarily should not be given conclusive or substantive weight in the forum non conveniens inquiry" even if the substantive law in the alternative forum is less favorable to the plaintiff is equally important. 454 U.S. at 247. The Supreme Court enumerated several arguments to justify its decision. Firstly, it declared that a different holding would undermine the purpose of the doctrine since dismissals would be rare and plaintiffs would be able to choose among several fora the most favorable one. *Id.* at 250. Secondly, the court pointed to the heavy practical problems such a ruling would pose: If a less generous law in the alternative field were to be considered a substantial factor, a court would have to find and decide the issues of law of its own forum and the alternative forum before it could decide on the motion to dismiss on *forum non conveniens* grounds when the doctrine was especially designed to help courts avoid conducting complex proceedings on foreign law. *Id.* Thirdly, the court stated that holding otherwise would increase litigation in the United States which is already extremely attractive to foreign plaintiffs. *Id.* at 251–52. Finally, the court limited its ruling in holding that "of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in the law may be given weight." *Id.* at 254. Thus, differences in substantive law do

Accordingly, Judge Norman found all other private interest factors to weigh heavily in favor of the foreign forum.[71] Again, Judge Rakoff simply adopted these findings in *Jota*.[72]

(b) Public Interest Considerations

In *Sequihua*, Judge Norman then turned to public interest considerations. Generally, the consideration of public interests protects the citizens of the district court against undue delay in the administration of justice due to the increase in cases filed which have no sufficient nexus to the district court.[73] In addition, the increased need to serve as a juror for citizens, which constitutes a significant burden for most of the working population, is avoided.[74] Again, over the years, the courts have developed a set of criteria, none of which is decisive.[75]

In addressing the issue, Judge Norman similarly followed the arguments of the TNC defendant.[76] He stated that danger of court congestion favors the foreign forum; that Ecuador itself has a local interest in litigating in its own courts the dispute implicating the contamination of its air, land, and water; and that parallel litigation should be avoided in the first place.[77]

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not constitute a substantial factor to be weighed in a *forum non conveniens* decision except for extremely exceptional cases.

[71] 847 F. Supp. at 65.

[72] *See* Dorsel, *supra* note 1, at 71.

[73] *Id.*

[74] *Id.* In particular, if the foreign law can only be determined with great difficulty or with a remaining uncertainty as to its exact scope, meaning, and input for the concrete dispute.

[75] *Id.*

[76] *Sequihua*, 847 F. Supp. at 64.

[77] *Id.* Courts also usually consider other public factors. Firstly, according to court practice, the question of which law applies to a given dispute, i.e., the one of the current or of the alternative forum, is an important factor to be weighed in the balancing process. Dorsel, *supra* note 1, at 95–97. Courts of Appeals require district courts regularly to determine the applicable law before the latter are allowed to dismiss a case. *E.g., Quintero v. Klavenes Ship Lines*, 914 F.2d 717, 725 (5th Cir. 1990). The reason for this is that the law applicable to a legal dispute necessarily predetermines the workload a court. Dorsel, *supra* note 1, at 96. The other unspoken ground is the fact that disputes are better resolved by a court which is familiar with the applicable law. Thus, economic and qualitative considerations inspire the criterion of applicable law. *Id.*

Secondly, in *Gilbert*, the Supreme Court stated that "[t]here is a local interest in having localized controversies decided at home." 330 U.S. at 509. The underlying rationale for this interest may be described as an attempt to determine which country actually wants or should decide a given dispute between parties. Dorsel, *supra* note 1, at 98. The criteria employed to identify local interest resemble to a great degree the private interest considerations discussed above. *Id.* Under these criteria, general policy considerations, e.g., the

As a consequence, he held that not only private interests but also public interest weigh in favor of the Ecuadorian forum and decided not to exercise jurisdiction by dismissing the case based on *forum non conveniens*.[78] Again, Judge Rakoff adopted these findings in *Jota*.[79]

2. *Appeal Decision*

On appeal, the Second Circuit reversed the decision based on lack of a conditional dismissal. In addition, as to the balancing of private and public interests by the district court on remand, the Second Circuit noted a public factor present in *Jota* that distinguished the case from *Sequihua* and made the district court's reliance on the latter also unsuitable.[80] The Second Circuit stressed that *Jota* was brought not only based on general torts law but also on ATS. As a consequence, the Second Circuit, while explicitly expressing "no view" on this factor, recognized "the plaintiff's argument that to dismiss…a claim pursuant to the ATS under forum non conveniens would frustrate Congress' intent to provide a federal forum for aliens suing domestic entities for violations of the law of nations."[81]

Indeed, various courts, inter alia, the Fifth and the Ninth Circuits, have ruled that policy considerations derived from statutes and laws may preclude

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common interest of American consumers towards American producers, can also play a certain role. *Id*. at 98–99.

Thirdly, federal courts generally consider themselves overworked and overburdened. William R. Reynolds, "The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts", 70 *Tex. L. Rev*. 1663, 1682 (1992), writes: "The federal courts believe they are overworked. That might even be true. One often hears…cases of collective sigh of the swamped judiciary." Whatever may be the status of such observation, the interest that the limited judicial resources of the U.S. which are financed by the U.S. taxpayers should be used economically and effectively and the concern for an expeditious resolution of a legal dispute constitute legitimate concerns and considerations in the balancing process of public interests. Dorsel, *supra* note 1, at 99. On the other hand, some judges have criticized this consideration declaring that the workload of a court can hardly determine the availability of courts to injured persons. See the dissent of Judge Musmano in *Rini v. N.Y. Central RR. Co.*, 240 A.2d 372, 376 (Pa. 1968): "If caseload is to determine availability of the courts to injured persons, then justice has become a commodity dependent on the size of the court house and the number of personnel therein."

[78] 847 F. Supp. at 64.

[79] *Aguinda v. Texaco, Inc.*, 945 F. Supp. at 627.

[80] *Id*.

[81] Moreover, the Second Circuit noted that the plaintiffs in *Jota* rested their case entirely on the conduct of Texaco in the U.S., thereby overcoming the argument of difficulty of access to evidence in Ecuador. *Id*.

a dismissal on the ground of *forum non conveniens*.[82] For example, in actions based on the Jones Act,[83] which provides for recovery for injury or death to seamen against the employer, numerous courts have decided that the statute does not allow the application of the doctrine.[84] Similarly, the district court for the District of Columbia ruled that the so-called State-sponsored terrorism exception to sovereign immunity[85] prohibits dismissal based on *forum non conveniens*.[86] It declared that

> Congress specifically created a certain forum in the United States for United States citizens, because even in the rare cases where there would be an adequate alternate forum for such a case, the interests of the United States in ensuring that its citizens have an opportunity to seek redress in the United States is paramount, and will inevitably exceed the interests of any other fora.[87]

Furthermore, the Supreme Court of Texas ruled that the legislature abolished the doctrine in actions for damages for death or personal injury under § 71.031 of the Civil Practice and Remedies Code.[88] Nonetheless, during the 1980s and 1990s, the willingness of courts to find a statute's underlying policy as precluding the dismissal or at least restricting the scope of discretion based on the doctrine declined.[89] For example, in *Transunion Corporation v. Pepsico*, the Second Circuit decided that the application of the doctrine is neither banned under the Racketeer and Corrupt Organizations Act nor under antitrust venue provisions.[90] Similarly, in *In re Air Crash near New Orleans*, the Fifth Circuit reconsidered its position under the Jones Act and found the

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[82] Dorsel, *supra* note 1, at 68; Markus Rau, "Domestic Adjudication of International Human Rights Abuses and the Doctrine of Forum Non Conveniens", 61 *ZaöRV* 177, 192 (2001).

[83] U.S.C. § 688.

[84] *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015, 1018 (5th Cir. 1981); *Zipfel v. Halliburton Co.*, 832 F.2d. 1477, 1483 (9th Cir. 1981). This position, though supported by many courts, has been and continues to be a minority position. *See* Dorsel, *supra* note 1, at 68; Paul S. Edelmann, "Forum Non Conveniens: Its Application in Admiralty Law", 15 *J. Mar. L. & Com.* 517 (1984); Timothy P. O'Shea, "The Jones Act's Specific Venue Provision: Does It Preclude Forum Non Conveniens Dismissal?", 14 *Fordham Int'l L.J.* 696 (1990–91).

[85] 28 U.S.C. § 1605(a)(7).

[86] *Flatow v. Islamic Rep. of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

[87] *Id.* at 25.

[88] *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990); *cert. denied*, 111 S. Ct. 671 (1991). *See* Russel J. Weintraub, "International Litigation and Forum Non Conveniens", 29 *Tex. Int'l L.J.* 321, 346 (1994).

[89] *See* Dorsel, *supra* note 1, at 69.

[90] 811 F.2d at 130.

doctrine to be applicable,[91] and the Supreme Court of Texas's aforementioned position remained singular and shortly thereafter, was repealed by the Texas Legislature.[92]

Accordingly, from this reasoning of the Second Circuit, the issue posed is whether the special purpose of ATS and the Torture Victim Protection Act ("TVPA") requires a difference in weighing the factors in the balancing process. However, the district court dismissed the case again based on *forum non conveniens*,[93] and this time, the appeal was fruitless.[94]

B. *Wiwa v. Royal Dutch Petroleum Co.*

Two years later, *Wiwa v. Royal Dutch Petroleum Co.*[95] provided a another possibility for the Court of Appeals for the Second Circuit to clarify the issue of balancing of various interests under the doctrine of *forum non conveniens* in ATS corporate litigation.[96] The defendants, Royal Dutch Petroleum Co. and Shell Transport and Trading Co., are the two corporations which own and control the Shell Group, an international network of affiliated oil and gas companies, of which Shell Petroleum Development Company of Nigeria, Ltd. is a member.[97] The plaintiffs, members of the Ogoni people who reside in the delta where the Nigerian oil resources are exploited, asserted human rights violations by the Nigerian government at the instigation of defendants due to the plaintiffs' political opposition to the oil exploration.[98] At first instance, Judge Wood for the Southern District of New York dismissed the case based solely on a private/public interest *forum non conveniens* analysis declaring the United Kingdom, Shell's country of incorporation, a more appropriate

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[91] 821 F.2d 1147, 1163 (5th Cir. 1987). The majority of the courts have always taken the position that the doctrine is applicable with respect to the Jones Act. *See Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985).

[92] Death or Injury Caused by Act or Omission Out of State (Alien Tort Statute), *Tex. Civ. Prac. & Rem. Cod. Ann.* § 71.031 (1986) (as amended 1993).

[93] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

[94] *See* 303 F.3d 470 (2d Cir. 2002).

[95] 226 F.3d 88 (2d Cir. 2000).

[96] On the relationship of ATS and the doctrine of *forum non conveniens*, *cf.* Kathryn Lee Boyd, "The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41 (1998); Peggy Rodgers Kalas, "The Implications of Jota v. Texaco and the Accountability of Transnational Corporations", 12 *Pace Int'l L. Rev.* 47 (2000); Rau, *supra* note 82; Aric K. Short, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001 (2001); Matthew R. Skolnik, "The Forum Non Conveniens Doctrine in the Alien Tort Claims Act Cases: A Shell of Its Former Self After Wiwa", 16 *Emory Int'l L. Rev.* 187 (2002).

[97] 226 F.3d 88.

[98] *Id.*

forum to decide the dispute.[99] Plaintiffs appealed. As to the public and private factors to be considered in the balancing process, the Second Circuit singled out three of the traditional set of factors to be balanced: two private factors and one public factor, which it deemed of particular relevance in this case.

1. *Residency*

As a starting point,[100] the Second Circuit pointed to a line of precedents, particularly the above-mentioned *Piper*[101] decision of the Supreme Court which emphasized that the plaintiff is the master of his complaint and under the doctrine of *forum non conveniens*, a strong presumption lies in favor of the plaintiff.[102] According to the Second Circuit, the deference to the plaintiff's choice is proportionate to the plaintiff's ties to the forum in the United States. While not amounting to an absolute rule, the Second Circuit stated that a court must take into consideration the hardship a dismissal causes for a U.S. citizen or resident.[103] Since two of the plaintiffs were U.S. residents, the Second Circuit ruled that the district court erred in not giving sufficient weight to their ties to the United States. The Second Circuit clarified that it is irrelevant that none of the plaintiffs resided in the Southern District of New York because the defendant might not be amenable to suit in the district where the plaintiffs reside.[104]

2. *Policy Interest*

Secondly, as to a possible policy interest expressed under ATS, the Second Circuit interpreted ATS as supplemented by the TVPA as an expression of a federal policy interest in providing a legal system for serious international human rights violations and therefore, plays a role in the balancing of interests under the *Gilbert* formulation.[105] The Second Circuit stated that with the

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[99] *Id.*

[100] On appeal, the plaintiffs denied the adequacy of the British forum since three doctrines of British law: double actionability, transmissibility, and the act of state doctrine would potentially bar a decision on the merits. *Id.* at 100. The defendants assured the court that they would raise none of these defenses in a British proceeding but the Second Circuit declared that a British court may rule on these questions, in particular the issue of act of state, regardless of whether a defense is invoked or not. *Id.* at 100–01. Finally, the Second Circuit held that it was not necessary to resolve the issue but would assume that a British court would reach the merits and moved to the second prong of the determination. *Id.* at 101.

[101] *Cf.* 454 U.S. at 251.

[102] 226 F.3d at 101.

[103] *Id.* at 102.

[104] *Id.* at 103.

[105] *Id.* at 104–06.

enactment of the TVPA at the latest, Congress has communicated its intent to provide plaintiffs judicial relief for international human rights violations.[106] Thus, while not totally abandoning the doctrine in actions brought under ATS, the Second Circuit held that jurisdiction is obligatory "unless the defendant has fully met the burden of showing that the *Gilbert* factors 'tilt… strongly in favor of trial in the foreign forum' ".[107]

3. *Relative (In-)Convenience*

Thirdly, while the Court of Appeals admitted the inconvenience of shipping documents from England to New York and the additional costs of flying witnesses from Nigeria to the United States rather than London, the court declared them a "legitimate part of the forum non conveniens analysis, but the defendants have not demonstrated that these costs are excessively burdensome, especially in view of the defendant's vast resources" and ruled that the "additional cost and inconvenience to the defendants of litigating in New York is fully counterbalanced by the cost and inconvenience to the plaintiffs of requiring them to reinstitute the litigation in England—especially given the plaintiffs' minimal resources in comparison to the vast resources of the defendants."[108] Accordingly, the Second Circuit reversed.[109]

4. *Legal Implications*

Consequently, even though it is generally recognized that courts enjoy broad discretion under the doctrine of *forum non conveniens*, the Second Circuit ruled that the district court "did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of violations of the law of nations", reversed the judgment of the district court, and remanded the case for further proceedings.[110]

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[106] *Id.* at 106. In *Sarei v. Rio Tinto, PLC*, the district court cited this *Wiwa* holding with approval, 221 F. Supp. 2d 1116, 1175 (C.D. Cal. 2002); *reversed on other grounds*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, WL 2389822 (9th Cir. 2007).

[107] *Id*. at 106.

[108] *Id*. at 107. Lastly, the decision addressed the defendants' argument that England has a public interest in adjudicating this case because Shell Transport is a British corporation and Nigeria at the time of the alleged actions was a member of the Commonwealth. The Second Circuit determined a comparable interest of the United States in adjudicating cases of their residents, noted that the second defendant was a Dutch, not a British, company, and declared membership in the Commonwealth irrelevant in this regard.

[109] *Id*. at 88.

[110] *Id.* at 101, 108. In the related proceeding filed in 2001 against defendant Brian Anderson, the former chairman of Nigeria for Royal Dutch/Shell and managing director of Shell Nigeria, the district court followed the reasoning of the Second Circuit and rejected the motion to

For future cases, the judgment can be read as precluding any dismissal of a case against a TNC based on ATS as long as at least one of the plaintiffs resides in the United States and torture or extrajudicial killings, possibly serious human rights violations in general, are alleged. If followed by other courts, the decision amounts to a major change in the law since generally, policy interests of the statute at stake has never been perceived as a decisive factor in the process of balancing and as a matter of fact, before *Wiwa*, was on a clear retreat in the last decade and had been almost deleted from the scope of the doctrine. This ruling effectively pushes the door for ATS proceedings wide open. However, note that *Wiwa* involved American residents who fled from Nigeria to the United States. Hence, the real question is whether the federal interest in human rights litigation under ATS alone outweighs all convenience concerns in all cases, irrespective of the residency or citizenship of plaintiffs. Would the Second Circuit have equally asserted jurisdiction if all victims lived, for example, in Sweden? The *Wiwa* decision is not clear on this point, although the order and flow of arguments suggest that the policy interest as such is deemed insufficient even under ATS to uphold the exercise of jurisdiction. This narrow interpretation of the *Wiwa* judgment is corroborated by the second recent major Second Circuit precedent on *forum non conveniens*: *Guidi v. Inter-Continental Hotels Corp*.[111] This action arose out of a terrorist shooting in an Egyptian hotel operated by Inter-Continental Hotels Corp.[112] The district court dismissed the action holding that Egypt was the better forum to try the case because a viewing of the premises would be an option and Inter-Continental would be able to implead the Egyptian government.[113] It further emphasized the pendency of two related suits in Egypt. Judge Oakes, writing for the Second Circuit, justified the reversal of the decision. The court, like in *Wiwa*, called attention to the Supreme Court precedents *Gilbert* and even more explicitly, *Koster*, under which, a court should not disturb a plaintiff's choice of forum if he chooses to litigate in his home forum.[114] Thus, reading both *Wiwa* and *Guidi* together, it is likely

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dismiss based on *forum non conveniens* following the Second Circuit's approach using the private interest of U.S. residency and the public interest of policy reasons involved in the litigation. *See Wiwa v. Royal Dutch Petroleum Co*., 2002 WL 319887, at 28–31 (S.D.N.Y. 2002).

[111] 224 F.3d 142 (2d Cir. 2000), *amend'g* 203 F.3d 180 (2d Cir. 2000).

[112] *Id*. at 143–44.

[113] 1997 WL 228360 (S.D.N.Y.). *See also* 1999 WL 411469 (S.D.N.Y.).

[114] 203 F.3d 180, 184 (2d Cir. 2000), *citing Gilbert*, 330 U.S. at 508–09; *Koster*, 330 U.S. at 524. In the amending opinion, the Second Circuit attempted to reconcile its holding with its decision in *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1981 en banc), wherein the citizenship of a plaintiff as a ground for a special rule not to dismiss

that the Second Circuit suggests that in the Second Circuit, residency and citizenship are accorded a greater weight in the balancing than before the decisions were rendered.[115]

IV. *Conclusions*

The discretionary doctrine of *forum non conveniens* which allows a competent court to dismiss a case if an alternative forum is in a better and more convenient position to try a case has posed an almost insurmountable hurdle to litigation by foreign plaintiffs in the 1980s and 1990s. Under this doctrine, courts ask firstly, whether there is another court which is both available to and adequate for the plaintiff, and secondly, whether the alternative forum is in a more convenient or appropriate position to resolve the legal dispute. Until today, courts in many instances follow this conservative view.

However, at least within the Second Circuit where the great majority of ATS cases are being filed, three decisions by the Second Circuit have eased the situation for ATS plaintiffs even if the exact reach of the holdings remain not fully clear. In this respect, three emerging trends appear responsible for further denials of motions to dismiss based on the doctrine of *forum non conveniens* in the future: (a) as to the availability of the foreign court, the enactment of retaliatory legislation in developing countries where the wrongs giving rise to ATS litigation in the U.S. occurred may preclude the dismissal based on the doctrine in the U.S.; (b) as to the adequacy of the alternative foreign court, the recognition of the factor that if victims of severe human rights violations return to their home country, they may be subjected to more abuse and vengeance and a generally corrupt court system as evidenced in the *Wiwa* and *Abdullahi* decisions of the Second Circuit; and (c) as to the balancing of interests, the recognition of a U.S. interest in litigating international law violations in general at least if one of the plaintiffs resides in the U.S. (without being necessarily a U.S. citizen).

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in *forum non conveniens* cases was rejected, according only heightened deference to the residency factor. *See Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d at 142, n. 3.

[115] In the more recent ATS judgment in *Turedi v. Coca-Cola*, the action was dismissed based on the doctrine of *forum non conveniens* where the plaintiffs were all citizens of Egypt and not residing in the United States, 460 F. Supp. 2d 507 (S.D.N.Y. 2006). Similarly, in *Adamu v. Pfizer*, an ATS case related to the above-presented *Abdullahi v. Pfizer*, the district court dismissed the claims based on *forum non conveniens*. It held that public interest factors do not favour either forum and that private interest factors, such as the location of evidence, clearly weigh in favour of the Nigerian forum. *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005).

Whether (and if yes, to what extent) this U.S. interest in litigating international law violations under ATS alone, without residency, can overcome the convenience of the alternative forum is not fully clear under the approach taken by the Second Circuit in *Wiwa*. Most likely, the answer to this question is no.

Chapter Twelve

Nonjusticiability Issues

I. *Introduction*

Since ATS plaintiffs are foreign plaintiffs,[1] the foreign relations of the United States, a field which has been traditionally held to fall within the realm of the President and Congress (and not the judicial branch), are in one way or another implicated. In practice, courts often directly solicit the executive's views on ongoing litigation with a potential to implicate the international relations of the United States in order to determine the executive's interests whether the case involves ATS or not.[2] Based on the feedback given, federal courts may rely on the three separate but related concepts of the political question doctrine, the act of state doctrine, and the comity doctrine in order to dismiss a case for reasons of prudence, diplomatic sensitivity, separation of power, and constitutional concerns although the court has personal jurisdiction.

This chapter analyzes whether and if yes, to what extent, nonjusticiability doctrines may be raised by TNCs as a defense in ATS litigation. Part II presents the early status and application of the doctrines in ATS litigation. Part III explores some categories in which the defence of nonjusticiability may succeed. Lastly, Part IV examines what guidance the Supreme Court gave in *Sosa v. Alvarez-Machain* regarding the future application of nonjusticiability doctrines. From a practical point of view, after the Supreme Court affirmed the Second Circuit's decision in *Filártiga v. Peña-Irala* in *Sosa* and recognized a federal court's power to acknowledge new claims based on current-day international law, nonjusticiability issues pose the biggest threat to TNC litigation today.[3]

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[1] Whereas the Torture Victim Protection Act ("TVPA") is open to U.S. and non-U.S. citizens; the ATS, in accordance with its clear wording, is limited to foreign plaintiffs.

[2] Margariat S. Clarens, "Deference, Human Rights and the Federal Courts – The Role of the Executive in Alien Tort Statute Litigation", 17 *Duke J. Comp. & Int'l L.* 415 (2007).

[3] *See generally* Brian C. Free, "Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation", 12 *Pac. Rim L. & Pol'y J.* 467

II. *General Inapplicability of Nonjusticiability Doctrines in ATS Cases*

Nonjusticiability concerns accompanied modern human rights litigation from the beginning.

A. *Early Case Law*

In *Filártiga v. Peña-Irala*, the defendant Peña-Irala failed to raise before the district court the "act of state" doctrine,[4] the purpose of which is so that matters concerning foreign relations over which the executive branch has already made a determination based on the executive's expertise in the context of diplomatically sensitive claims is not reopened again.[5]

1. *Act of State Doctrine*

Under this doctrine, a court may abstain from adjudicating claims when it is required to judge the acts of foreign sovereign governments made within their own sovereign territory.[6] In *Banco Nacional de Cuba v. Sabbatino*, the facts of which relate to expropriation acts exercised by the Cuban government under Fidel Castro, the Supreme Court laid down the concept based on the constitutional separation of powers doctrine.[7] Defendants argued that the Cuban plaintiff's claim is not valid because the plaintiff had acquired certain sugar from a corporation which had been expropriated by Cuba in contravention of customary international law.[8] In response, the Supreme Court held that the act of state doctrine proscribed a judicial review of the validity of the Cuban Expropriation decree.[9] The court enumerated three factors to be considered in deciding whether an issue implicates the act of state doctrine:

> (1) the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render [a] decision regarding it; (2) the less important the implications on an issue

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(2003); Michael J. O'Donnell, "A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts", 24 *B.C. Third World L.J.* 223 (2004); Beth Stephens, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169 (2004).

[4] 630 F.2d 876, 889 (2d Cir. 1980). For more details on the case, *see supra* Introduction; Chapter One: Actionability Standards; Chapter Three: Civil and Political Rights.

[5] O'Donnell, *supra* note 3, at 230.

[6] *Id.* at 229–30.

[7] 376 U.S. 398, 401–02 (1964). The U.S. Constitution does not explicitly employ the term separation of powers. However, the concept can be derived from its articles I to III.

[8] *Id.* at 433.

[9] *Id.* at 439.

> are for our foreign relations, the weaker the justification for exclusivity in the political branches; [and] (3) [t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.[10]

In *Filártiga* as indicated, the Second Circuit was not forced to formally address the issue on appeal due to neglect at the first instance.[11] Nonetheless, the Second Circuit, on the assumption that it had been properly argued before the district court, expressed doubts regarding the applicability of the doctrine to the case at hand by questioning whether the "action by a state official in violation of the Constitution and the laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state".[12] In addition, in the ATS cases of *Bigio v. Coca-Cola*[13] and *Royal Dutch Petroleum Co.*,[14] where the acts of the respective former governments of Egypt and Nigeria gave rise to the litigation and the current governments impugned the acts of their predecessors or at least, notably distanced themselves from such acts, which eased the decision-making of the courts, the act of state doctrine was deemed inapplicable due to the third factor – change in government.[15]

2. *Political Question Doctrine*

The ATS case *Rep. of the Philippines v. Marcos* involved the suit against the former Philippine dictator Ferdinand Marcos and his daughter targeting the dictator's assets in foreign bank accounts worldwide.[16] It was filed and decided in the Ninth Circuit in the late 1980s.[17] The defendant moved to dismiss based on the political question doctrine[18] which is a judicial tool of prudence by which a court declines to adjudicate a dispute despite having jurisdiction if the case raises issues which should be addressed by the political rather than the judicial branches of government within the constitutional

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[10] *Id*. at 428.

[11] 630 F.2d at 889.

[12] *Id*.

[13] 239 F.3d 440, 451 (2d Cir. 2000). *See also In re Estate of Marcos Human Rights Litigation*, where the Ninth Circuit held that murders "by military personnel pursuant to martial law" were not acts of state. 978 F.2d 493, 496 (9th Cir. 1992).

[14] 2002 US Lexis 3293, at 93–94 (S.D.N.Y.).

[15] *Id.*; *Bigio*, 239 F.3d at 451. *See also* Sarah Joseph, *Corporate Human Rights Litigation* 41 (2004).

[16] 862 F.2d 1355 (9th Cir. 1988). This case was later consolidated on appeal.

[17] *Id*.

[18] *Id*. at 1361.

framework.[19] It has been summarized as excluding the adjudication of issues "too political…to handle" for the judicial branch.[20] In 1962, the Supreme

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[19] *See Baker v. Carr*, 369 U.S. 186, 228 (1962). The doctrine was first envisaged by Chief Justice John Marshall in the landmark case *Marbury v. Madison* wherein the court asserted the power of judicial review over any legislative or presidential act. 5 U.S. 137, 170 (1803). The Chief Justice, while emphasizing that the political branches of government were constitutionally compelled to accept judicial review and judicial supremacy in the adjudication of interbranch disputes, indicated that the court would restrain itself from deciding issues dealing with the exercise of "important political powers". *Id.* The problem is that strictly speaking, any legal issue is accompanied by socio-political consequences. Justice Holmes, in reaction to a litigant's assertion that the specific issue in the case was nonjusticiable for a court of law, said that such an objection "is little more than a play upon words." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

The modern era of the doctrine began with the Supreme Court's decision in *Luther v. Borden* in 1849 arising out of the Dorr's Rebellion in which plaintiffs were challenging martial law imposed in Rhode Island. 48 U.S. 1 (1849). Citizens of Rhode Island who were disenfranchised under the original colonial charter sought the adoption of a new and more democratic constitution against the heavy opposition of the government then in power established under and in accordance with the charter. *Id.* The specific issue was whether charter government soldiers committed a trespass by intruding into the plaintiffs' home after the rebels had proclaimed the adoption of a new constitution despite the government insisting on the governing power of the charter. *Id.* The court decided not to touch upon the issues regarding "political rights and political questions", *id.* at 46, holding that claims were nonjusticiable in a court of law because they were vested in the authority of the charter government. *Id.* at 34. The decision rests heavily on the assumption that the judiciary would overstep its boundaries if it decided whether the people of the state properly displaced the existing charter government and should be seen in the light of an attempt to prevent anarchy. *See id.* at 46–47.

In the aftermath of the decision, lower courts found the Guarantee Clause of the Constitution which secures a "Republican Form of Government" on the state level under article IV, section 4 of the U.S. Constitution which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence" to be nonjusticiable due to the political question doctrine. *See* Louis Weinberg, "Political Questions and the Guarantee Clause", 65 *U. Colo. L. Rev.* 887 (1994), who notes that the Guarantee Clause "has long been held to be unenforceable in courts". *Id.* at 920.

[20] *See* Lea Brilmayer, "International Law in American Courts: A Modest Proposal", 100 *Yale L.J.* 2277, 2305 (1991).

Over the decades, doubts within the legal scholarship have remained as to whether the doctrine indeed necessitates the denial of the exercise of judicial functions. In particular, Professor Henkin criticized the notion that the judiciary is forced to turn a blind eye upon some parts of the constitution. Louis Henkin, "Is There a Political Question Doctrine", 85 *Yale L.J.* 597 (1976). In his opinion, the cases decided on the grounds of the doctrine do not support such proposition. *Id.* at 606. He argued that in all cases, the courts could have taken resort to the reasoning that the challenged legislative or executive act fell within the boundaries of a constitutional grant of authority and remained within the scope of the

Court clarified the modern scope and elements of the doctrine in *Baker v. Carr*.[21] The court guided lower courts to decline adjudication in case one of the following factors is inextricably involved:[22]

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; (5) the unusual need for unquestioning adherence to a political question already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[23]

In practice, although the doctrine has been criticized as inherently imprecise and uncertain,[24] and some see the doctrine on the wane,[25] especially

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constitutional limitation, and thus, the challenged act was subject merely to a political, but not judicial, challenge. *Id.* He asserted that

> the Court does not refuse judicial review; it exercises it. It is not dismissing the case or issue as nonjusticiable; it adjudicates it. It is not refusing to pass on the power of the political branches, it passes upon it, only to affirm that they had the power which had been challenged and that nothing in the Constitution prohibited the particular exercise of it.

Id.

[21] 369 U.S. 186. In *Baker*, the Supreme Court, confronted with the issue of the constitutionality of a reapportionment statute which was challenged as an unconstitutional mal-apportionment of congressional voting districts, reversed the lower court's dismissal of the claim as nonjusticiable based on the political question doctrine. *Id.* at 192–93. The plaintiffs argued that because the populations of the voting districts differed, the votes of voters of the more populous districts compared to the voters of the less populous districts were diluted which amounted to a violation of the Fourteenth Amendment Equal Protection Clause. *Id.* In addressing the question, the court explained that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question". *Id.* In effect, the court held that the Equal Protection Clause amounts to a judicially enforceable right. *Id.*

[22] *Id.* at 217.

[23] *Id.*

[24] *E.g.*, Thomas Healy, "The Rise of Unnecessary Constitutional Rulings", 83 *N.C. L. Rev.* 847, 863 (2005). A host of scholars have been critical of the political question doctrine and the relative uncertainty of the test announced in *Baker*. *See* Martin H. Redish, "Judicial Review and the Political Question", 79 *Nw. U. L. Rev.* 1031, 1022–55 (1985); Michael E. Tigar, "The Political Question Doctrine and Foreign Relations", 17 *UCLA L. Rev.* 1135 (1970). Graham Hughes, "Civil Disobedience and the Political Question Doctrine", 48 *N.Y.U. L. Rev.* 1 (1968). On the case law of the Supreme Court, *see generally* Laurence E. Tribe, *I American Constitutional Law* 365–85 (2000).

[25] In the last four decades, a majority of the Supreme Court justices were able to agree on the application of the doctrine in only a few instances and in most of these cases, the constitutional text transferred the decision to Congress in a relatively unambiguous way. *Nixon v.*

in cases touching upon foreign relations, the political question doctrine is still frequently resorted to.[26] In *Rep. of the Philippines v. Marcos*, the Second

United States, 506 U.S. 224, 226 (1993), where the Supreme Court refrained from reviewing the impeachment trial of a federal judge since the Senate has the sole authority to craft impeachment procedures under article I, section 3, clause 6 of the Constitution; *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973), where a request to control the behavior of the Ohio National Guard was rejected because the Constitution vests in Congress the "responsibility for organizing, arming, and disciplining the Militia". In the recent case of *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004), four justices held that claims of partisan gerrymandering present nonjusticiable political questions. *Id*. at 1778. However, Justice Kennedy, who joined the plurality in the judgment, declined to foreclose the possibility of judicial relief in all future partisan gerrymandering cases. *See id*. at 1793 (Kennedy, J., concurring). Likewise, in *Goldwater v. Carter*, 444 U.S. 996 (1979), a plurality of the court agreed that the issue of the President's power to terminate a treaty without consulting the Senate was a nonjusticiable political question. Again, there was no majority for this view, and the case was dismissed on the merits. *See id*. at 996–1006.

It is uncertain how many cases were refused judicial review prior to this forty-year period. *See also* Robert J. Pushaw, Jr., "Judicial Review and the Political Question Doctrine: Reviving the Federalist 'Rebuttable Presumption' Analysis", 80 *N.C. L. Rev*. 1165, 1168–71 (2002), who stresses that prior to *Baker v. Carr* in 1962, the Supreme Court frequently relied on the political question doctrine to avoid adjudication of numerous constitutional claims.

In other situations where the situation was not similarly clear-cut, the court did not apply the doctrine in a single instance. *E.g., Davis v. Bandemer*, 478 U.S. 109, 118–27 (1986), wherein the Supreme Court deemed an apportionment plan not to constitute a political question; *Powell v. McCormack*, 395 U.S. 486, 518–22, 527–28 (1969), wherein the Supreme Court held that the constitutional provision making each House the "Judge of the… qualifications of its own Members" excludes judicial review of the alleged exclusion of a member of the House of Representatives. In the landmark decision involving the recounting of votes in Florida in the course of the 2000 presidential elections, the political question doctrine was not even mentioned and as a consequence, created speculations over the viability of the doctrine in general. *Bush v. Gore*, 531 U.S. 98 (2000). *See* Robert J. Pushaw, Jr., "The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Kent and Shane", 29 *Fla. St. U. L. Rev*. 603, 612 (2001); Mark Tushnet, "Law and Prudence in the Law of Justiciability", 80 *N.C. L. Rev*. 1203, 1229 (2002).

Regardless of the actual rank of the doctrine within current case law, within the academic community, criticism has not been silenced. One common argument is that the political question doctrine itself is contradictory since the determination of whether there is a textual commitment to the political branch presupposes the very interpretation, review, and judicial resolution which the doctrine, at least in its formulation, attempts to avoid. *E.g.*, Louis Michael Seidman, "This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory", 46 *UCLA L. Rev*. 501, 529–30 (1998).

[26] *See* Lee Epstein et al., "The Supreme Court During Crisis: How War Affects Only Non-War Cases", 80 *N.Y.U. L. Rev*. 1, 25–26 (2005). In the words of Justice Sutherland in the 1936 Supreme Court decision *United States v. Curtiss-Wright Export Corp*., the nonjusticiability of political questions is predicated upon the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." 299 U.S. 304, 319–20 (1936). While *Baker* observed that the doctrine may have its

Circuit simply reasoned that "bribe taking, theft, embezzlement, extortion, fraud, and conspiracy to do these things are all acts suspectible of concrete proofs that need not involve political questions."[27] Accordingly, it held that the claim constituted a justiciable question and the political question doctrine not to apply.[28] Similarly, in *Kadic v. Karadzic*,[29] the Second Circuit which heard claims against Radovan Karadzic, at the time the President of the self-proclaimed Bosnian-Serb entity named Republic of Sprska while he was undertaking negotiations for the peaceful resolution of the civil war which erupted in the disintegration process of the former Yugoslavia,[30] also refused to apply the political question doctrine to the case at hand.[31] It emphasized that not every case "touching foreign relations is nonjusticiable".[32] Moreover, the Second Circuit stressed that the answer to the question of which branch of government has the duty to handle human rights atrocities is obvious – the judicial branch.[33]

3. *Comity Doctrine*

In *Bigio v. Coca-Cola*, the district court likewise declined to dismiss the case based on comity.[34] Under the doctrine of (international) comity, a court declines to adjudicate a claim in deference to the act of a foreign government although the latter is not officially binding upon the court.[35] The Supreme Court in *Hilton v. Guyot* explained the doctrine as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[36] In this sense, comity among courts reflects the reciprocal tolerance, good will, and reluctance inherently important to the

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greatest impact in matters of foreign relations, it also cautioned lower courts that not every such case presents nonjusticiable political questions. 369 U.S. at 211. Yet, in general, there seems to be a general perception that the political question doctrine in the Supreme Court's jurisprudence is on the wane. *E.g.*, Healy, *supra* note 24, at 863.

[27] 862 F.2d at 1361.

[28] *Id.* at 1362.

[29] 70 F.3d 232 (2d Cir. 1995).

[30] *Id.* at 236–37.

[31] *Id.* at 249, *quoting Baker v. Carr*, 369 U.S. at 211.

[32] *Id.*

[33] *Id.*

[34] 239 F.3d at 451, 454.

[35] Joseph, *supra* note 15, at 46. On the related issue of the doctrine's reach in relation to state courts, *see generally* Leonard E. Birdsong, "Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us – Get Over It!", 36 *Creighton L. Rev.* 375 (2003).

[36] 159 U.S. 113, 164 (1895).

maintenance of proper international relations.[37] In deciding whether to refrain from adjudicating a claim based on the doctrine of comity, courts frequently take into consideration the standards established in section 403 (Limitations on Jurisdiction to Prescribe) of the Restatement (Third) of the Law on Foreign Relations ("Restatement"), which explains that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[38] The Restatement identifies a host of factors that courts should take into consideration when judging the unreasonableness of the exercise of jurisdiction:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.[39]

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[37] *Laker Airways Ltd. v. Pan American Airways, Inc.*, 604 F. Supp. 280, 291 (D.D.C. 1984). Rather than a strict obligation to dismiss cases based on comity, it allows dismissal of diplomatically sensitive cases although the doctrine is more than a simple matter of courtesy among nations and their courts. *See* Justice Blackmun in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987), explaining that "[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states". *Id*. at 544. In its most recent restatement of the doctrine of comity, the Supreme Court held that a court with proper jurisdiction should dismiss a case based on comity concerns only when an actual conflict between foreign and domestic law exists. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).

[38] Restatement, § 403(1). *See also Marsoner v. United States*, 40 F.3d 959, 965 (9th Cir. 1994), wherein the Ninth Circuit declared that "[u]nder the revised Restatement, reasonableness is an essential element in determining whether, as to a matter of international law, the state may exercise jurisdiction to prescribe." *Id*. at 965.

[39] These factors may therefore advice against the adjudication of torts committed outside U.S. soil if the exercise of jurisdiction affects the interests of another State or due to the nexus of the dispute to another sovereign State. Sung Teak Kim, "Adjudicating Violations of International Law: Defining the Scope of Jurisdiction under the Alien Tort State – Trajano v.

In *Bigio*, the defendants again relied on comity grounds on appeal. However, the Second Circuit held that "this case falls within the category of extreme cases… where a foreign sovereign's interests [are] so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted", recognizing that tensions may be possible as a result of adjudication in the U.S. and that strong ties with the Egypt forum exists.[40] Accordingly, with little exceptions, nonjusticiability doctrines largely lapsed into disuse over the years.

B. *Political Context*

The reason for the very modest application of nonjusticiability doctrines is that previous presidential administrations did not rely on foreign policy implications as an argument in ATS proceedings independent of their stance on the scope of ATS.[41] The Carter Administration was strongly devoted to the enforcement of human rights internationally through ATS adjudication by federal courts.[42] The statements in the administration's amicus curiae brief in the landmark case *Filártiga v. Peña-Irala* that judicial recognition and enforcement of international law in U.S. courts would buttress U.S. foreign policy by representing the nation's commitment to human rights are still famous and well-known.[43] In *Trajano v. Marcos*, another proceeding involving claims against the former Philippine dictator,[44] the Reagan Administration in its amicus curiae brief argued that ATS is of a purely jurisdictional nature and does not provide for any cause of action not established by international law.[45] Inspite of this narrow substantive understanding of ATS, the government expressly declined to comment on the applicability of the political question doctrine or other justiciability issues to the case against Marcos.[46] Instead, the brief declares that continued adjudication of claims under ATS would not

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Marcos", 27 *Cornell Int'l L.J.* 387, 413 (1994). The doctrine of (international) comity should be differentiated from the presumption against extraterritorial application of a U.S. statute. The presumption against extraterritoriality requires a clear expression from Congress for a statute to reach non-domestic conduct. International comity, by contrast, may apply to curb the application of a statute that would otherwise apply to such conduct.

[40] 239 F.3d at 455.

[41] *See* Free, *supra* note 3, at 474.

[42] *Id.*

[43] *Memorandum for the United States as Amicus Curiae Brief, Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79–6090), *reprinted in* 19 I.L.M. 585, 604 (1980).

[44] 878 F.2d 1438 (9th Cir. 1989).

[45] *Id., Brief for the United States of America as Amicus Curiae*, at 5.

[46] *Id.* at 6–7, 33–34.

complicate U.S.-Philippine relations.[47] The Clinton Administration similarly decided not to oppose ATS litigation, even in instances with a potential for serious foreign policy implications. In *Kadic v. Karadzic*,[48] upon request for the executive's view on the case, the administration raised no objection to the judicial action.[49]

III. *Emerging Limits of Justiciability*

However, even in ATS litigation, the exercise of judicial authority is not boundless.

A. *Reparation Treaties and Executive Agreements*

It is in the limited area of reparation – a traditional realm of the executive branch – where nonjusticiability has prevented ATS adjudication against TNCs. For example, in *Iwanowa v. Ford Motor Co.*, involving the use of forced labor in the plants within the sphere of influence of the German Nazi Regime during World War II, the court employed the political question doctrine to dismiss the claims filed under ATS.[50] Likewise, in *Burger-Fischer v. Degussa AG*,[51] the court stated that:

> In effect, plaintiffs are inviting this court to try its hand at refashioning the reparations agreements which the United States and other World War II combatants (whose blood and treasure brought the war of conquest and the program of extermination to an end) forged in the crucible of a devastated Europe and in

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[47] *Id.* at 32.

[48] 70 F.3d. 232.

[49] *Id.* at 250. The Statement of Interest issued by the Justice Department and the State Department declared that "[a]lthough there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." *Id.* In the *Unocal* case involving the alleged use of forced laborers in furtherance of a pipeline construction in Southern Myanmar, the Department of Justice informed the district court of the government's position that "at this time adjudication of claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government" of Myanmar. *National Coalition Government of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 362 (C.D. Cal. 1997).

[50] The court noted that the issue of compensation and remedy for the crimes committed and grievances incurred had been addressed by the political branches of government in concluding post-war reparation treaties. Yet, even in this case, the actions would have failed in any case for other reasons not related to the political question doctrine, and therefore, its application was not of a decisive nature. 67 F. Supp. 2d 424, 483–91 (D.N.J. 1999).

[51] 65 F. Supp. 2d 248 (D.N.J. 1999).

> the crucible of the Cold War.… [T]his is a task which the court does not have the judicial power to perform.[52]

Other World War II forced labor claim cases against other companies were similarly dismissed.[53]

Such practice accords with the policy of the Clinton Administration, at that time in office, which opposed human rights litigation in instances in which such litigation would infringe or undermine U.S. obligations under treaty or executive agreements. The Clinton Administration opposed state-law claims against Japanese corporations for the use of slave labor during World War II on the grounds that such claims were barred by post-war treaties.[54] Moreover, the Clinton Administration opposed claims of Holocaust victims on the ground that an executive agreement between the United States and Germany had created a foundation to specifically address compensation and restitution claims arising out of the Holocaust.[55]

Such result – the exclusion of judicial authority at the cost of the individual – further corresponds with international law to which ATS refers. In international humanitarian law, it is recognized that the right to compensation or reparation in relation to the foreign State is exclusively limited to the State whose citizens were victims of violations of international law, or alternatively, if one perceives in limited instances the individual as the right-holder towards the foreign State disregarding the classic view of international law, the right of the citizen's State in a post-conflict situation to regulate or even waive the individual right to compensation in reparation treaties or agreements is not

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[52] *Id*. at 282. The court distinguished *Filártiga v. Peña-Irala* and *Kadic v. Karadzic* on the ground that in the case at hand, the corporate wrongdoing formed an integral part of Germany's war efforts. *Id*. at 273.

[53] *See Iwanowa v. Ford Motor Co*., 67 F. Supp. 2d at 483–91. Defendants asserted that the 2 + 4 Treaty with Germany completely settled the issue of reparations rendering the claims a political one subject only to the scrutiny of the political branches. *Id*. The court agreed. *Id*.

[54] *See Statement of Interest of the United States of America, In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939 (N.D. Cal. 2000), *available at* http://www.state.gov/documents/organization/6641.doc (accessed 16 September 2006).

[55] *See Statement of Interest of the United States, In re Austrian and German Bank Holocaust Litigation*, No. 98 Civ. 39328 (SWK), 2002 U.S. District LEXIS 2311 (S.D.N.Y. 2001), *available at* http://www.state.gov/documents/organization/6542.doc (accessed 16 September 2006). Under the executive agreement, the United States is obliged to file Statements of Interest in pending cases involving compensation of Holocaust victims from German companies. *See In re Nazi Era Cases against German Defendants Litig.*, 129 F. Supp. 2d 370, 380 (D.N.J. 2001).

doubted.[56] The dismissal of ATS cases involving reparation treaties or agreements therefore finds support from general international law which assigns a large discretion to the government of a State to regulate claims in post-conflict situations which arose under international law of its own and/or of its citizens and residents in negotiations with other States for peace treaties and reparation agreements[57] and accordingly, does not threaten or undermine the credibility and legitimacy of corporate ATS litigation. As a consequence, in practice, any international agreement negating individual claims has a preemptive effect on ATS claims indirectly through nonjusticiability doctrines and directly through incorporation of international law by federal common law.

B. *War-Related Claims?*

Yet, the development did not stop at this point.

In recent times and unlike previous administrations, George W. Bush's Administration has fiercely opposed international law enforcement via ATS through its intervention arguing that the continuation of the litigation poses a threat to the foreign relations of the United States and doubting the propriety of judicial proceedings for the resolution of the underlying conflicts.[58] Hence, the Bush Administration has taken a substantially different position

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[56] *See* Bert Wolfgang Eichhorn, *Reparation als völkerrechtliche Deliksthaftung – Rechtliche Probleme unter besonderer Berücksichtigung Deutschlands* (1918–1990) 71–81 (1992). Eichhorn speaks of an "absorption" of the individual right by the State right to compensation. *Id*. *See also* Martin Seegers, *Das Individualrecht auf Wiedergutmachung, Theorie, Struktur und Erscheinungsformen der völkerrechtlichen Staatenverantwortlichkeit gegenüber dem Individuum* 213–14 (2005). *Cf.* Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (2004).

[57] *See* Seegers, *supra* note 56, at 213–14. Besides, the United States is certainly free to forego claims under domestic law, such as ATS. If this is done retrospectively, however, the constitutional issues of taking may arise.

[58] Joseph, *supra* note 15, at 40. Two reasons for such shift appear possible.

First, as a consequence of heavy lobbying, economic concerns about the disadvantage faced by American TNCs compared to their non-American counterparts are prevailing although given the broad scope of personal jurisdiction by federal courts, such disadvantage is minimal. *See supra* Chapter Ten: Lack of Personal Jurisdiction. On the lobbying efforts by various influential business associations against ATS, *see* Paul R. Dubinsky, "Justice for the Collective: The Limits of the Human Rights Class Action", 102 *Mich. L. Rev.* 1152, 1186 (2004), involving the International Chamber of Commerce and the U.S. Council for International Business; Marjorie Cohn, "Human Rights: Casualty of the War on Terror", 25 *Thomas Jefferson L. Rev.* 317, 330 (2004), on the National Foreign Trade Council; Terry Collingsworth, "Separating Fact from Fiction in the Debate over the Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations", 37 *U.S.F. L. Rev.* 563, 564 (2003), discussing USA Engage and the National Foreign Trade Council.

compared to previous administrations.[59] In accordance with such attitude, the Bush Administration has filed in a growing number of ATS cases "Statements of Interests" through the Department of Justice expressing dissatisfaction with ATS litigation in general.

1. Sarei v. Rio Tinto

The case where such intervention had a great impact is *Sarei v. Rio Tinto*.[60]

It dealt with a long-lasting and bloody civil war between the inhabitants of the island of Bougainville and the government of Papua New Guinea ("PNG") due to the inhabitants' resistance and opposition to the large-scale mining on their island undertaken by Rio Tinto, a huge TNC specializing in mining, which allegedly resulted in the devastation of their environment and livelihood and led to discriminatory labor practices, both of which ultimately caused a long-lasting and bloody civil war with grave international human rights violations and international humanitarian law violations. Judge Morrow of the federal court for the central district of California solicited an opinion from the Department of State as to the possible impact of the current litigation on the foreign relations of the U.S., a practice common among courts confronted with foreign affairs-related claims such as under ATS.[61] The Attorney General, acting on behalf of the Department of State, filed a Statement of Interest by the U.S. in accordance with 28 U.S.C. §§ 516 and 517. Attached to the statement was a letter from William Howard Taft, Legal Adviser to the Department of Justice, that explained the department's views on the impact of continued litigation in this case and specifically stated that continued adjudication of the lawsuit "would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations."[62]

Second, in the war on terrorism, the Bush Administration appears to be more willing to turn a blind eye on human rights violations compared to earlier administrations as long as the foreign government joins the coalition fighting terrorism.

[59] Joseph, *supra* note 15, at 40.

[60] 221 F. Supp. 2d 1116 (C.D. Cal. 2002). *See also Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (C.A.9 (Wash.) 2007), where action brought against a manufacturer of bulldozers by family members of individuals killed or injured when Israeli Defense Forces used bulldozers, which were paid for by United States, to demolish homes in the Palestinian Territories was considered nonjusticiable based on the political question doctrine. On appeal, the Court of Appeals affirmed. Yet, this case concerned Israel, however, and may therefore be a special case.

[61] 221 F. Supp. 2d at 1180–81.

[62] *Id.* at 1181.

In reaction, plaintiffs filed two offers of proof asking the court to consider declarations made by negotiators involved in the peace process which contradict the State Department's assessment.[63] The negotiators specifically contend that the litigation has neither affected the peace negotiations in the past nor will it do so in the future if the litigation continues.[64] In fact, plaintiffs asserted that the position of the Department of State was merely taken due to representations made by the PNG government to the U.S. government.[65] Judge Morrow, however, explained that in the determination of whether the act of state doctrine, the political question doctrine, or comity of nations doctrine applies, the court needs to identify as a first step the relevant foreign policy of the executive branch in order to proceed to the second step which is determining whether continued adjudication of the dispute unduly interferes with the determined policy.[66]

With respect to the political question doctrine, in response to the plaintiffs who advanced the argument that Congress has determined that U.S. courts are the proper forum to redress ATS claims, the court explained that Congress, by the mere enactment of ATS and TVPA, did not speak of the applicability or limited use of the doctrine in this field.[67] It further held that the continued adjudication of the lawsuit would trigger the fourth *Baker* factor, the impossibility of a court's undertaking independent resolution without expressing lack of respect due to coordinate branches of the government,[68] and the sixth factor, the potential embarrassment created by multifarious pronouncements by various departments on one question,[69] and stressed that each factor alone suffices to dismiss a case.[70] The court blatantly rejected the argument that the court's decision would not actually interfere or impede the peace process because in its view, any decision containing implied rulings on the activities which gave rise to the litigation would serve as an input by any party who wishes to profit from it and may undermine the political balance and insight needed to implement the peace agreement.[71] The court ultimately declared that a judgment on the merits may take the opposite position from that of the government resulting in the very embarrassment the political question

[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 1195.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1198.
[71] *Id.*

doctrine was meant to avoid.[72] Accordingly, the court held that all claims are barred by the political question doctrine.[73]

In addressing the act of state doctrine in respect of the environmental and racial discrimination claims, defendants asserted that PNG had transformed its agreement with Rio Tinto into the Copper Act and declared that the adjudication of Rio Tinto's conduct inevitably also invalidated PNG's official acts for that reason.[74] After accepting this argument,[75] Judge Morrow considered the factors enunciated by the Supreme Court in *Banco Nacional de Cuba*. As to the first factor, international consensus on the point, the court noted that a high degree of international consensus exists regarding racial discrimination but not in respect of environmental torts.[76] With regard to the second factor, implications for foreign relations, it accepted the view of the Department of State that the implementation of the peace agreement of 30 August 2001 between the parties required a continued effort to maintain a necessary political balance and the continued adjudication of claims in this respect would negatively impact the peace process.[77] In respect of the third factor, change of government, the court noted that the control over the PNG government has not changed since the alleged atrocities giving rise to the lawsuit. Since two of the three factors favored application of the doctrine, the court concluded that the doctrine bars adjudication in respect of the environmental and racial discrimination claims.[78]

As to the comity principle, the court looked for guidance in § 403 of the Restatement and identified one of the factors for the evaluation of the reasonableness of exercising jurisdiction as the conflict of laws between the laws of interested States.[79] The court found such conflict in respect of the Papua New Guinea Compensation (Prohibition of Foreign Proceedings) Act of 1995 which prohibits and prescribes as a criminal offence for PNG citizens to initiate or undertake legal proceedings in a foreign court over compensation claims

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[72] *Id.*

[73] *Id.* at 1198–99.

[74] *Id.* at 1184.

[75] Plaintiffs argued that no official action in respect of racial and environmental discrimination was present. *Id.* at 1186.

[76] *Id.* at 1189. In respect of the claims of war crimes and crimes against humanity, the court held that the alleged crimes against humanity and war crimes during the civil war cannot be deemed official State acts within the meaning of the doctrine and therefore, cannot be adjudicated although military orders are commonly classified as official acts for purposes of the act of state doctrine barring adjudication of the dispute. *Id.* at 1188–89.

[77] *Id.* at 1190.

[78] *Id.* at 1193.

[79] *Id.* at 1200.

arising from mining or petroleum projects in Papua New Guinea.[80] It further considered the interest of PNG and the U.S., both of which, according to the court, suggest that the court should refrain from exercising jurisdiction.[81] Ultimately, upon the consideration of further Restatement factors, particularly the connection to the territory regulating the activity and the assumption of the adequacy of PNG's forum, the court held that all environmental and racial claims are barred under the principle of comity (since only these claims were covered by the Compensation Act).[82] Accordingly, the attempts by the Bush Administration to stall litigation against American TNCs in *Sarei v. Rio Tinto* were successful at first instance.[83]

Critics have accused the Bush Administration of undermining human rights and siding with big business.[84] Yet, the Administration's approach cannot simply be discarded by reference to international law. The reason for this is that international humanitarian law – the branch of international law which

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[80] *Id*. at 1203. The court assumed that victims have adequate access to the courts of PNG.

The court assumed that a conflict of law is a threshold requirement although noting that this is not settled. *Id.* at 1201. It is true that case law has not been settled as to whether the last factor in the Restatement, a conflict between the laws of the interested States, constitutes a threshold requirement for the application of the doctrine or is merely one factor, though an important one, to be considered in the balancing of the factors. The uncertainty arises out of a possible reading of the Supreme Court's decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, where the court was asked to rule whether a court can refrain from the exercise of jurisdiction under the Sherman Antitrust Act over foreign reinsurers on international comity grounds. *Id.* at 798. The court did not reach this issue but held that "the only substantial question in this litigation is whether there is in fact a true conflict between domestic and foreign law". *Id.* Answering this question negatively, the court found no "need to…address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 798–99. It is therefore not clear whether the court intended the conflict requirement as a threshold for the doctrine. *See, e.g., In re Simon (Hong Kong & Shanghai Banking Corp. v. Simon)*, 153 F.3d 991, 999 (9th Cir. 1998); *In re Maxwell Communication Corp. (Maxwell Communication Corp. v. Societe Generale)*, 93 F.3d 1036, 1049 (2d Cir. 1996). See also Justice Blackmun in his partially concurring and dissenting opinion in *Société Nationale Industrielle Aérospatiale*, 482 U.S. 522, 555 (1987), where he notes that "the threshold requirement in a comity analysis is whether there is in fact a true conflict between domestic and foreign law" or whether the court merely suggested that this factor was decisive under the particular facts of this case. *See, e.g.*, *Metro Industries Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996).

[81] 221 F. Supp. 2d at 1204–05. The PNG government provided a Statement of the Government of Papua New Guinea's Position concerning the Class Action Lawsuit against Rio Tinto in the United States of America. *Id*. at 1202.

[82] *Id*. at 1207–08.

[83] The dismissal of the *Sarei* case demonstrates that the resistance of an administration can hinder successful enforcement of human rights.

[84] Free, *supra* note 3, at 480–81; Joseph, *supra* note 15, at 40.

regulates the conduct of hostilities in times of war – is generally considered as not granting individual rights, or at least, if these rights are violated, as not providing for a judicially-enforceable secondary right to compensation.[85] And under the prevailing view, human rights law which remains applicable in armed conflicts despite the overlap with international humanitarian law,[86] loses

[85] Since the Kosovo Conflict, there are signs that a development where victims seek access to courts for compensation has gained more and more momentum. *See* Michael Bothe, "Die Anwendung der EMRK in bewaffneten Konflikten – eine Überforderung?", 65 *ZaÖRV* 615, 621 (2005). As an example of the development, *see Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), where the Supreme Court explained that regardless of whether the claimant, a so-called enemy combatant turned over by militias in Afghanistan to the U.S. military, could rely in court on violations of international humanitarian law, the claimant could only be tried in accordance with the laws of war as referred to in the statutory provision granting such authority to the government, i.e., article 21 of the Uniform Code of Military Justice, UCMJ, 10 U.S.C. §§ 801–946 (2000), *available at* http://www.loc.gov/rr/frd/Military_Law/UCMJ_1950.html (accessed 24 April 2006. *Id*. at 2794. *See also* Judgment of 28 July 2006, AZ 7 U 8/04, Oberlandesgericht Koeln (Court of Appeals of Cologne), *available at* http://www.olg-koeln.nrw.de (accessed 13 August 2006).

Yet, even with respect to human rights, which are true rights of the individual under international law, there is no general human right to compensation in case of violations. On secondary rights arising out of a violation of a primary (human) right in peace and wartime, *see generally* Seegers, *supra* note 56.

[86] There is ongoing debate in respect of the relationship between international human rights law and international humanitarian law. *See generally* Dirk Lorenz, *Der territoriale Anwendungsbereich der Grund- und Menschenrechte – Zugleich ein Beitrag zum Individualschutz in bewaffneten Konflikten* 199–247 (2005).

Historically, international humanitarian law and human rights law were perceived as so fundamentally different in terms of purpose, origin, foundation, content, and finality that any parallel application of the two bodies of law was impossible. Compare the expression of the classic view by Henri Meyrowitz, "Le droit de la guerre et les droits de l'homme", 88 *Revue de Droit Public* 1059, 1104 (1972): "Nous avons constanté que le droit des conflit armés et la notion des droits des l'homme sont, par leur origine, leur fondement, leur nature, leur object, leur finalité et leur contenu, radicalement différents, s'ils ne sont pas diamétralement opposés, et qu'ils sont irréductibles l'un a l'autre."; Yoram Dinstein, "The International Law of Inter-State Wars and Human Rights", 7 *IYHR* 139, 148 (1977).

Humanitarian law was depicted as striking a balance between military necessities on the one hand and chivalry on the other hand allowing, *e.g.*, the killing of innocents, whereas international human rights law in this view was a reaction to the atrocities of Nazi Germany which were of such a scale that even in peacetime, a severe restriction of a State's power towards its citizens appeared advisable. *See* Bothe, *supra* note 84, at 621.

Yet, very soon it became clear that such radical approach denying any possible overlap between the two bodies of law seemed too radical, was not required by practical necessities, and in contradiction to human rights treaties which explicitly applied in times of armed conflict. *See* Lorenz, *infra* note 85, at 202–03. *E.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 4.

much, if not all, of its teeth since its rules have to be interpreted considering the necessities of warfare.[87] The underlying attitude is to question the propriety of a judicial forum singling out some rights out of a mass of foreign war-related claims for judicial resolution. Accordingly, with respect to war-related claims, doubting the propriety of courts to handle the issues is not absurd as many critics would want to think so. Moreover, from the viewpoint of torts law, of which ATS forms part of, not to allow war-related claims seems economically sound since, although it carves out the most severe and massive injuries and damages from effective adjudication, deterrence cannot be delivered on both sides of the heated armed conflict in areas of the world far removed from the U.S. territory where ATS claims are being heard in courts.

If one looks into domestic nonjusticiability law for further guidance, it is certainly true that the Supreme Court has held: "The conduct of the foreign relations of our Government is committed by the Constitution to the Execu-

[87] For the time being, the complementary view prevails in which both fields of law apply simultaneously. For example, the right to life remains a valid right in armed conflict. However, what is considered an arbitrary deprivation of human life in armed conflict is largely determined by the laws of war. In other words, military necessities can be sufficiently taken into consideration by maintaining the necessary margin of appreciation in the actual implementation of human rights in an armed conflict.

The International Court of Justice has taken this complementary view in two advisory opinions. *See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 1996 ICJ 15, para. 25 (8 July): "The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." This complementary approach was affirmed in *Legal Consequences of the Construction of a Wall In the Occupied Palestinian Territory (Advisory Opinion)*, 2004 ICJ para. 106 (July 9), where it held that: "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

tive and Legislative – 'the political' branches."[88] Similarly, it is recognized that the president enjoys greater freedom and less restriction from other branches in the field of foreign affairs.[89] The strongest expression of this attitude can probably be found in the *Curtiss-Wright Export Corp.* decision, in which Justice Sutherland declared that "the President as the sole organ of the federal government in the field of international relations" has the "plenary and exclusive power" to decide "the important, complicated, delicate and manifold problems" of foreign relations.[90]

Still, it is equally established that the mere assertion of executive power does not exclude judicial review. The Supreme Court has repeatedly held that courts have no freedom to decline from exercising jurisdiction under existing statutes simply because of possible international repercussions of a judicial resolution of a given dispute.[91] In the above-cited *Banco Nacional de Cuba* case, for example, the court reasserted judicial power and control over the executive by stressing that not "every case or controversy which touches foreign relations lies beyond judicial cognizance."[92]

The following holding in *Sarei* appears particularly over-deferent:

> [P]laintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here. This is probably because to do so would have the potential to embarrass the executive branch in the conduct of its foreign relations[.][93]

Such holding implies that the executive's assessment of the case would be decisive leading to a dangerous situation concentrating de facto veto power of the executive branch over claims related to foreign relations.[94] Such view is itself contradictory to the separation of powers doctrine.

Furthermore, the argument can be and has been made that the danger of diplomatic tensions as a consequence of court decisions in the U.S. are overrated. For example, in respect of the Chinese government's attitude toward ATS litigation initiated by Falun Gong disciples in the U.S. as to human rights violations by China towards their Chinese disciples, although officially protested, China is aware of the separation of powers doctrine in western legal systems with independent courts and that judicial holdings are not deemed

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[88] *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).
[89] Stephens, *supra* note 3, at 171.
[90] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).
[91] *E.g., Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).
[92] 376 U.S. at 423, *quoting Baker v. Carr*, 369 U.S. at 211.
[93] 221 F. Supp. 2d at 1192.
[94] Stephens, *supra* note 3, at 201.

at par with congressional or executive condemnations of human rights violations.[95] Therefore, the letter submitted in this case by the Bush Administration warning of tensions in foreign relations with China seems beside the point.[96] In other words, one should not underestimate the capability of foreign governments to embrace the U.S. concept of separation of powers which can lead to judicial decisions the current U.S. administration does not support. Indeed, in respect of almost all human rights violations under ATS, the very same State Department or the Department of Justice, which is opposing ATS litigation, previously publicly condemned the events.[97] The same holds true in the case filed more recently against the TNC Exxonmobil involving its operations in Aceh, Indonesia, where the Bush Administration also intervened.[98] Constant criticism from Congress and the Bush Administration on the human rights practices has not undermined U.S. relations with Indonesia.[99]

As a consequence, the Court of Appeals for the Ninth Circuit overturned the judgment of the district court in *Sarei v. Rio Tinto* and warned the district court against relying on statements of interests in this context.[100] It held that none of the claims were barred by the political question doctrine.[101] As to the first *Baker* factor, it cited the holding in *Kadic* that the resolution of human rights disputes is constitutionally committed to the judiciary.[102] Moreover, stressing the separation of powers doctrine as well as the necessity to give serious weight to the views expressed by the executive branch, the Court of Appeals held that even if continued adjudication presented some risk to the Bougainville peace process, this would not be sufficient to implicate the last three *Baker* factors.[103] Similarly, the Court of Appeals disagreed that the act of state doctrine would bar the claims partially because the claims were based on *jus cogens* and partially because consideration of foreign policy concerns is only one of several *Sabbatino* factors.[104] As to comity, the Court of Appeals likewise

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[95] *See* Jacques Delisle, "Human Rights, Civil Wrongs and Foreign Relations: A 'Sinical' Look at the Use of US Litigation to Address Human Rights Abuses Abroad", 52 *DePaul L. Rev.* 473, 491 (2002).

[96] Stephens, *supra* note 3, at 199.

[97] *See id.* at 199.

[98] *Id.* at 198.

[99] *Id.* Likewise unfounded is the administration's argument that further litigation would deter future investment and thereby impede the war on terror conducted with the authorities of Indonesia.

[100] *Sarei v. Rio Tinto PLC.*, 487 F.3d 1193, 1213 (9th Cir. 2007).

[101] *Id.* at 1208.

[102] *Id.* at 1204.

[103] *Id.* at 1204–08. As to the first factor, it argued that ATCA claims are legal claims entrusted to the judiciary. *Id.* at 1203–04. On the various *Baker* factors, *see* II.A.2 above.

[104] Stephens, *supra* note 3, at 1208–11.

warned the district court of too much deference to the Executive Branch.[105] As a consequence, the case was remanded for further consideration.

2. Mujica v. Occidental Petroleum Corp.

The next court to substantially address issues of justiciability was the district court for the central district of California in *Mujica v. Occidental Petroleum Corp*.[106] The complaint was filed against Occidental Petroleum Corp. and AirScan, Inc., both American companies.[107] The allegations arose out of a bombing by the Colombian military in Santo Domingo near Occidental's Colombian oil operations operated in a joint venture with the Colombian government.[108] The attack was meant to protect Occidental's oil pipeline from left-winged guerrillas but killed only civilians. The plaintiffs alleged that Occidental Petroleum and AirScan, which provided security for Occidental's pipeline against insurgents' attacks, were directly involved in the raid in Santo Domingo with AirScan employees in the planes of the Colombian air force unit and which were paid for by Occidental.[109] Again, as is the usual practice in proceedings with a potential for repercussions on foreign relations, the court requested for an opinion from the executive which submitted its view in a Statement of Interest.[110]

In addressing the issue of the political question doctrine, the court focused on the arguments presented by the Statement of Interest of the Department of State.[111] As to the first factor, noting the absence of an explicit textually demonstrable commitment of foreign policy to the executive branch, it nonetheless conceded that the management of foreign affairs falls within the realm of the executive branch, in line with previous jurisprudence.[112] In the absence of a treaty or executive agreement which would preclude the exercise of jurisdiction, the court distinguished two lines of precedents.[113] As a representative of the first line, it read the *Alpecin* decision of the Ninth Circuit in which the political question doctrine was thoroughly analyzed in a claim brought against the Vatican Bank, the Order of Friars Monor, and

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[105] *Id*. at 1211–12.
[106] 381 F. Supp. 2d 1164 (2005).
[107] *Id*. at 1168.
[108] *Id*.
[109] *Id*.
[110] *Id*. at 1169.
[111] *Id*. at 1191. Defendants argued that the case presents a nonjusticiable political question since it touches on matters of foreign relations and it would involve military decisions which the court does not have the standards to evaluate. *Id*.
[112] *Id*. at 1192–93.
[113] *Id*.

the Croatian Liberation Movement for allegedly handling profits made by the Croatian Ustasha Regime during World War II.[114] The Ustasha Regime was supported by Nazi Germany and accumulated assets through the use of forced labor and looting. In *Alpecin*, the Ninth Circuit held that the war-related claims were nonjusticiable because a re-examination of the complete Ustasha Regime during World War II would intrude into the policy choices committed to the political choices.[115] It distinguished *Kadic* on the fact that *Kadic* focused on the acts of a single individual during a localized conflict whereas in *Alpecin*, the court was being requested to assign fault for actions taken by a regime "in the morass of a world war".[116] With respect to *Mujica*, the court found the plaintiffs' allegations to be closer to the *Kadic* case since the dispute arose from a single incident.[117] As to the second criteria, the court explained that international law provides for judicially discoverable and manageable standards.[118] The court then turned to the fourth criteria, the lack of respect.[119] It noted that the State Department filed a Statement of Interest outlining several areas of foreign policy which would be negatively impacted by the continuation of the proceeding.[120] The court explained that the State Department has declared that the litigation would interfere with its approach to encouraging the protection of human rights in Colombia.[121] It further informed the court of its decision to suspend U.S. assistance to the Colombian Air Force Unit involved in the incident and agreed with the plaintiffs that a wrong has occurred[122] and denied the propriety of a court proceeding to address the issue.[123] In response, the court held that the fourth and the fifth *Baker* factors, adherence to a policy decision, are present.[124] As to the sixth factor, it found the instant case not implicating the sixth *Baker* factor since other than in the *Nazi Era* cases, no executive agreement had been signed by the President.[125]

The unattractive result of jurisprudence similar to *Sarei* (at first instance) and *Mujica* would be that only TNCs doing business in countries referred to by the administration as axis of evil, rogue, or terrorist states, e.g., Sudan,

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1193.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1194.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 1195.

would be subject to successful litigation under ATS.[126] In *Mujica*, there were not even ongoing peace negotiations that could be potentially disturbed like in *Sarei* and the steps undertaken by the administration were minimal.[127] Hence, the *Mujica* decision can even be read as conditioning ATS litigation on the approval of the presidential administration, the views of which are subject to dramatic shifts as explained above.[128] Such approach would fuel the already widely perceived critical view that ATS litigation, instead of strengthening the rule of law in international law in general through decentralized enforcement, merely reasserts the power-oriented strive for US hegemony through judicial means in the interest of the respective U.S. administration in the post-Gulf War II-world.[129] This could severely undermine the credibility and legitimacy of the enforcement of international law through ATS in the long term.[130] The decision is under appeal.

3. Agent Orange *Litigation*

In *In re "Agent Orange" Product Liability Litigation*, Vietnamese plaintiffs sought compensation from U.S. chemical companies for harm done to them and their land due to the U.S. military's use of agent orange and other herbicides during the Vietnam War from 1965 to 1971 and the South Vietnamese

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[126] On the notion of "rogue" or "pariah" States in international law, *see generally* Petra Minnerop, *Paria-Staaten im Völkerrecht* (2004). In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court refused to request the government for its view on the case.

[127] As to the *Mujica* case, plaintiffs have already filed a case against the Colombian government and got an award of $700,000. They did not sue Occidental.

On the other hand, plaintiff's failure to sue Occidental can be easily explained: Civil-war shaken Colombia provides for a special proceeding to sue the government in which private parties cannot be sued and that a separate proceeding would have seriously risked their lives. One of the plaintiffs who joined a human rights workshop in Chicago on the topic was killed after he returned to Colombia. *See generally* John Gibeaut, "Alberto Galvis Claims that Occidental Petroleum Corp. Is Liable for a Raid that Killed His Family in Colombia", 91 *JUL. A.B.A.J.* 29 (2005). In addition, the State Department in its yearly human rights reports on Colombia still notes serious problems with violence, undue influence, threats, and intimidation of judges, parties, prosecutors, and witnesses. *E.g.*, State Department, Country Reports on Human Rights Practices (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/ (accessed 16 August 2006).

[128] *See supra* II.B.

[129] For example, Viljam Engström warns that the lack of a multilateral approach "can result in selective and divergent application, mainly favouring the policies of the state allowing such proceedings.… It should also be considered that 'weaker' states are not necessarily sufficiently powerful to use such mechanism to begin with." Viljam Engström, *Who Is Responsible for Corporate Human Rights Violations?*, 32–33, Abo Akademi University (Finland), Institute for Human Rights (2002), *available at* http://www.abo.fi/instut/imr/norfa/ville.pdf (accessed 1 June 2005).

[130] Engström, *id.*, takes a similar position.

Government's subsequent use thereof until 1975.[131] While the case was ultimately dismissed due to a perceived lack of international law prohibiting the use of herbicides, interestingly, the court addressed the defendant's contention that the plaintiff's case interferes with the U.S.' conduct of foreign relations in extenso.[132] In doing so, the court frankly criticized the U.S. Department of Justice's Statement of Interest for failing to accept that the U.S. is bound by international law and accused it of having an "inflated understanding" of the power of the executive branch.[133] It further clarified that there is no exception to judicial review in times of war and that even at such times, presidential powers are still limited.[134] In justifying its reasoning, the court cited *Sosa* according to which, customary international law is part of federal common law and prohibits turning a blind eye on violations of international law.[135] As to the first *Baker* factor, the court, relying on *Kadic*, stressed that there is no textually demonstrable commitment of claims of violations of international law by the political department.[136] As to the second *Baker* factor, judicially manageable and discoverable standards for resolution of the issues, the court noted that questions of international law, just like those of domestic law, are not always easy to handle, yet in principle, "ascertainable and manageable."[137] As to the third factor, the impossibility of a decision without stating implicitly a policy determination, the court emphasized that the question of violation of international law by American corporations is a judicial determination, not a policy decision.[138] As to the fourth to sixth factors related to the embarrassment of other branches, the court ruled, again relying on *Kadic*, that such factors would only be relevant if "judicial resolution of a question would contradict prior decisions taken by the political branch in those limited contexts where

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[131] 2005 WL 555582 (E.D.N.Y.).

[132] *Id*. at 56.

[133] *Id*. at 56. On appeal, the Court of Appeals for the Second Circuit affirmed the judgment but did not address the issue because it held that no norm of international law satisfying the *Sosa* standard has been breached. *See Vietnam Association for Victims of Agent Orange v. Dow Chemical Company*, 517 F.3d 104, 117–23 (2nd Cir. 2007).

[134] 2005 WL 555582, at 57. In effect, the court rejected the broad claim of the Department of Justice that the executive branch can decide on its own what international law norm to abide to or not and reasserted the power of judicial review. *Id*. Further, it held that "[w]hat 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. That power cannot be frustrated by the overly broad pre-emption doctrine espoused by defendants." *Id*.

[135] *Id*.

[136] *Id*. at 51.

[137] *Id*. at 52.

[138] *Id*.

such contradiction would seriously interfere with important governmental interests".[139] Thus, the court concluded that adjudication is not barred by the political question doctrine.[140] *In re "Agent Orange"* seems more in line with *Kadic* than *Sarei* (at first instance) and *Mujica*.

IV. *Guidance Given in* Sosa

The Supreme Court unambiguously emphasized in *Sosa* that international law is federal common law and as such, binding upon the Executive Branch.[141] In addition, the Supreme Court indicated that deference to political branches may constitute one possible limitation to the judicial application of ATS but at the same time, the court limited its holding immediately by stressing that such deference is case-specific.[142] Accordingly, the Supreme Court opened the door to the use of nonjusticiability in ATS cases. However, this is still irreconcilable with a broad and borderless attitude under which the propriety of the legal forum is generally questioned in ATS cases regardless of the facts.

Interestingly enough, in the *Apartheid* case, to which the court referred to as an example of possible necessity to defer, both the governments of South Africa and the U.S. opposed the suits and after the abolition of apartheid, the deliberate choice was made in South Africa not to impose criminal and/or civil sanctions but to establish a Truth and Reconciliation Commission which would address and examine the crimes committed in the name of the former regime. Both governments protested that litigation under ATS in this case undermined the policy of concession and absolution deliberately chosen by the South African government and to avoid any semblance of "Victor's Justice".[143] In addition, the *Apartheid* case, in respect of which the Supreme Court thoroughly emphasized judicial caution in relation to other branches, was ultimately dismissed at first instance, the district court judge dismissing

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[139] *Id.*

[140] *Id.* at 61. As to reparation cases, the court distinguished reparation cases where the political question doctrine was deemed to apply with the argument that in this case, reparation agreements which hinder litigation are non-existing. *Id.*

In re "Agent Orange" could be distinguished from *Sarei* by the fact, though not explicitly mentioned in the *In re "Agent Orange"* decision, that the embarrassment therein would lie in the conduct of the United States, not the misconduct of other nations.

[141] 124 S. Ct. at 2765.

[142] *Id.*

[143] *Id.* at 2766, *citing In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (2004); 238 F. Supp. 2d 1379 (2002).

it based on lack of subject matter jurisdiction and not on a denial of the exercise of jurisdiction.[144]

V. *Conclusions*

In recent times, the three related concepts of the political question doctrine, the act of state doctrine, and comity doctrine which direct the dismissal of a case although the court had proper jurisdiction for reasons of prudence, diplomatic sensitivity, separation of power, and constitutional concerns, did not constitute a substantial barrier to ATS litigation against TNCs. However, in a policy shift, the Bush Administration has interfered in judicial proceedings through Statements of Interest filed by the Department of Justice which strongly opposed human rights enforcement litigation based on ATS against TNCs by stating that the continuation of the litigation poses a threat to the foreign relations of the United States whereas earlier administrations were generally in favor of human rights litigation.

The decisions of the first instance in *Sarei v. Rio Tinto* and *Mujica v. Occidental Petroleum Corp.* show that where specific arguments and evidence as to the risks to ongoing peace negotiations of a judicial approach in the resolution of an armed conflict are made available, judges may follow the suggestions of the executive branch. However, ATS litigation which depends on the day-to-day politics in Washington would severely erode its recognition and legitimacy as an impartial and strong enforcement mechanism for international law, particularly in the long-term perspective.[145]

Yet, the Supreme Court's explicit insistence in *Sosa v. Alvarez-Machain* that customary international law forms part of federal common law contains an implied holding that the acts of the executive branch are subject to a federal court's judicial review and paves the way for a reassertion of judicial power and review in this respect. However, the Supreme Court has equally recognized that deference to the political branch is proper in certain cases. Such holding excludes the possibility of the general application of nonjusticiability doctrines to war-related claims but may, in some cases, lead to dismissals.

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[144] 346 F. Supp. 2d 538 (S.D.N.Y. 2004). Regarding the *South African Apartheid Litigation*, Judge Sprizzo of the Southern District of New York doubted the illegality of doing business with apartheid regimes under international law. *Id.* at 545–48. The judgment was reversed by the Court of Appeals. *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2d Cir. 2007).

[145] One has to bear in mind that not all States have the actual power to allow such proceedings to continue within their court system.

Given the impreciseness, open-endedness, and case-specificity of nonjusticiability doctrines, further clarification is needed from courts of appeals or even from the Supreme Court, which is more desirable although not a reasonable option in the near future.

Chapter Thirteen

Duress

I. *Introduction*

Despite the undisputed power of TNCs arising primarily from their economic size and influence,[1] they, like other private actors, are often under tremendous pressure to do or enable certain acts to be done by governments in the countries where they are doing business. If such pressure reaches the level of coercion, one can argue that TNCs should not be liable for violations of international law connected to their investment. What may be at stake for them is the life and limb of their employees assigned to or hired in these countries or at the very least, the profits and investments in these countries.

This chapter explores whether, and if yes, to what extent, the defence of duress (i.e., the claim of absence of a reasonable choice) may be available to a TNC in an ATS case. Parts II and III analyze the two court decisions on the subject in the light of the defense's status under current international criminal law.[2] It is clear that duress could be extensively used to shield corporate groups from liability under ATS.

II. *Reliance on Duress in the* Unocal *Case*

In ATS litigation, duress was raised for the first time in the *Unocal* case.[3]

A. *Factual Background and Context*

The case involved human rights violations, inter alia, the use of local villagers as forced labor in the furtherance of a gas pipeline project in Southern

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[1] *See* Chapter Seven: Norms that Can Be Violated Only by State Actors.

[2] As will be shown, however, the conclusions drawn in this chapter do not depend on the applicable regime. Under any applicable field of law (torts or domestic criminal law), the practical result will be identical. See the discussion under II. and III. below.

[3] *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

Myanmar.[4] To understand the circumstances of the defense raised by Unocal, one needs to look at the general political situation in Myanmar. A military dictatorship has ruled Myanmar for several decades turning the country into an international pariah by being one of the worst human and labor rights offenders in the world. Year after year, both the Country Report on Human Rights Practices of the United States Department of State[5] and the Annual Report of Amnesty International[6] are replete with reports of political prisoners, torture, ill treatment, forced labor, and extrajudicial executions.[7] It is common for the government to seize members of the minority groups Shan, Karen, and Karenni for forced labor to pursue infrastructure projects such as building roads and bridges.[8] Members of minority groups are also forced to carry equipment used by military troops on their missions throughout the countryside, and in places where there are armed minority groups, they face ill treatment and extrajudicial executions.[9] Myanmar is therefore isolated within the international community. Nonetheless, in 1992, Myanmar licensed the French oil giant Total S.A. ("Total") to produce, transport, and sell natural gas from the deposits in the Yadana Field off the coast of Myanmar.[10] The project included the construction and use of a gas pipeline through Southern Myanmar to the interior of Thailand whose booming economy is striving for energy supplies.[11] In the same year, Unocal Corporation ("Unocal"), a California-based company, bought from Total a substantial interest in the project and set up two wholly-owned subsidiaries for the implementation of the project.[12] Burmese villagers assert that the military government committed widespread human rights violations in the furtherance of the project such as rape, torture, extra-judicial killings, and the use of forced laborers to

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[4] 395 F.3d at 936.

[5] *E.g.*, U.S. Department of State, *Country Reports on Human Rights Practices 2005: Burma*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100515.htm (accessed 24 October 2007). The U.S. State Department still uses the old name of Myanmar, Burma, in its annual country reports.

[6] *E.g.*, Amnesty International, *Report 2008: The State of the World's Human Rights: Myanmar, available at* http://thereport.amnesty.org/eng/regions/asia-pacific/Myanmar (accessed 23 November 2008).

[7] According to Amnesty International, at least 1150 political prisoners continue to suffer in the various prisons under poor conditions such as lack of food, water, sanitation, and adequate medical treatment. *Id.*

[8] U.S. Department of State, *supra* note 5.

[9] *Id.*; Amnesty International, *supra* note 6.

[10] 395 F.3d at 937.

[11] *Id.*

[12] *Id.*

clear and build roads and the pipeline and brought action under ATS against, among others, Unocal.[13] At first instance, Judge Lew of the Central District of California held that the evidence suggests that forced labor was used and that Unocal knew of it.[14]

B. *Unocal's Defense Strategy*

In defense, Unocal relied on the concept of duress.[15] Indeed, under criminal law in common law countries as well as in civil law countries, the accused is acquitted if the commission of the crime is justified or excused.[16] Both legal systems differentiate between the defense of necessity, which constitutes a justification, and the defense of duress, which amounts to an excuse.[17] In both cases, however, the accused is not punished.[18] Dogmatically, necessity requires an objective balance of the conflicting interests, whereas duress provides an excuse independent of the extent or degree of the harm as long as the accused could not be reasonably expected to withstand the threat.[19] Accordingly, the crucial feature of duress constitutes coercion whereas necessity presupposes the outweighing of the sacrificed interest compared to the saved interest. In both instances, the government foregoes the conviction of the perpetrator since the punishment of the accused would be a socially undesirable outcome.[20]

In international law, the differentiation is less stringent and the various concepts are commonly discussed under the common term "duress".[21]

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[13] *Id*. at 943.

[14] 110 F. Supp. 2d at 1310.

[15] *Id*. at 1309–10.

[16] *See generally* Albin Eser, "Justification and Excuse", 24 *Am. J. Comp. L.* 621 (1976); Jerome Hall, "Comment on Justification and Excuse", 24 *Am. J. Comp. L.* 638 (1976); Joshua Dressler, "Justifications and Excuse: A Brief Review of the Concepts and the Literature", 33 *Wayne L. Rev.* 1155 (1987); *Justification and Excuse: Comparative Perspectives* (Albin Eser & George P. Fletcher eds., 1991); John Cyril Smith, *Justification and Excuse in Criminal Law* (1989); Michael Louis Corrado, *Justification and Excuse in Criminal Law* (1994).

[17] Joshua Dressler, *Understanding Criminal Law* 185 (1995).

[18] For that reason, the distinction may not be as sharply drawn in practice-oriented common law countries. *Id*.; Kai Ambos, *Der allgemeine Teil des Völkerstrafrechts* 837, 839–41 (2002).

[19] Albin Eser, Art. 31, in *Commentary on the Rome Statute of the International Criminal Court* para. 40 (Otto Triffterer ed., 1999).

[20] Dressler, *supra* note 17, at 185. The principal distinction is that compared with duress as an excuse, self defense is still possible and legal while defense against acts justified by necessity are illegal and punishable.

[21] *Cf.* Eser, *supra* note 19, para. 35; Anthony S. Paphiti, "Duress as Defence to War Crime Charges", 38 *Revue de droit militaire et de droit de guerre* 247 (1999); Ambos, *supra* note 18, at 837.

Indeed, the post-war tribunals often employed the terms interchangeably.[22] The discussion is further complicated by the fact that in most cases, the plea of superior orders is also raised.[23]

C. *Judge Lew's Reading of Industrialists' Post War Trials*

In addressing the issue of the availability of the defense of duress, Judge Lew reviewed three judgments of the industrialists post war trials which convicted leading German industrialists laying down the roots of today's international law on the defense of duress.[24] He read the precedents as requiring an active participation or cooperation in the employment of slave laborers.[25] He stated that only "active steps" in seeking forced laborers on the side of the accused would translate into culpability in international criminal law.[26] Accordingly, since Unocal did not seek to employ forced labor in connection with the pipeline construction but compensated all workers who were "recruited" by the military forces in charge of the project as forced laborers whenever possible, i.e., when Unocal employees realized that workers were not voluntarily participating in the project, he concluded that the corporation is not responsible under ATS for the use of slave labor by the Myanmar military.[27] As a consequence, the court held that the plaintiffs' claims against Unocal fail as a matter of law.[28]

1. *Defense under the Statute of the International Criminal Court*

The issue then is whether such holding is based on an adequate understanding of the defense of duress in international criminal law as it stands today. The Statute of the International Criminal Court, the provisions of which can be

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[22] The tribunal in the *Krupp Case* declared "[t]he defence of necessity in municipal law is variously termed as 'necessity', 'compulsion', 'force and compulsion', and 'coercion and compulsory duress'." *United States v. Alfred Krupp*, IX *Trials of War Criminals* 1436 (1950). *See* Christiane Nill-Theobald, *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA* 179–80, 184, 187, 205 (1998). The International Law Commission and its special rapporteur, Doudou Thiam, state that necessity as well as coercion is subject to the same requirements. II-2 Y.B. I.L.C. 51 (1986). Cherif M. Bassiouni, a leading expert on international criminal law declared that "necessity can be viewed together with coercion and duress for purposes of this analysis". Cherif M. Bassiouni, *Crimes against Humanity in International Criminal Law* 484 (1999).

[23] 110 F. Supp. 2d at 1309–10.

[24] *Id*., i.e., *Flick*, *Farben*, and *Krupp* cases. For a detailed discussion, *see* II.C.3. below.

[25] 110 F. Supp. 2d at 1309–10.

[26] *Id*.

[27] *Id*.

[28] *Id*.

taken as very recent expressions of the current (minimum) state of customary international law considering the high number of parties to the negotiations and the compromised character of the statute,[29] states in article 31 (Grounds for excluding criminal responsibility):

> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) made by other persons; or
>
> (ii) constituted by other circumstances beyond that person's control.[30]

Thus, article 31 has three basic requirements for the defense of duress in international criminal law. Firstly, the person must be subjected to threat of personal injury not of a minor but of a major character, i.e., death or serious bodily harm. The threat of loss of property or income is insufficient. Secondly, the incriminated action must be both necessary and reasonable. Necessity implies the absence of other possibilities. Reasonableness refers to the usefulness of the means employed to achieve the desired result as well as the notion of proportionality.[31] Thirdly, from the perspective of the perpetrator, the value and extent of the injury expected caused by the act must not be larger than the harm which would have occurred if the act had not been performed.[32] Applying this scheme to the *Unocal* case, it is clear that none of the requirements are met. Unocal has only property or investment interests

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[29] Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities* 86 (2001).

[30] Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF. 183/9, *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm (accessed 17 September 2006). Albin Eser depicts the subprovision on duress as "one of the least convincing provisions, as in an ill-guided and lastly failed attempt, it tried to combine two different concepts: (justifying) necessity and (merely excusing) duress". Eser, *supra* note 19, para. 35. He notes that while earlier drafts and proposals distinguished (at least to certain degree) between necessity and duress, for unknown reasons, the two distinct concepts were mixed in one single provision. *Id.* For a less disapproving view of the provision, *see Model Draft Statute for the International Criminal Court* 57 (Leila S. Wexler ed., 1998).

[31] Eser, *supra* note 19, para. 39.

[32] At this point, the concept attempts to find a common ground between necessity and duress. While necessity classically requires a balancing of interests and the rescue of an objectively greater good at the cost of the minor, duress in its pure form provides for an excuse regardless of the greater or lesser harm, if and to the degree the person cannot be reasonably expected to withstand the threat. *Id.* at para. 40. Under the provision, the acting person does not need to objectively cause the lesser harm, yet it is required that he subjectively intended to do so. *Id.*

at stake or possibly, only the perspective of lesser profits. Neither the life nor the limb of a Unocal executive (who, most probably lives in California) was at stake nor was the danger in any way imminent or present. Lastly, slave labor largely outweighs purely monetary interests. Consequently, the ICC Statute rebuts Judge Lew's stance.

2. *ICTY Holding on Duress*

Similarly, in the late 1990s, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber ruled in the *Erdemovic* case[33] that duress is not a complete defense available to a soldier who is accused of a crime against humanity or war crime involving the murder of innocent third persons.[34] Instead, it only constitutes a mitigating factor for sentencing.[35] The tribunal characterized the general perception of the doctrine of duress

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[33] *Prosecutor v. Erdemovic*, Case No. IT-96–22–A, Judgment of the Appeals Chamber (7 October 1997). The accused Erdemovic, a lance corporal of the Bosnian Serb Army, confessed participation in collective mass executions of captured Bosnian Muslim male civilians at the collective farm in Pilica in the Zvornik Municipality in Bosnia-Herzegovina on or about 13 July 1995. It was unclear how many persons he exactly killed with his Kalashnikov automatic rifle. *Prosecutor v. Erdemovic*, Case No. IT-96–22–Tbis, Sentencing Judgment (5 March 1998), para. 15. He was charged with crime against humanity and in the alternative, with violation of the laws or customs of war. He pleaded guilty to crime against humanity and told the trial judges that:

> I had to do this. If I had refused, I would have been killed together with the victims. When I refused they told me: "If you are sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for my family, my wife and son who the had (sic) nine months, and I could not refuse because then they would have killed me. That is all I wish to add.

Prosecutor v. Erdemovic, Case No. IT-96–22–D, Transcript of the Initial Appearance Hearing (31 May 1996), 9. At first instance, the trial chamber convicted him to ten years imprisonment in respect of crimes against humanity considering the extreme gravity of the offence and the mitigating factors. The other charge was dismissed. *Prosecutor v. Erdemovic*, Case No. IT-96–22–T, Sentencing Judgment (29 November 1996). Both defense and prosecution appealed. The Appeals Chamber found his guilty plea to be uninformed and not equivocal and remitted the case to a different trial chamber to provide an opportunity for the accused to replead. *Prosecutor v. Erdemovic*, Case No. IT-96–22–A, Judgment of the Appeals Chamber (7 October 1997). Erdemovic reentered plea on 14 January 1998, pleading guilty to a violation of the laws or customs of war. The charge of crime against humanity was withdrawn by the prosecution. After the conclusion of a plea bargain agreement, Erdemovic was convicted for violation of the laws of war or customs of wars and sentenced to five years imprisonment. *Prosecutor v. Erdemovic*, Case No. IT-96–22–Tbis, Sentencing Judgment (5 March 1998), para. 23.

[34] *Prosecutor v. Erdemovic*, Case No. IT-96–22–A, Judgment of the Appeals Chamber (7 October 1997), para. 19.

[35] *Id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 82.

in international law as requiring that "(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; [and] (c) the remedy was not disproportionate to the evil."[36] Underlying the majority's opinion is the necessity to assist in the development and effectiveness of international humanitarian law.[37] While the issue may not have been ultimately settled as shown by the strong dissent of President Cassese and Judge Stephen and the voices of criticism in the academic literature,[38] even the dissenters did not in any way suggest that the threat of monetary damages should allow enslavement of innocent persons or the commission of other serious crimes against the integrity of a human being. President Cassese merely understood case law as permitting the defense of duress in situations wherein had the accused refused to commit the crime, his death would have been committed with high probability and such additional death would benefit no one, while in his opinion the majority was in effect implementing policy considerations with no basis in international law.[39] Similarly, Judge Stephen suggested the adoption of the doctrine of duress as a

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[36] *Id*. at para. 42. The majority interpreted the *Stalag Luft III*, the *Feuerstein*, and *Holzer* cases as supportive of the view that innocent persons could not be killed with impunity under the defense of duress. *Id*. The majority rejected the position taken by the United States Military Tribunal in the *Einsatzgruppen Case*, which declared that: "There is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." *Id*. at para. 43, *citing Trial of Otto Ohlendorf et al. (Einsatzgruppen Case)*, 4 *Trials of War Criminals* 480 (1949).

[37] *Id*. at para. 75. The majority's position finds roots in English common law tradition which does not allow the defense of duress if innocent life is taken. *Cf.* James Fitzjames Stephen, *History of the Criminal Law of England* 607–08 (1883); Antonio Cassesse, *International Criminal Law* 245 (2003). In the famous *Mignonette Case*, an English court was confronted with the fate of two castaways who, in order to survive in a tiny boat on the high seas after their ship, the Mignonette, had sunk, killed their dying companion and nourished on his blood and flesh until they were finally discovered and rescued by a passing ship. The court convicted the accused to death partially because the concept of the defense of duress as an excuse as opposed to a justification was unknown in English criminal law at the time. *The Queen v. Dudley and Stephens*, 14 Queen's Bench Division 273 (1884–85). Granting the defense of duress, therefore, would have meant that any resistance on the side of the victim constituted an illegal behavior, a result which is clearly unbearable. *See* Hans-Heinrich Jeschek & Thomas Weigend, *Lehrbuch des Strafrechts—Allgemeiner Teil* 195 (1995).

[38] *See, e.g.*, Peter Rowe, "Duress as a Defence to War Crimes After Erdemovic", 1 *Y.B. Int'l Humanitarian L.* 210–28 (1998).

[39] *Prosecutor v. Erdemovic*, Case No. IT-96–22–A, Judgment of the Appeals Chamber (7 October 1997), Separate and Dissenting Opinion of Judge Cassese, para. 44. He interpreted *Stalag Luft III* as leaving the door open, declared the Judge-Advocate's statement in *Feuerstein* as obiter dictum, and referred to the statement of the Judge-Advocate in *Holzer* that Canadian law,

general principle of law as recognized by all current major legal systems even when innocent persons are killed so long as the stringent requirements are met, particularly the condition of proportionality.[40] Whatever the outcome of the legal controversy may be in the long run, for purposes of this paper, the case law of the ICTY similarly suggests that a TNC like Unocal cannot effectively claim the defense of duress unless life or limb is at stake which is not true in the *Unocal* case. It was a free business judgment to go to Myanmar and build a pipeline together with the military.[41] Accordingly, international criminal case law on duress undermines Judge Lew's view.

3. *Reasoning of the Industrialists' Trials*

Lastly, even under the industrialists' trials advanced by Judge Lew, the conclusions drawn may be flawed. The background of the trials in the aftermath of World War II was the importance of the war economy for the warfare of the Nazi government. Throughout the war, the Nazi government had established a huge and heavily regulated slave labor program in order to reduce the tremendous manpower shortage in Germany due to the substantial drafting of German males of working age.[42] A specialized government unit determined production quotas for the industry.[43] Without slave laborers, these production quotas could not be met as other sources of workforce were unavailable.[44] In order to obtain forced laborers, the management of a plant had to notify the agencies so that suitable slave workers would be allocated to the specific

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not international law, applies. *Id.* at paras. 22–26. Similarly, he explained the *Einsatzgruppen Case* by the application of German law. *Id.* at para. 27. *Cf.* Rowe, *supra* note 38, at 214.

[40] *Prosecutor v. Erdemovic*, Case No. IT-96–22–A, Judgment of the Appeals Chamber (7 October 1997), Separate and Dissenting Opinion of Judge Stephen, paras. 66–67.

[41] Such a result is just and fair even if lower direct foreign investment in countries infamous for potential liability under ATS for investors may have negative effects on the human rights situation in general and worsen the overall situation in such countries since the argument is too general to justify the disregard of basic (human) rights of the victims as shown in the case of the forced laborers in Myanmar working on the pipeline. If human rights constitute inalienable rights and the natural minimum standard of decency on which civilization is based, TNCs cannot expect some humans to be sacrificed in the name of the common good. Moreover, reduction of direct foreign investment in critical countries provides an incentive for the concerned governments to reconsider their human rights policies and accordingly, has positive effects in the long run.

[42] *United States v. Friedrich Flick and Others, VI Trials of War Criminals* 1196 (1950).

[43] *Id.* at 1197.

[44] *Id.*

plant.[45] After the war, leading industrial figures of the German war economy were tried under Control Council Law No. 10 by the Allied Powers.[46] The

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[45] *Id.*

[46] Subsequent to the unconditional surrender of the German Reich and the termination of any form of administration or government under German rule, the victorious powers established the Control Council as the principal legislative authority for the occupied Reich. Its members were Great Britain, the Republic of France, the Union of Soviet Socialist Republics ("USSR"), and the U.S. In order to establish a uniform legal basis for the prosecution of war criminals and other similar offenders other than those dealt with by the International Tribunal at Nuremberg, the Allied Control Council enacted on 20 December 1945 Control Council Law No. 10. Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, *reprinted in "The Medical Case", I Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, XVI–XIX* (1950). Its preamble stated the purposes of the act, which are: (1) to give effect to the Moscow Declaration of October 1943; (2) to give effect to the London Agreement of 8 August 1945 and Charter; and (3) to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal ("IMT") at Nuremberg. The Moscow Declaration on German Atrocities of 1 November 1943, in which Great Britain, the U.S., and the USSR represented respectively by Winston Churchill, Theodore Roosevelt, and Josef Stalin, announced the prosecution of major war criminals "whose offences have no particular geographical localization". Those whose atrocities were centered in certain territories were to be "brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged". *1 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, infra* note 46, at VIII. On 8 August 1945, the four victorious powers concretized their declaration by concluding an agreement in London (the "London Agreement") on the prosecution of the war criminals of the Axis Powers. Part of the London Agreement was the Charter of the IMT. 39 *Am. J. Int'l L. Suppl.* 257 (1945). The London Agreement was ratified by 19 other countries. The proceedings against the 22 major war criminals (Hermann Göring, Rudolf Hess, etc.) started on 20 November 1945 in Nuremberg. *See* Hans-Heinrich Jescheck, *Nuremberg Trials*, *in* III(2) *Encyclopedia of Public International Law* 747–54 (Rudolf Bernhardt ed., 1997).

In effect, the law opened the door for the prosecution and conviction of war criminals by military tribunals of each Allied Power within their respective zones of occupation. Article I declared the Moscow Declaration and the London Agreement integral parts of the law. Article II provided for jurisdiction on crimes against peace, war crimes, crimes against humanity, and for the crime of membership in categories of a criminal group or organization declared criminal by the IMT. Article III articulated the right of each occupying power to establish tribunals within its zone of occupation and authorized each power to take all necessary steps to prosecute the major war criminals in cooperation with the others. Article IV regulated the situation when the accused was located in another zone or country other than where the alleged crime was committed. Article V required quick delivery of a person for trial under article V and the right to return to the zone where he was previously located upon demand of the commander of the zone if not convicted within six months. *I Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, infra* note 46, at XVI–XIX.

Flick, *Farben*, and *Krupp* judgments which, as indicated above, were relied upon by Judge Lew in the *Unocal* case,[47] belong to the most important ones in this category.[48] As cases of first impression, they laid down the foundations

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As a result, leading figures of German industry and finance who played crucial roles in Germany's military economy were indicted and put on trial. No leading figure of German Industry was put on trial by the IMT in Nuremberg. The only major industrialist charged, Dr. Gustav Krupp von Bohlen und Halbach convinced the tribunal to postpone his trial because he suffered from serious progressive arteriosclerosis, senility, and the consequences of a cerebral thrombosis. Attempts to replace him with his son Alfred Krupp, who had taken over as head of the Krupp group in 1940, failed. Four major economic advisers of Hitler were, however, prosecuted. Matthew Lippman, "War Crimes Trials of German Industrialists: The 'Other Schindlers'", 9 *Temp. Int'l & Comp. L.J.* 173, 176–78 (1995).

One declared purpose of the trials was to determine the role of the German economy in the war machinery of the Third Reich. Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law 10*, 185 (1949).

[47] *See supra* accompanying text to notes 24–27.

[48] The 12 extensive trials conducted by the six U.S. military tribunals in Nuremberg read as if they were the "Who's Who" of German politics, diplomacy, medicine, and industry encompassing the most prominent and outstanding figures of their fields during the 12 years of Nazi reign in Germany. The trials started in October 1946 and ended in April 1949. The American Military Government created six military tribunals, a general secretariat for their assistance, and the Office of the Chief Counsel for War Crimes for the judicial process of addressing German crimes and history. Ordinance No. 7, 11 and Executive Order 9679, *I Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, supra* note 46, at IX, XXI–XXVII. They are of extraordinary value for purposes of this book since the decisions provide not only an accurate specific set of facts but are also justified by extensive and sophisticated reasoning of the courts revealing the factors and arguments which led to the ultimate legal conclusions. In 3 of these 12 cases, 41 leading German industrialists and in one case, the most prominent banker of the war economy, were charged. *The Farben Case*, Military Tribunal VI, Case 6, *United States v. Carl Krauch and Others*, VII & VIII *Trials of War Criminals Before the Nuremberg Military Tribunals* (1950). The three industrialists' cases represented the three major German steel, coal, and armistice empires which enabled Germany to draw the world into a long and bitterly fought war. These trials are the *I.G. Farben Case*, *id.*; the *Flick Case, supra* note 42; and the *Krupp Case, supra* note 22.

In the British Zone, The British Military Court was established by Royal Warrant, 14 June 1945, Army Order 81/45 (with amendments). *Cf. United Nations War Crimes Commission, I Law Reports of Trials of War* 105 (1947). The Crown accused and convicted the owner and managers of Tesch and Stabenow Enterprise, which provided a huge amount of the highly poisonous Zyklon B gas to the gas chambers in the concentration camps in Eastern Europe. *The Zyklon B Case, I Law Reports of Trials of War* 93 (Brit. Mil. Ct., Hamburg, Germany, 1946). In Auschwitz alone, more than four and a half million were barbarically exterminated in the chambers. *Id*. at 94.

In the French Zone, the French prosecution indicted the managers of the Roehling Company. *The Roehling Case*, (Superior Military Court of the French Occupation Zone in Germany 1949), in *XIV Trials of War Criminals* 1097 (1952). The main defendants availed

of the concept of duress in international criminal law at the time.[49] In the *Flick Case* in which the Flick Group was accused of likewise utilizing tens of thousands of members of the civilian population deported from the occupied territories, concentration inmates, and prisoners of war as slave laborers in its plants,[50] the issue arose for the first time whether the defendants heading the group could rely on the defense of necessity. The prosecution pointed to article II, paragraphs 2 and 4(b) of Control Council Law No. 10[51] which states explicitly that "[t]he fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."[52] It read paragraph 4 as a barrier to the defense of necessity for the defendants as the industrialists were neither government soldiers nor officials nor were they acting under such orders in the common understanding of the term.[53] Furthermore, the prosecution insisted on the narrow application of the defense to situations where the defendants were threatened by a "clear and present danger".[54] However, even the Counsel for the Prosecution admitted that in case defendant Flick refused to employ forced laborers, the government would have taken over the management of his plants and he might have ended in an SS concentration camp.[55]

The tribunal, in its analysis, did not read article II, paragraphs 2 and 4(b) as excluding the defense of necessity for a defendant under such circumstances as the defendants found themselves. It reasoned that the tribunal "might be reproached for wreaking vengeance rather than administrating justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf."[56] While the Nuremberg tribunals intended to apply international customary law as it stood, the court could not find any citation for the doctrine of necessity in international law.[57] Instead, it looked for guidance in American and British legal systems and cited Wharton's

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themselves of the opportunity to spoil and plunder the industry of Alsace Lorraine. *Id*. at 1114–16. Herrman Roehling was found guilty of participating in the deportation of over 200,000 from the occupied territories. *Id*. at 1130.

[49] *See* Günter Werle, *Principles of International Criminal Law* (2005).

[50] *The Flick Case*, Judgment, *supra* note 42, at 1194.

[51] *Supra* note 46, IX–XIV, at X.

[52] *The Flick Case, supra* note 42, at 1201.

[53] *Id*.

[54] *Id*.

[55] *Id*. at 1197.

[56] *Id*. at 1200.

[57] Bing-Bing Jia, "Judicial Decisions as a Source of International Law and the Defence of Duress in Murder or Other Cases Arising from Armed Conflict", in *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, 76, 86–87 (Sienho Yee & Wang Tieya eds., 2001).

Criminal Law as an authority for the recognition of the defense of duress.[58] Wharton described necessity (duress) as "a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil."[59] The tribunal further referred to the reasoning by Lord Mansfield in the (British) *Stratton Case* to discover the rationale for the doctrine stating that "[n]ecessity forcing a man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity forced, his will does not go along with the act".[60]

With regard to the requirement of a clear and present danger as claimed by the prosecution, in the face of the omnipresent Nazi Leviathan, a risk of such a nature and quality was found to exist.[61] As a result, the defense of duress was available in principle and the defendants were accordingly acquitted with two exceptions. The court found defendants Weiss and Flick guilty on the count of slave labor. It ruled that the one who actively participated in the use of slave labor removes himself from the shield of the protection of necessity.[62] Since it was established that Weiss, with the knowledge of Flick, without any compulsion and on management initiative, strived for an additional allocation of Russian prisoners of war in the freight car production in the Linke-Hoffmann Werke at Breslau to increase the production above the determined quotas,[63] the tribunal labelled these active steps as "not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible".[64]

Similarly, in *The Farben Case*, the defense raised duress against the accusation of participation in enslavement and deportation of slave labor of the civilian population in the occupied territories and prisoners of war.[65] The tribunal viewed the earlier *Flick* precedent as suggesting the following reasoning:

> [A]n order of a superior officer or a law or governmental decree will not justify the defense of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows

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[58] *The Flick Case, supra* note 42, at 1200–01.

[59] Francis Wharton, *Wharton's Criminal Law I*, chapter III, subdivision VII, para. 126 (1932).

[60] *Cited in The Flick Case, supra* note 42, at 1200–01.

[61] *Id.* at 1201. The court referred to the "hordes of enforcement officials" in the "Reich reign of terror". *Id.*

[62] *Id.* at 1202.

[63] See the documents in *id.* at 709–17.

[64] *Id.* at 1202.

[65] *The Farben Case, supra* note 48.

> that the defense of necessity is simply not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.[66]

In effect, the *Farben* judgment confirmed the application of the defense of duress and the exception in the case of undemanded participation as established in the *Flick* precedent.[67]

Furthermore, the military tribunal in the *Krupp Case* was similarly confronted with the issue of necessity in the face of the mass use of forced laborers in the Krupp plants.[68] While it held the principle in general to exist in international law, it took a much more cautious approach than the *Flick* or *Farben* tribunals. Firstly, it assumed that the refusal to accept slave laborers for its plants would have resulted in no more than a loss of control of management.[69] Thus, in this connection, it put forward again the authority of Wharton's Criminal Law which stated that the fear of loss of property is not sufficient for the defense of duress to succeed as the remedy was disproportionate to the evil.[70] Secondly, even accepting "the extreme possibility" that Krupp and its managers were under the threat of arrest and having their lives terminated in a concentration camp, the court was of the opinion that the personal friendship with Hitler and the influence of the Krupp dynasty in Germany would have prevented any serious harm to the managers.[71] Lastly, the tribunal stated that the Krupp staff still would have been better off as inmates in a concentration camp than the forced laborers in the Krupp plants and the disparity in terms of numbers of victims were likewise obvious.[72] At the end of the day, the tribunal convicted the defendants because they were in "ardent desire" to employ slave laborers from the first day until the end of the war in order to increase their profits. The court determined that their active steps towards enslavement removed them from the protection of the doctrine just as defendants Weiss and Flick in the *Flick Case*. In the opinion of the tribunal, "avidity", not threat or compulsion, was the true reason for the exploitation. Thus, the court convicted all the accused with the exception

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[66] *Id.*, VIII at 1179. The court also referred to *The Roehling Case, supra* note 48.

[67] *Id.* at 1174 et seq.

[68] *Supra* note 22, at 1435–38.

[69] *Id.* at 1444. *Cf.* Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations", 20 *Berkeley J. Int'l L.* 91, 112 (2002).

[70] *Krupp, supra* note 22, at 1445.

[71] *Id.*

[72] *Id.* at 1446.

of Karl Pfirsch whose role was deemed rather passive on the count of slave labor.[73]

D. *Consequences for the* Unocal *Case*

Accordingly, Judge Lew in his *Unocal* decision is at odds with current international criminal law and simplified the reasoning of the *Flick*, *Krupp*, and *Farben* cases on which he purported to rely in a way which amounts to a misreading. Firstly, the industrialists' trials held the defense of duress as available to managers in principle. Secondly, the tribunals ruled that those who participated beyond what was required by governmental threat are removed from the defense of duress. Thus, it is true as Judge Lew put it that the postwar trials required active participation and cooperation beyond what is actually required by the government. However, this test presupposes the presence of duress (in the form of an immediate threat or danger in general) which did not exist in the case of Unocal with regard to the pipeline project. Since the management of Unocal is in California, their lives were under no circumstances endangered by the Myanmar government. The same is true if one looks at the defense of duress under the Statute of the International Criminal Court or the leading precedent of the ICTY on duress, the *Erdemovic* case.[74]

Besides, even with regard to Unocal management and personnel stationed in Myanmar, there is nothing to suggest that the government would have retaliated with murder and crime on Unocal employees in Myanmar if Unocal retreated. Thus, Unocal's argument that it would have lost its investment in Myanmar or would have lost profit does not remove it from liability. Indeed

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[73] *Id*. at 1449. In each of the three industrialists' trials, the tribunals rejected the idea that the necessities of economic warfare provide justification for plunder and spoliation of industrial property in the occupied territories. *Id*. at 1327, 1347; *The Farben Case*, *supra* note 48, at 1081, 1137–38. The *Flick* tribunal conceded that with regard to Flick's seizure of the Rombach plant in Lorraine, the objective elements of the defense of military necessity were present since the management had escaped during the advance of the German army and the population was in urgent need for work. The conversion of the plant, however, in the eyes of the court, expressed an intent to plunder rather than to preserve law and order. *The Flick Case*, *supra* note 42, at 1187, 1206.

The United Nations War Crimes Commission, after a careful examination of more than 2000 cases, summarized the requirements of duress as a defense in international criminal law as follows:

(1) the act charged was done to avoid an immediate danger both serious and irreparable;
(2) there was no adequate means of escape; and
(3) the remedy was not disproportionate to the evil.

United Nations War Crimes Commission, XV Law Reports of Trials of War Criminals 174 (1949).

[74] *See supra*, II.C.2.

it is more than misleading as Judge Lew did, to read the industrialists' cases as demanding active participation whereas Unocal is depicted as a mere "investor". Instead, Unocal voluntarily chose to become a co-joint venturer with the Myanmar military government.[75] Unocal is not a Burmese company which had no other reasonable choice but to deal and live with a brutal and inhuman government, as was true for the German industries in the 1930s. It is thus no surprise that on appeal, the Ninth Circuit reversed the holding on the ground that the "Military Tribunals applied the 'active participation' standard only to overcome the defendants' 'necessity defense'" and that in the case of Unocal, it did not nor could it have invoked the necessity defense.[76] For the Ninth Circuit, such holding seemed so self-evident that it was not even worth considering.[77] The Court reversed the case and remanded it for trial.[78] Later, the case was settled extra-judicially with the result that there exists no full-fledged precedent.[79]

III. *Rejection of Duress in the* Agent Orange *Case*

The second ATS case in which the defense of duress was addressed is the *Agent Orange* case.[80]

A. *Factual Background*

In *In re "Agent Orange" Product Liability Litigation*, Vietnamese nationals and a Vietnamese organization sued corporations in the United States for committing violations of the laws of war by manufacturing and supplying herbicides to the governments of the United States and South Vietnam which

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[75] In addition, compared to the setting in the Nazi industrialists cases, Unocal was informed from the beginning that the government would inevitably use slave labor for the furtherance of the project, 110 F. Supp. 2d at 1297, whereas the system of slave labor in Germany started in 1941 on a large scale, eight years after Hitler's takeover. Thus, even if one agrees with the interpretation of the court that the test for liability is simply "active participation", Unocal could still be held liable (assuming that all other conditions for responsibility are met).

[76] *Doe I v. Unocal Corp.*, 2002 WL 3106976, at 11 (9th Cir. 2002).

[77] *Id.* Later, reconsideration by the Ninth Circuit was granted. The case was settled before it could be decided on the merits by the Ninth Circuit en banc.

[78] *Id.*

[79] *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. Times, *available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm (accessed 11 September 2006).

[80] 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

were sprayed, stored, and spilled in Vietnam from 1961 to 1975.[81] Plaintiffs sought damages for the deaths and injuries caused by the chemical warfare and the conducting of clean-ups of contaminated areas and disgorgement of profits.[82] Defendants were 36 American chemical companies, including the giant TNC Dow Chemical Co., all of which were alleged successors-in-interest, parent companies, subsidiaries, or otherwise associated with or related in interest with those defendants who manufactured and supplied the herbicides for use in Vietnam.[83] In the early 1960s, the U.S. government entered into a series of fixed-price production or procurement agreements with the defendants.[84] Under these agreements, the U.S. government bought as much herbicides as defendants were able to produce.[85]

B. *Commercial Order Is Insufficient*

The defendants' attorneys pointed to the defense of duress as applied in the *Flick* and *Krupp* cases as an available defense for the corporate defendants.[86] While the action ultimately failed because the court held that the laws of war at the time did not (yet) prohibit the spraying of herbicides despite the severe consequences to the life and health of those affected, the brief reasoning of Judge Weinstein in respect of the defense of duress for the alleged corporate wrongdoers shed light on the issue of this defense under ATS.[87] After a careful review of the respective reasoning in the *Flick* and *Krupp* cases, the court correctly noted that "defendants in the case at bar were ordered by the government to produce as much Agent Orange as they could and to promptly deliver it to the government."[88] He stressed that "such a commercial order, even in wartime," in the absence of any pressure hardly constitutes "necessity" under domestic or international law.[89] Accordingly, this recent decision

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[81] *Id*. at 15.

[82] *Id*. at 28.

[83] *Id*. at 29–30.

[84] *Id*. at 31.

[85] *Id*. *See* Dieter Martinetz, *Vom Giftpfeil zum Chemiewaffenverbot—zur Geschichte der chemischen Kampfmittel* 11 *et seq*. (1996); M. Saalfeld, "Umweltschutz in bewaffneten Konflikten aus völkerrechtsgeschichtlicher Sicht", in *2 Humanitäres Völkerrecht—Informationsschriften* 23, 25 (1992); *Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict* 176 *et seq*. (2004).

[86] 373 F. Supp. 2d at 96. The court employed the term "necessity" instead of "duress". For the interchangeable use of the terms in international law, *see supra* accompanying text to notes 21–23.

[87] 373 F. Supp. 2d at 96. For more details on the case, *see supra* Chapter Five: Environmental Destruction.

[88] 373 F. Supp. 2d at 98.

[89] *Id*.

confirms the view that duress is not available for TNCs to defend merely economic interests.

IV. *Conclusions*

The concept of the defense of duress in international law (and domestic concepts of duress and necessity do not deviate from this concept substantially) requires the presence of a threat of imminent death or continuing or imminent serious bodily harm against that person or another person, and that person acts necessarily and reasonably to avoid this threat.

Accordingly, in the context of ATS litigation, the defense of duress is, in principle, available to TNCs to avoid responsibility for violations of international law in connection with their investments in countries where the infringements occurred.

However, given its definition, it is important to stress what the concept of duress does not justify: economic duress or coercion does not amount to duress as a legal defense.

As a consequence, a TNC cannot successfully raise the defense of duress if the mere withdrawal from a market, project, or plant in a given country which may result in the loss of investments and profits is at stake but not the life or limb of management and personnel. ATS litigation has acknowledged this fact, after some doubts and repercussions in the *Unocal* case, in *In re "Agent Orange" Product Liability Litigation* involving the use of herbicide in the Vietnam War which was produced by the American chemical industry.

If human rights of the victims are to be taken seriously, such understanding is the only correct one.

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