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The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence

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THE CORPORATE FACE OF THE ALIEN TORT CLAIMS ACT: HOW AN OLD STATUTE MANDATES A NEW UNDERSTANDING OF GLOBAL INTERDEPENDENCE

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THE CORPORATE FACE OF THE ALIEN TORT CLAIMS ACT: HOW AN OLD STATUTE MANDATES A NEW UNDERSTANDING OF GLOBAL INTERDEPENDENCE

I. INTRODUCTION

In the past thirty-five years, international human rights lawyers and, more recently, international environmental lawyers, have been invoking the Alien Tort Claims Act (ATCA) as a tool to prosecute human rights abuses committed abroad by transnational corporations (TNs) in U.S. federal courts. The ATCA 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." Although plaintiffs' lawyers have experienced some success in the human rights context, most claims of environmental abuses have failed. In all

2. Much debate surrounds the attempt to define transnational corporations. This Comment adopts the flexible definition contained in the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. ESCOR, 55th Sess., 22nd mtg. ¶ 20, U.N Doc., E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter Norms], available at http://www.unhchr.ch/html/menu2/2/55sub/55sub.htm. See generally David Weissbrodt & Muria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 AM. J. INT'L L. 901, (2003). "The Norms are the first nonvoluntary initiative accepted at the international level." Id. at 903. They define a transnational corporation as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." Norms, supra ¶ 20. Notably, the Norms also apply to "other business enterprise[s]," which the working group defined as "any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity." Id. ¶ 21.
5. See Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y., 1991) (dismissing for lack of subject matter jurisdiction a claim brought under the ATCA against a U.S. corporation by a British corporation because the environmental harm—the shipping of hazardous waste to a foreign country without notice or permission—did not constitute a violation of international environmental law); Torres v. Southern Peru Copper, 965 F. Supp. 895 (S.D. Tex. 1995) (dismissing environmental claims); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (dismissing claims of human rights violations, environmental torts, and cultural genocide against
these cases, the reluctance of judges to enforce the ATCA against private actors is palpable and, to some extent, puzzling. The more obvious reasons for this judicial reluctance are tied to separation of powers concerns, particularly the fear of over-involvement in foreign affairs and the resulting embarrassment that may befall the political branches should the judiciary meddle in this area.

Other concerns, however, involve economics more than politics. Court opinions in ATCA cases tend to be extensive and address a breadth of constitutional, prudential and philosophical concerns, often without moving the law of the ATCA toward greater clarity. This analytic confusion derives from the courts' tendency to conflate political and economic concerns as well as jurisdictional and cause of action questions, and their application of an outdated political question doctrine. This confusion has led to a barrage of academic commentary on the role the ATCA should play in many contexts. Most recently the focus has been on how the ATCA might be applied to TNs for violations of human rights and internationally recognized environmental standards. Human rights advocates support expanding its reach to include a wider range of offenses; business interests oppose its application to transnational corporations. The George W. Bush administration (Bush Administration) has supported the latter view, arguing consistently that the ATCA interferes with the executive prerogative in foreign affairs, and that from a legal standpoint the statute grants federal courts jurisdiction but does not grant plaintiffs a private cause of action.

Business interests and the Bush Administration have predicted that dire consequences would flow from the expanded use of the ATCA. The Institute for International Economics (IIE) recently published a treatise entitled *Awakening Monster: The Alien Tort Statute of 1789*.

The first chapter, "Nightmare Scenario," predicts the rapid divestment of TNs in developing countries "with less than perfect observance of individual and labor rights and shortcomings in the realm of political and environmental norms," should these ATCA suits be allowed to proliferate.

Business interests and the Bush Administration collectively charge that

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Freeport-McMoran Copper & Gold, Inc., a Delaware mining corporation, for its activities in the Pacific Rim because Beanan's pleadings did not allege facts sufficient to show that genocide occurred or that Freeport acted in concert with the government, and because environmental abuses do not violate the law of nations); Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001) (dismissing for lack of standing claims brought under the ATCA for environmental abuses resulting from the highly toxic gas leak that killed thousands and injured more than 200,000 people); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (dismissing class action suit brought by citizens of Ecuador under the ATCA against Texaco for environmental abuses in connection with oil drilling on the grounds of forum non conveniens, international comity, and the failure to join indispensable parties); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (holding that plaintiffs stated a cause of action for violations of the law of war, crimes against humanity, racial discrimination and the United Nations Convention on the Law of the Sea, but dismissing the entire suit on grounds that the UNCLS and the racial discrimination claims violated the Act of State Doctrine, and that the political question doctrine barred all remaining claims); Flores v. S. Peru Copper, 253 F. Supp. 2d 510 (S.D.N.Y. 2002), aff'd Flores v. S. Peru Copper, 343 F.3d 140 (2d Cir. 2003).


7. Id. at 1.

8. Id. at 1-2.
these lawsuits are often frivolous or politically motivated. The Bush Administration has further argued that such encroachment into foreign policy undermines long-term U.S. economic and diplomacy interests. In a recent amicus brief filed on behalf of Unocal Corporation in a suit pending against the company for its involvement in the Bhopal gas leak disaster, the Bush Administration and a coalition of national and international business groups echoed these arguments and unequivocally outlined their anti-ATCA stance. Amidst this noise, the U.S. Supreme Court agreed to hear an ATCA case involving a charge by a Mexican national against the U.S. government of arbitrary arrest and detention. The Bush Administration also filed an amicus brief in a different case before the Supreme Court, asking the Court to effectively overturn Filartiga v. Pena-Irala, the landmark case that ushered in the modern era of ATCA human rights litigation. The Bush Administration requested that the Court rule that the ATCA grants federal courts jurisdiction over these claims, but does not grant plaintiffs a private cause of action absent an express congressional directive. The Supreme Court rejected this view but urged the cautious use of judicial discretion in ATCA cases.

12. See Sosa v. Alvarez-Machain v. U.S., 124 S. Ct. 2739 (2004). Twelve groups of amici filed amicus curiae briefs in support of respondents (pro-ATCA); four groups of amici filed amicus curiae briefs in support of petitioners (anti-ATCA). See Sosa v. Alvarez-Machain, No. 03-339, 2003 WL 22429204 at *18 (Oct. 6, 2003). Those filing in support of the respondent included International Jurists; Alien Friends Representing Hungarian Jews and Bougainvillainese Interests; Corporate Social Responsibility Amici; International Human Rights Organizations and Religious Organizations; Women's Human Rights Organization; Center for Justice and Accountability; National Consortium of Torture Treatment Programs and Individual ATCA Plaintiffs; Professors of Federal Jurisdiction and Legal History; the World Jewish Congress and the American Jewish Committee; Career Foreign Service Diplomats; the Presbyterian Church of Sudan and Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church; National and Foreign Legal Scholars; and the Lawyers Committee for Human Rights and the Rutherford Institute. Id. Those filing in support of the petitioner included International Jurists; Alien Friends Representing Hungarian Jews and Bougainvillainese Interests; Corporate Social Responsibility Amici; International Human Rights Organizations and Religious Organizations; Women's Human Rights Organization; Center for Justice and Accountability; National Consortium of Torture Treatment Programs and Individual ATCA Plaintiffs; Professors of Federal Jurisdiction and Legal History; the World Jewish Congress and the American Jewish Committee; Career Foreign Service Diplomats; the Presbyterian Church of Sudan and Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church; National and Foreign Legal Scholars; and the Lawyers Committee for Human Rights and the Rutherford Institute. Id. Those filing in support of the petitioner included the Washington Legal Foundation, National Fraternal Order of Police and Allied Educational Foundation; National Foreign Trade Council, USA*Engage, the Chamber of Commerce of the U.S., et al.; the Pacific Legal Foundation; and the National Association of Manufacturers. Id. The European Commission filed an amicus brief on behalf of neither party. Id.
13. U.S. Brief in Unocal, supra note 11, at 1-5.
14. Id.
15. Sosa v. Alvarez-Machain, 124 S. Ct. at 2761. Petitioners asked the court to rettool the now thirty-year approach of the circuit courts to ATCA cases partly in an attempt to quell suits against TNs. In particular, the Bush Administration argued that ATCA claims encroach on the ability of the political branches to conduct the war on terror by undermining the ability of the executive to definitively set foreign policy, compromise, and negotiate. Brief for U.S. in Alvarez-Machain, supra note 9, at 13-14. Furthermore, the Administration argued, as it consistently has,
Human rights advocates view the ATCA as a more benign tool, one that balances profit-making and morality and does not represent judicial interference with the powers constitutionally committed to the political branches. Even among human rights advocates, however, there is much disagreement. In the idealist tradition, natural law adherents argue that human rights are the baseline from which all international policy should be made. They emphasize "the ideal of constraints on the exercise of power and the importance of world cooperation." Realists, by contrast, "focus on power as the dominant feature of international relations." Neither side can fully come to terms with the role a statute like the ATCA should play in the enforcement of human rights worldwide. For idealists, the assertion in U.S. courts of jurisdiction over offenses occurring in other countries represents that international law itself does not grant a cause of action and the ATCA is therefore only a jurisdictional statute. Id. at 10-11. The Supreme Court rejected the Bush Administration's cause of action analysis, holding that the statute both grants jurisdiction and furnishes a cause of action for a limited universe of international law offenses. Sosa v. Alvarez-Machain, 124 S. Ct. at 2758-59. The Court limited the types of cognizable offenses to those that are as clearly defined and specific as those existing at the time of the enactment of the ATCA in 1789—offenses against ambassadors, violations of safe conduct, and actions arising out of prize captures and piracy. Id. at 2759, 2761. Although the Court held that the claim in the present case, arbitrary arrest and detention, was not sufficiently definite to be cognizable under the ATCA, it affirmed the general Filartiga approach to ATCA cases, stating that although the [ATCA] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time. Id. at 2761. The statute, then, implicitly grants discretion under common law principles in federal courts to recognize (or create) new causes of action. See id. But see Sosa v. Alvarez-Machain, 124 S. Ct. at 2772-73 (Scalia, J, concurring) (arguing that no such discretion to infer new causes of action remains with federal courts in the post-Erie era). Still, the majority opinion urged extreme caution, observing that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind" and that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" recognized in the opinion. Id. at 2761-62.

Noteworthy for those bringing cases against TNs is the acknowledgement that the ATCA allowed for actions against private actors from the very beginning. See id. at 2761. This should quell, to some degree, the insistence by ATCA opponents that the subjects of international law are exclusively nation-states and not private citizens. See id. For further discussion of the application of international law principles to private citizens, see Beth Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DePaul L. Rev. 433 (2002) (critiquing the traditionalist position as blind to the important place individuals have held in the long history of international law) [hereinafter Stephens, Individuals].


18. Id. at 250.
anti-cooperative behavior. Although it advances human rights ideals, it does so in a unilateral manner. For realists, ATCA suits conflict with the goal of maintaining U.S. power by undermining U.S. corporate and economic dominance. Furthermore, if these suits are pursued equitably—both against U.S. and foreign corporations—they will at times undermine U.S. interests, undercutting the pragmatist view of a world predicated on power struggles.

Another level of the debate comes from traditionalists. They argue that international law exists primarily to regulate nation states. International law under this theory functions on the necessary premise that organized state actors are the only cognizable players in the international system. Although the individual has historically been subject to international law, traditionalists argue, this has been only in exceptional circumstances, such as piracy, and only when the individual action proved to be a threat to the international system of organized nation-states. Traditionalists also point out that since the nineteenth century, the power in international law has rested largely with nation-states, which have collectively agreed to recognize and respect each others' concurrent authority as superior to the authority of the individuals that comprise each nation-state.

20. See id.
21. See id. at 449. While Stephens argues forcefully for the role of the individual as both a subject and object of international law, her examples of the historical right of individuals to bring claims or to be sued for violations of international law are limited to piracy and slave trading. Id. She also highlights the fact that after Nuremburg, "international law recognized that individuals have the right to protection from their own government." Id. Stephens also concedes that by the nineteenth century, "[P]ositivists dismissed the moral, natural law basis of international obligations" and "gradually redefined [international law] to focus on state-to-state relations." Id. at 448.
22. See id. at 447-49. Stephens highlights the pre-nineteenth century commitment to individual rights under international law:

Ancient scholars had little difficulty understanding the role of individuals within international law. Viewing international law as originating in part from religious or natural law sources, they recognized that such norms applied directly to govern the conduct of individuals. Through the end of the eighteenth century, international norms and sanctions were viewed as founded upon religious belief as well as social custom and reason. This set of sources led to the all-encompassing system of international rules described by William Blackstone as founded upon "maxims and customs... of higher antiquity than memory of history can reach" and construed by reference to "the law of nature and reason, being the only one in which all the contracting parties are equally conversant and to which they are equally subject." These rules governed all interactions among foreign states and their citizens, not just between sovereign states.

Id. at 446 (footnotes omitted). Despite the individual's place in the pre-nineteenth century scheme, when the portion of Blackstone's Commentaries, quoted by Stephens in her article, is examined closely, it too reinforces the primacy of the nation-state:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.

Id. Here, individuals are mentioned in a subordinate clause, which reads like an afterthought, suggesting that the importance of the individual is subordinate to that of the nation-state.
In the middle of this polarized debate over competing theories of the role of U.S. courts in enforcing international law sit the judges, who must situate themselves between theory and reality. They confront the competing interests of the litigants, the demands of the Constitution, the pronouncements of the executive branch, their own conception of the role of the courts in enforcing international law, and the emotional appeals of the victims and their families. Amidst such complexity, judges have to decide cases in ways that do not understate or overstep the power of the court. Through this lens, judges interpret international law, consider whether the U.S. forum is most appropriate, and wrestle with court-created doctrines of restraint. In dealing with both forum non conveniens objections and political question concerns, in particular, courts continue to reposition themselves in relationship to the political branches. Underlying these decisions always remain the larger questions of whether and where these cases should be heard. Courts’ answers to these questions reveal the theories that inform judicial rulings in the international context.

Under current ATCA litigation, to be held liable for violations of international law, a corporate actor must be acting under color of state authority. Thus, individual (corporate) accountability is still dependent upon the basic component of nation-states, because the existence and power of nation-states is what makes the international system make sense. But the current reality of the international economic system does not fit this paradigm. TNs often possess far greater power than nation-states, yet they have no recognizable borders nor are they answerable to any one sovereign authority. They may be answerable in part to many different

23. Ratner, Corporations, supra note 16, at 465-66. Ratner points out that although the Nuremburg trial “destroyed any notion that only states had rights under international law (or, in other words, that states had duties only to other states), it did seem to rest on the premise that the rights individuals have are principally against states.” Id. “This seemingly originalist position regarding human rights,” he notes, “emphasizes that international law should distinguish between, on the one hand, ordinary crimes (e.g., murder) or torts (e.g., slander) between private actors—which are outside its province and belong to domestic law—and, on the other hand, governmental action, which is the true subject of international law.” Id. at 466. Ratner counters this originalist position by noting that international law already imposes duties on individuals to refrain from the most egregious abuses—e.g., slavery, piracy, and genocide. Id. at 466-67. He goes further, however, and recognizes that application of human rights law represents an extension of traditional principles, but one that is both legally and morally justifiable. Id. at 467. First, he asserts, rights precede duties. That is, if the international community has recognized the right of individuals to be free of torture and slavery (for example), then there is no limit on those who may hold a duty to respect that right. Id. at 468. Furthermore, even if one begins from a duty-based framework, such as a Kantian theorist would, the “dutyholders still encompass a broad range of entities.” Id. Finally, from the natural rights perspective, it is clear that Locke never saw human rights as only against the state. Id. Over time, however, as power became concentrated in the state, the assertion of those rights against the states became more common and led to the currently flawed assumption that these inherent rights were only assertable against the state. Id. at 468-69.

authorities, but there is no final law the international community can point to that regulates this actor.25

The distribution of power, therefore, has shifted, yet the legal community has devised no systematic way of accounting for this shift and adjusting the law accordingly.26 Moreover, no framework exists within which nation-states can manage non-state actors possessing more power than the nation-states themselves.27 Only subconsciously aware of this, courts frequently dismiss ATCA cases on any number of grounds—no cause of action, presence of a nonjusticiable political question, forum non conveniens28—in part because they feel comfortable and legally justified in constructing arguments around the sanctity of the sovereign authority of each state to prosecute harms that occur within its borders.29 Judges often dismiss these cases without recognizing that the very legal problem they confront

   The transnational activity of corporations implicates a home country and a host country, each with their own interests. These interests, and the legal control of each country over a corporation, are not perfectly aligned, so at times the countries’ jurisdictions overlap and there is a jurisdictional lacuna where the corporation is not subject to any law. In the case of many resource-extraction firms, the host government will not upbraid the foreign MNC for actions that the government is involved in, while the MNC’s [multinational corporations] home courts are unlikely to engage in extraterritorial control. In other words, in many instances where a developing host country is eager to attract corporate capital and expertise and, for various reasons, does not (or cannot) subject corporate conduct to judicial scrutiny, a corporation acts without any legal control, domestic or international. The long and short of it is that the legal status of the MNCs under international law has not advanced significantly in the quarter century since the International Court of Justice despaired of finding suitable international legal principles for addressing the litigation surrounding the Barcelona Traction company and simply decided that famous case on the basis of domestic laws. Id. at 86-87 (footnotes omitted).

26. Developments in the Law: International Criminal Law, 114 HARV. L. REV. 1943, 2030-31 (2001). This article points out that although states were traditionally viewed as the only subjects of international law,
   [i]t is now generally accepted that individuals have rights under international human rights law and obligations under international criminal law. This redefinition, however, has occurred only partially with respect to legal persons such as corporations: international law views corporations as possessing certain human rights, but it generally does not recognize corporations as bearers of legal obligations under international criminal law. The absence of criminal liability results mainly from the different approaches that national legal systems have taken to corporate criminal liability. Although many common law and some civil law jurisdictions recognize corporate criminal liability, many do not.
   Id. (footnotes omitted).

27. Rishikof, Janusism, supra note 17, at 248. Rishikof observes that “[t]errorist groups, as NGOs, have called into question both domestic and international structures since they involve non-state actors with multiple nationalities (including US citizens and aliens), loose affiliations or networks involving criminal law, armed conflict conventions, and national security violations.” Id. TNs present similar problems and challenge the international system in a parallel fashion. It is the very multi-state character of TNs that makes private international law incapable of dealing with them, partly because such litigation generally involves one country trying to prosecute a foreign corporation within its own borders for violations that impact the host country.

28. See sources cited supra note 5.

29. See infra Part II.B for a general discussion of the traditional bases of jurisdiction under international law.
stems from the fact that power in the international system has to some extent been stripped away from nation-states. Despite this reality, courts still conceive of international law as resting on the old assumptions of power distribution.

Application of the ATCA to corporations in this new context is compelling courts to change the international law paradigm. As with any paradigm shift, there is understandable resistance and confusion. Rather than reifying existing economic structures, greasing the wheels of commerce, and ensuring the collective security of organized nation-states, ATCA litigation in the corporate context asks that the law acknowledge corporate actors as subjects of international law and to prioritize individual dignity as a goal of international law. It challenges traditional assumptions by insisting that international law is not exclusively about maintaining the power of individual nation-states and facilitating commerce (which also maintains the power of the status quo) and compels those involved in the system of international law to unpack these assumptions and their effects and forge a new paradigm.30 When courts talk of deference to separate branches of government, or deference to sovereign nations, they are accepting the old paradigms—when nation-states were the primary actors on the international scene worthy of legal recognition and thus all other interests were subordinated to the maintenance of the system of nation-states. In that system, the executive branch was supposed to be the primary enforcer of international law because it, by Constitutional directive and prudential conclusions, shaped foreign policy and molded foreign relations.

This Comment offers a different way to conceptualize these questions in the context of ATCA litigation against corporate defendants. Rather than focus on the traditional arguments about this law—what the First Congress intended, whether it provides a private cause of action, which law applies and to whom—it will focus on the issues underlying those questions. This comment seeks to contribute to the debate over the ATCA by focusing on judge-made doctrines as they are applied to ATCA suits involving corporate defendants and suggests ways in which such doctrines might be shifted or refined to account for the new legal and economic realities of globalization. Part II outlines the history of and the debate over the use of the ATCA. Part III reviews application of the ATCA to corporate defendants and identifies three barriers ATCA plaintiffs face in the corporate context—the limited liability inherent in the corporate form and the added protection given corporations by the state-actor requirement, the forum non conveniens doctrine and the political question doctrine. Part IV draws lessons for U.S. judges from Belgium’s experience with its universal jurisdiction law and from this country’s precedent in matters concerning piracy law. When updated to account for the reality of economic globalization, both models can assist judges in reviewing ATCA claims against corporations. Part V concludes by commenting on the problem with current legal thinking and the ways it has begun and should continue to shift in order to account for the realities of globalization.

Overall, this Comment argues that the ATCA forces courts to reassess their assumptions about the distribution of power, in both domestic and international arenas, and come to a more balanced assessment of the proper role of U.S. courts.

30. This process is particularly difficult from the vantage point of the most powerful country on earth. The United States clearly has an interest in retaining the existing power structure and reifying those tenets of international law that support its place in the global system.
in the enforcement of international human rights norms. Because individuals and non-state actors are increasingly subjects of private international law, and because national borders are now porous and diffuse, U.S. courts, at least in the short-term, should assert the rule of law in ATCA cases as a form of "soft power" in an increasingly interdependent, globalized world in which the exporting of capitalism has led to the dominance of corporate wealth and the supplanting of nation states by non-state actors seeking private gain.

II. A History and Overview of ATCA Litigation

A. Background

For the 190 years following the passage of the ATCA, the statute was invoked only twenty-one times, remaining an unremarkable provision of the Judiciary Act of 1789. In the past twenty-four years, however, the ATCA has been invoked and led to published decisions in about eighty cases. Its original passage was prompted by circumstances or purposes that legal historians seem unable to agree upon. Many who oppose current uses of the ATCA argue that current

31. See Rishikof, Janusism, supra note 17, at 275-76. Rishikof describes international theorist Joseph Nye's conception of hard and soft power. "Soft power involves the ability to influence action through the institutionalization of the value of liberty, human rights, and democracy." Id. at 275. Currently, soft power is applied in cultural institutions, such as universities, "cultural exports . . . and international organizations." Id. Institutionalizing soft power requires that tribunals of some sort be available to enforce the rules. Id. at 276. Rishikof points out that if a world power like the United States and those international institutions dominated by the U.S. stand on the sidelines as human rights abuses occur, "the morality of the system will be called into question." Id. He also notes, however, that "[h]aving only one state actor, or having only one state's courts be the sole forum for redress, will breed deep resentment no matter how well-intentioned." Id. This points to the ultimate wisdom of an international tribunal for the adjudication of corporate international law that is binding on TNs.

This Comment attempts to offer a vision of the ATCA that can be applied presently but does not suggest that this is the ideal legal enforcement mechanism. Ultimately, an international tribunal, binding on all signatories, should be established to police the conduct of TNs. See id. To date, however, multiple nonvoluntary codes of corporate conduct have emerged as regulatory mechanisms. Recently, a binding code of corporate conduct was issued by the U.N. See Weissbrodt & Kruger, supra note 2, at 903, and accompanying text. The ATCA, therefore, brings redress to victims of human rights violations in a lawful manner during this transitional period and marks the emergence of new international regulatory structure. See generally Rishikof, Janusism, supra note 17, at 251.

34. See Stephens, Individuals, supra note 15, at 437.
35. See William S. Dodge, The Historical Origins of the Alien Tort Claims Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221 (1996) (arguing that legislative and constitutional history support the notion that the ATCA grants courts both jurisdiction and provides a cause of action, as found in the law of nations, which should be discerned by the courts and applied to each case). But see Bradley, Article III, supra note 33, at 590-91 (arguing that the ATCA provides only jurisdiction; a cause of action may only be defined by Congress—not the judiciary—as Congress so chooses to interpret international law and explicitly make it part of domestic law).
applications run far afield of the framer’s intent. 36 Both sides of the debate are able to find indirect support for their argument in historical documents and early case law, but most acknowledge the lack of a clear statement of congressional intent. Indeed, discerning the ATCA’s original intent has become fodder for extensive academic commentary that has attempted to fill in gaps in legislative history. 37 In the end, the only thing these commentators seem to agree about is that the precise role the ATCA should play continues to elude jurists and commentators alike. 38

Unlike the general grant of federal subject matter jurisdiction, 39 the ATCA has been read both to confer jurisdiction and grant a cause of action if a violation of the law of nations or a treaty can be shown. 40 Some argue that the statute confers only jurisdiction and no cause of action, but this is a minority view. 41 The narrowest reading of the statute states that is does nothing more than grant federal courts jurisdiction over these types of suits, which means a cause of action will only lie if Congress has explicitly defined a violation in a separate statute. 42 A slightly broader construction would allow the statute to cover only the causes of action recognized by the framers in 1789. 43 Those advancing this theory invoke


37. See, e.g., supra notes 34-35, notes and accompanying text.


40. In Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), Judge Edwards and Judge Bork fundamentally disagree as to whether the ATCA confers a cause of action. Judge Bork interprets section 1350 to be strictly a grant of jurisdiction, like section 1331, and insists that plaintiffs must locate a cause of action under the law of nations or in another congressional statute. Id. at 777. In contrast, Judge Edwards adopts the “Filartiga approach” and finds the ATCA to grant a right to sue as well as jurisdiction. Id. at 776-77. Judge Edwards points to the fact that international law does not mandate a particular reaction to violation, but instead leaves the specifics up to each individual country. Id. at 777-78.

41. Compare Bradley & Goldsmith, supra note 36 (arguing against the “modern position” and asserting that customary international law should not be incorporated into federal common law absent explicit congressional mandate) and Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2769-76 (2004) (Scalia, J. concurring), with Dodge, supra note 35 (arguing that the ATCA does provide for both jurisdiction and a cause of action under customary international law, and that customary international law is part of the federal common law that may be interpreted and applied by courts even in the absence of legislation explicitly incorporating it into U.S. law).

42. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 799 (Bork, J., concurring); see also Michael T. Morely, The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism, 112 Yale L.J. 109, 118-19 (2002) (arguing that the “law of nations” is not synonymous with “international law” or “customary international law”; it does not include agreements or norms that address a country’s treatment of its own nationals nor does it evolve with time; instead, the law of nations is more akin to natural law and is therefore static and unchangeable and cannot, as the Filartiga formulation suggests, evolve over time). Moreover, notes Morely, “[b]ecause of the immutable nature of the law of nations, the Offenses Clause, unlike other constitutional provisions, was not expected to evolve with time.” Id. at 119.

43. See Tel-Oren v. Libyan Arab Republic, 726 F.2d at 815 (Bork, J., concurring). Here Judge Bork, while arguing the statute only grants jurisdiction, concedes that the framers may have intended to make law of nations grievances recognized at the time—namely the infringement of the rights of ambassadors and piracy. Id.
Blackstone’s definition of the “law of nations” as encompassing only “a limited universe of seriously egregious infractions.” A broader position still would have courts treat customary international law as general law, “a third category of law, neither state nor federal in nature.” Professor Bradley argues that the law of nations portion of the ATCA was simply intended to implement Article III alienage jurisdiction, and that the First Congress “implicitly intended to limit the Alien Tort Statute to suits involving at least one U.S. citizen defendant.” Again, it remains unclear what types of offenses Congress intended to bring within its scope.

In 1980, the Second Circuit in *Filartiga v. Pena-Irala* offered a broad interpretation of the ATCA. This formulation would have courts embrace international law as part of federal common law, holding that international law consists of those rules that “command the ‘general assent of civilized nations.’” Evidence for such rules can be found “by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” In a much earlier case, Justice Story explained that “every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations.” Moreover, modern courts have tended to view the law of nations as “embracing modern international legal understandings.” The *Filartiga* court conceived of international law as evolving, and mandated that “courts . . . interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” This formulation of the nature of the law of nations is the most widely accepted among courts today.

Congress ratified the *Filartiga* decision when it passed an amendment to the ATCA in 1992, the Torture Victim Protection Act (TVPA). By enacting the TVPA, “Congress expressly intended both to codify and to extend to [U.S.] citizens the Second Circuit’s holding in *Filartiga*.” The accompanying legislative history to

49. *Id.* at 881 (quoting *The Paquette Habana*, 175 U.S. 677, 694 (1900)).
50. *Id.* at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).
53. *Filartiga v. Pena-Irala*, 630 F.2d at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796)).
54. This interpretation seems to have survived the recent Supreme Court case, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763-64 (2004), although the Court urges federal judges to exercise extreme caution when asked to define new causes of action based on the evolution of international law, *id.* at 2764. See *supra* text accompanying note 13.
the TVPA made clear that by its passage Congress did not intend to limit the application of the ATCA to other offenses. The House Report states that Congress wanted to "establish an unambiguous and modern basis for a cause of action" for torture, partly in response to Judge Bork's questioning of the ATCA in Tel-Oren v. Libyan Arab Republic. In spite of the acknowledgment of the debate over whether the ATCA provides a cause of action absent express congressional mandate, the House Report also stated that "[s]ection 1350 has other important uses and should not be replaced." Courts that have addressed the ATCA and the TVPA since the passage of the TVPA "have found them to be complimentary, and have refused, thus far, to view the explicit grant of a cause of action in the case of torture and extra-judicial killings as a reason to require such explicit grants in other cases not concerning torture and extra-judicial killings."

B. Traditional International Law Principles and the ATCA

A word about universal jurisdiction will help explain the jurisdictional confusion that arises when the ATCA is invoked. The statute provides courts with a domestic basis for jurisdiction, but the question remains whether such assertions of jurisdiction—where there may be no clear nexus between the defendant, plaintiff and the United States—run afoul of jurisdictional principles under international law. The basis for international jurisdiction has traditionally been found in the criminal context, and determining which country may assert jurisdiction de-

58. Id. at 3. See discussion of Tel-oren infra Part II.C.2.
59. Id.
60. Jason Jarvis, Comment, A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle, 30 Pepperdine L. Rev. 671, 689 (2003). Based on his survey of legal history, Jarvis argues that the application of the ATCA was not meant to be applied extraterritorially, nor is it in compliance with principles of universal jurisdiction. Id. at 672, 694. Some have called for Congress to amend the ATCA to clarify its basis and the causes of action it is meant to encompass. See Kieserman, supra note 47. Kieserman argues specifically that the current legal bases for prosecuting TNs under the ATCA is dubious, and he proposes that "judge-made federal common law be augmented by amending the ATCA to incorporate specific claims into U.S. domestic law, rather than basing jurisdiction solely on the narrow and subjective legal fiction of universal norms." Id. at 889.
61. Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 786-87 (1988). Because jurisdictional questions in international law have been handled mostly in the criminal context, interesting questions arise as to the wisdom of applying these same doctrines to the assertion of jurisdiction in civil cases. Indeed, the cleaner means to enforce corporate accountability abroad would be to pass a federal criminal law defining specific offenses and the minimum contacts the company must have with the United States in order to allow the U.S. to prosecute these crimes on behalf of the public. As the law currently stands, an alien is granted standing to seek a civil remedy in a U.S. court, and the courts thereby struggle to find applicable international standards to define the "tort in violation of the law of nations" as well as a basis to assert jurisdiction—thus creating a civil cause of action for which courts must then look to international criminal law for applicable standards. Passing a federal criminal statute would make it easier for the courts to apply traditional international jurisdictional principles, including those of universal jurisdiction, to these cases because courts could comfortably rest on international law precedent in so doing. Indeed, the squeamishness on the part of courts in these cases seems to rest partly on the fact that they suspect foreign citizens of bringing suit in the U.S. in order to maximize potential awards, rather than to pursue justice. Further, by merely conceptualizing these offenses as "civil" and not criminal trivializes them, as if to suggest they are not serious enough to be called "crimes," in spite of the fact that the only way
pends "on reconciling a state's interest in a particular offense with other states' interests in the offense."62 In striking this balance, courts have applied either the territoriality principle, the nationality principle, the passive personality principle, the protective principle, or the universality principle.63

The universality principle "provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern."64 Universal jurisdiction focuses on what has been done rather than who committed it or where it was committed. It derives from concepts of natural law, and is supported by international consensus that the specific act is so egregious that it constitutes an offense against all people, which therefore may be prosecuted by any nation.65 The source of this jurisdiction springs from the nature of the act itself and therefore transcends the borders of sovereign nations. Indeed, universal jurisdiction applies to the "easy" cases—genocide, crimes against humanity, torture, and terrorism—acts that are universally condemned, in word if not in deed.

The concept of universal jurisdiction seems to significantly impact the court's analyses under the ATCA. Although the term "universal jurisdiction" never explicitly arises in ATCA cases, because the statute itself is jurisdictional, the basis for international jurisdiction under international law lurks in the background. If an international law violation is found in an ATCA case, then the court has jurisdiction under the ATCA. However, such automatic jurisdiction may not comport with traditional jurisdictional principles under international law.66 That is, without the ATCA, no other basis for jurisdiction exists under international law; the traditional nexus between the forum and the offense often does not exist, and by definition the victims are never U.S. citizens.67 Thus, even though expressly told to assume jurisdiction by Congress, judges place onerous threshold requirements on plaintiffs in ATCA cases in an attempt to avoid overreaching under the rules of international law.68 Put another way, a conflict exists between domestic (ATCA) and international principles of jurisdiction. The insistence that offenses be "clear and unambiguous," for example, derives not from the language of the ATCA but, rather, from case law applying the ATCA.69 This requirement is one way judges reviewing ATCA claims reconcile traditional principles of jurisdiction under international law.

we find a "tort" in violation of the law of nations will be if the court finds that an international crime has been committed. See generally id. at 787 n.7 (citing Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int'l L. 280 (1982) (asserting that public and private international law are based on the same values)).

62. Randall, supra note 61, at 786.
63. Id. at 787-88. The territoriality principle applies when the offense occurs within a prosecuting state's territory. Id. Traditionally, civil cases are left to the discretion of the countries in which those violations occur, to be tried based on that country's domestic law. Id. at 787 n.7 (citing Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 Recueil Des Cours 1, 218 (1957)). The nationality principle looks to the nationality of the offender as the basis for jurisdiction; the passive personality principle focuses on the nationality of the victim; the protective principle applies when "an extraterritorial act threatens the state's security or a basic governmental function." Id. at 787-88.
64. Id. at 788.
65. See id. at 788, 800.
66. See Randall, supra note 61, at 786-91.
67. See id.
68. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).
69. Id.
law with the seemingly broad grant of jurisdiction under the ATCA.

Furthermore, ruling in a particular case could offend a home country (where the harm occurred) or could interfere with diplomatic efforts underway in the executive branch. Notably, however, the minimum contacts requirement of personal jurisdiction ensures that defendants have some contact with the United States. In the corporate context, this means that the parent corporation conducts a sufficient amount of business in the United States to create the nexus that some lament is often missing in ATCA cases.

C. Landmark ATCA Cases: Filartiga v. Pena-Irala to the Present—Evolving and Conflicting Interpretations of the ATCA

1. Filartiga v. Pena-Irala

In this 1980 case, the Second Circuit embraced the notion that federal courts should hear ATCA claims for violation of international law, even if neither party was a U.S. citizen. The Filartiga court's interpretation of the ATCA and subsequent questions raised by Judge Bork and Judge Robb of the D.C. Circuit sparked

70. See infra, Parts III.B., C.

71. See Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (holding that Royal Dutch Petroleum was "doing business" in New York for personal jurisdiction purposes solely on the basis that it maintained agents in New York who worked exclusively on investor relations). "Under New York law, a foreign corporation is subject to general personal jurisdiction in New York if it is 'doing business' in the state." Id. at 95. "Doing business" means the company maintains "'continuous, permanent, and substantial activity in New York.'" Id. (quoting Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1043 (2d Cir. 1990)). In response to the defendants' argument that its investor relations office in New York was not important to the company because it only dealt with investor relations and matters only indirectly related to its core business, the court remarked,

The defendants are huge publicly-traded companies with a need for access to capital markets. The importance of their need to maintain good relationships with existing investors and potential investors is illustrated by the fact that they pay over half a million dollars per year to maintain the Investors Relations Office.

Id. at 96. It is curious that courts will stretch to find minimum contacts under the personal jurisdiction analysis, yet when prudential doctrines arise, they will stretch in the opposite direction—tipping the scales in favor of dismissal and arguing that ATCA cases are problematic precisely because the harm did not occur in the United States (which often morphs into a territorial sovereignty argument).

72. See Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) ("Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan"). Compare with Aguinida v. Texaco, 303 F.3d 470 (2d Cir. 2002) (examining the contacts of U.S.-based Texaco to its partly-owned Ecuadorian subsidiary as a basis for finding liability and dismissing on forum non conveniens ground after finding proper personal jurisdiction); Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997) (finding sufficient minimum contacts to warrant personal jurisdiction but currently considering which standard of vicarious liability should apply in the case). See also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, in which the court responded to defendants' fairness objection to the assertion of personal jurisdiction by repeatedly referencing that "defendants control a vast, wealthy, and far-flung business empire which operates in most parts of the globe" as sufficient evidence of their fairness of being subjected to a New York court's jurisdiction. Id. at 99.

73. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

the modern debate over the original intent and the modern scope of the statute. 75

Dr. Filartiga, a citizen of the Republic of Paraguay and an outspoken opponent of the Paraguayan government, brought an action against Americo Norberto Pena-Irala (Pena), a citizen of Paraguay and the former Inspector General of a local police force, for abducting and torturing Joelito, Dr. Filartiga’s son, to death. 76

When Dr. Filartiga brought criminal charges in a Paraguayan court, his lawyer was arrested and threatened with death. 77 The attorney was subsequently disbarred “without just charge.” 78 At the time the Filartiga case was brought in New York, four years after Joelito’s murder, the criminal case in Paraguay was still pending, and a member of the Pena household, Hugo Duarte, had suspiciously confessed to the murder. 79 Despite his confession, Duarte was never convicted of the crime. 80 It was quite obvious that Paraguay, despite its law against official torture, did not intend to prosecute the crime.

Subsequent to the torture incident, Pena legally entered the United States. 81 When Dolly Filartiga, Joelito’s sister, learned that Pena was in New York, she notified Immigration & Naturalization Service (INS), who arrested Pena and began deportation proceedings. 82 Before deportation actually occurred, Dolly filed a complaint in federal court alleging wrongful death and torture by a state official and seeking compensatory damages, 83 claiming jurisdiction in part under the ATCA. 84

The district court dismissed the case for lack of jurisdiction 85 and suggested that the “law of nations” under the ATCA excluded a state’s treatment of its own citizens. 86 On appeal, the Second Circuit held that the plaintiffs had established a violation of the law of nations. 87 The court emphasized that such sources must be used to determine what the law actually is and not “what the law ought to be,” but concluded that official torture was a violation of the law of nations. 88 In support of this conclusion, the court relied on the U.N. Charter, which sets forth in great detail the definition of torture, the extent of the prohibition against torture, and the forms of redress victims of torture may seek. 89 This Resolution was adopted with-

75. See supra Part II.A for discussion of conflicting versions of “framer’s intent.”
76. Filartiga v. Pena-Irala, 630 F.2d at 878.
77. Id.
78. Id.
79. Id. The implication is that the confession was staged to absolve Pena of the crime. Id.
80. Id.
81. Id.
82. Id. at 879.
83. Id.
84. Id. Plaintiffs claimed jurisdiction under general federal question jurisdiction, 28 U.S.C. 1331, and a cause of action arising under wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and “other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations.” Id.
85. Id. at 880.
86. Id.
87. Id.
88. Id. at 881 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).
out dissent, and specifically defined the obligations of member nations under the U.N. Charter. Although the U.N. Charter is not wholly self-executing, the court noted, the Universal Declaration of Human Rights did not fit into the "dichotomy of 'binding treaty' against 'non-binding pronouncement'"; the Declaration had become an "'authoritative statement of the international community." Because this had gradually become part of state practice, the Declaration had evolved into a norm binding on all states. With the offense clearly defined, multiple treaties and accords indicating international consensus that torture was prohibited, and states in fact enforcing that prohibition, the *Filartiga* court concluded that international law clearly prohibited torture. The plaintiffs made out a threshold case for violation of the law of nations, and the court could properly take jurisdiction under the ATCA.

The executive branch reinforced this interpretation of international law in a joint Memorandum of the Justice and State Departments to the court, which described the "universal abhorrence" to torture. The government's assertions were based on diplomatic exchanges between embassy personnel, and suggested that countries that do engage in torture do so without sanction, fully aware of the universal prohibition. This awareness of the prohibition, in spite of the existence of state practices to the contrary, suggested that states have agreed to abide by this rule. Based primarily on the practice of nations, the United Nations convention on the Law of the Sea (UNCLOS) agreement and the concurrence by the executive branch, the *Filartiga* court resoundingly declared that "[t]he prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."

The *Filartiga* court also embraced international law, declaring that the "constitutional basis for the Alien Tort [Claims Act] is the law of nations, which has always been part of the federal common law." The court pointed out that common law courts regularly adjudicated "transitory tort claims"—torts between individuals over whom the court had personal jurisdiction regardless of where the tort occurred—and this, combined with the "articulated scheme of federal control over external affairs" supported the claim that federal courts have jurisdiction over violations of international law committed abroad. To support its contention that international law is part of federal common law, the *Filartiga* court cited

90. *Id.* at 883.
91. *Id.* (quoting E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 70 (1964)).
93. *Id.* at 878.
94. *Id.* at 884.
95. *Id.* at 884 n.15 (citing J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 4-5 (1944)).
96. *Id.* at 884. With regard to the position of the U.S. government, the court later stated that the many treaties it cites in the opinion,
as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.
*Id.* at 884-85 (footnote omitted).
97. *Id.* at 885.
98. *Id.*
Blackstone’s Commentaries, a decision of the Pennsylvania Court of Oyer and Terminus at Philadelphia under the Articles of Confederation, and a law review commentary on the subject.99 The idea of incorporating international law into the law of the land sprung from “the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries.”100 The court insisted that incorporation of international law into domestic law is consistent with the Framers’ intent and with early decisions applying international law.101

The court also rejected the argument that Congress must expressly define the international law violation before it can be enforced in U.S. courts, calling it “extravagant,”102 and citing the Supreme Court cases Ware v. Hylton,103 The Paquete Habana,104 and Banco Nacional de Cuba v. Sabbatino105 as support. The Filartiga

99. Id. at 886.

If we are to understand the plan for “a more perfect union” which a constitutional convention was soon to produce, it is essential that we recapture something of the ideological climate of the time. It was late in the eighteenth century. Excepting only the ideals of religion, there were probably no ideals of such impact upon the minds of men as the ideals of law. Leaders in law had a knowledge of contemporary legal thought and of the great legal systems which has rarely been equaled [sic] since in this country. It was axiomatic among them that the Law of Nations, applicable to individuals and to states, was an integral part of the law which they administered or practiced. The great principles of the Declaration of Independence were indisputably legal principles. “Full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do” came straight from that universal jurisprudence which had been elaborated in the treatises of Grotius, Pufendorf, Burlamaqui, Vattel and others. These treatises were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century. It will be remembered that a majority of the delegates to the convention soon to be convened were lawyers and that among the more influential were many of an enviable learning. Whenever in terms or by implication they spoke or wrote with reference to the Law of Nations, they were indulging no mere flights of hopeful rhetoric... [T]here appears to have been an impressive measure of agreement at the outset that the Law of Nations and treaties must be the subjects... of a paramount national concern.

Dickinson, supra, at 35-37.

102. See also Ex parte Quirin, 317 U.S. 1 (1942). In determining whether Congress had provided for the establishment of military commissions, the Court noted that Congress included “all offenses which are defined... by the law of war.” Id. at 30. The Court observed, “Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter.” Id. In an accompanying footnote, the Court compares this provision in the Articles of War with the ATCA, suggesting that the ATCA also represented a conscious choice by Congress to allow the offenses therein to be defined by the law of nations, just as Congress allowed the offenses which may be tried by military commissions to be defined by the law of war. See id. at n.6.

103. Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796).
104. The Paquete Habana, 175 U.S. 677 (1900).
court relied on the Supreme Court's express rejection of this argument in *U.S. v. Smith.* Notably, the court observed that questions of federal jurisdiction—and not just questions involving the content of international law—must be considered as part of an evolutionary process that may change over time.

There are several things worth noting about the *Filartiga* decision. First, the court relied heavily on the fact that the crime of torture was exceedingly well-defined in international treaties and agreements. Second, the court knew that the Executive and Legislative branches agreed with its construction of the ATCA and the role of international law in domestic courts in general. Third, the opinion rested on the assumption that the framers intended that international law be part of U.S. law, and that our courts had a duty to enforce international law. Finally, it underscored in emphatic, idealistic terms the importance of human rights:

In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. [This decision is] a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

2. The Post-Filartiga Debate: *Tel-Oren v. Libyan Arab Republic*

Several landmark decisions followed in the decades after *Filartiga.* The first, *Tel-Oren v. Libyan Arab Republic,* laid out the debate over interpretation and application of the ATCA in the context of a terrorism case. Survivors and representatives of those murdered in an armed attack on a civilian bus by members of the PLO brought suit in federal court against the Republic of Libya and various Arab organizations, seeking damages for the alleged torture and murder of civilians by a state organization acting for political purposes. "Most of the victims of the attack were Israeli citizens, but a few were American and Dutch citizens." Plaintiffs sued in federal court, claiming this attack violated the international prohibition against torture and murder, and alleging jurisdiction and a right to sue under the ATCA. On appeal, the D.C. Circuit addressed only the issue of whether the plaintiffs alleged sufficient facts to meet the threshold jurisdictional requirements. Each of the three judges on the panel held that the case should be dismissed, but on different grounds.

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107. *Filartiga* v. Pena-Irala, 630 F.2d at 887, n.20. Specifically, the court relied on Chief Justice Marshall's assertion that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *Id.* (quoting *The Charming Betsy,* 6 U.S. (2 Cranch), 34, 67 (1804)).
108. *Id.* at 890.
110. *Id.* at 776.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 775.
Judge Edwards affirmed the legal principles articulated in *Filartiga* but dismissed the case on a factual distinction between it and *Filartiga*. While the defendant in *Filartiga* was acting under color of state authority, the PLO in this case was not a state actor and thus could not be liable for the crime of torture under international law—an early version of the debate in many current ATCA claims against corporations. Judge Edwards admitted this point was hotly debated, but he was unwilling to extend liability to non-state actors absent a Supreme Court directive. Judge Edwards acknowledged the current “mix of views about private party liability,” but also admitted that that throughout the eighteenth and into the nineteenth century, most “believed that rules of international law bound individuals as well as states.” Because he saw backtracking on individual liability in the twentieth century, however, Judge Edwards refused to extend liability on the facts of *Tel-Oren*. Only piracy, slave trading, and “a handful of other private acts” survived the “19th century swing toward statism,” he argued, and therefore there simply was not sufficient consensus on the rule against non-official torture to warrant its application to the PLO.

Judge Bork’s opinion revealed his hostility toward ATCA litigation. Bork argued that federal common law neither explicitly nor impliedly granted a cause of action for violations of international law. He based this conclusion on separa-

115. *Id.* at 798 (Edwards, J., concurring). Judge Edwards agreed with the following four propositions derived from the *Filartiga* decision: (1) the law of nations is not stagnant and should be construed as changing organically with changed perceptions of international law; (2) the customs and usages of “civilized nations” serves as one source of international law; (3) modern international law proscribes state-sponsored torture, conferring a fundamental right on people to be free from torture; and (4) the ATCA allows federal courts to adjudicate rights already recognized by international law. *Id.* at 777.

116. *Id.* at 795 (Edwards, J., concurring).


119. *Id.* at 794 (Edwards, J., concurring).

120. *Id.* (Edwards, J., concurring).

121. *Id.* at 794-95 (Edwards, J., concurring).

122. *Id.* at 794 (Edwards, J., concurring). Judge Edwards also dispensed with Judge Bork’s argument that § 1350 is nothing more than a jurisdictional grant. *Id.* at 779-80, nn.3-4 (Edwards, J., concurring). Judge Edwards compared “arising under” jurisdiction in § 1331 with § 1350. *Id.* at 779 (Edwards, J., concurring). Applying the policy of plain language, Judge Edwards pointed to the fact that Congress knew how to grant jurisdiction because it had done so in § 1331. *Id.* (Edwards, J., concurring). In § 1350 (the ATCA), however, Congress chose to require only a “violation of the law of nations” to confer jurisdiction on the federal courts. *Id.* (Edwards, J., concurring). Given that international law itself does not create a right to sue because that can only be granted under municipal law, the different wording in § 1350 suggested to Judge Edwards that Congress fully intended to grant a cause of action for any violation of the law of nations through § 1350. *Id.* (Edwards, J., concurring). Presumably, the alternative would have been to provide a cause of action “arising under” international law as *defined by Congress*, had Congress meant to so limit the statute. See *id.* (Edwards, J., concurring).

Additionally, congressional silence in the face of ATCA litigation—the fact that Congress has not attempted to amend or limit the ATCA in any substantial way since its passage in 1789, even after the *Filartiga* decision—suggested to Judge Edwards congressional acquiescence in the court’s current application of the ATCA. *Id.* at 779-80 (Edwards, J., concurring).

123. *Id.* at 801-08 (Bork, J., concurring).
tion of power principles and asserted that deciding whether there was a cause of action for a particular plaintiff required an analysis similar—but not identical—to that required by the political question doctrine and act of state doctrine.\textsuperscript{124} He conceded that his conclusion could also have been based, as was Judge Robb’s, on the political question doctrine, but he admitted “[i]t is probably better not to invoke the political question doctrine in this case, . . . [because] the contours of the doctrine are murky and unsettled.”\textsuperscript{125} Thus, Judge Bork conducted one general survey of separation of power principles and their application to the ATCA. Citing the factors “‘counseling hesitation in the absence of affirmative action by Congress’” described in \textit{Bivens}, Judge Bork emphasized the separation of powers concerns that arise in the field of international relations.\textsuperscript{126} In short, to rule on the \textit{Tel-Oren} case would require, among other things, a determination of the status of the PLO, whether PLO attacks on Israel were unlawful, and whether international law proscribed terrorist acts such as this one, even by non-state actors—subjects that Judge Bork felt were not within the court’s province.\textsuperscript{127}

Bork made interesting use of the lack of legislative history surrounding passage of the ATCA. He admitted there was little to no clear indication of the First Congress’s intent, surveyed what little history there is to suggest the statute was used very narrowly, and then asserted that courts that interpret the statute in a way that differs from his create “substantive law” and usurp the role of the legislature.\textsuperscript{128}

> When courts go beyond the area in which there is any historical evidence, when they create the substantive rules for topics such as that taken up in \textit{Filartiga} or in Judge Edwards’ formulations, then law is made with no legislative guidance whatsoever. When that is so, it will not do to insist that the judge’s duty is to construe the statute in order not to flout the will of Congress. On these topics, we have, at the moment, no evidence what the intention of Congress was. When courts lack such evidence, to “construe” is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend.\textsuperscript{129}

Although Judge Bork admitted that the statute can be read in at least three ways, he insisted that to read it in any way but his would amount to legislating.\textsuperscript{130} His

\textsuperscript{124} Id. (Bork, J., concurring).
\textsuperscript{125} Id. at 801 n.8 (Bork, J., concurring).
\textsuperscript{126} Id. at 801 (Bork, J., concurring) (discussing \textit{Bivens} v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)).
\textsuperscript{127} Id. at 798-823 (Bork, J., concurring).
\textsuperscript{128} Id. at 815-16 (Bork, J., concurring).
\textsuperscript{129} Id. at 815 (Bork, J., concurring).
\textsuperscript{130} Id. at 804 n.10, 815 (Bork, J., concurring). Interestingly, Judge Bork spent a great deal of time construing and interpreting the history he admitted was lacking or was ambiguous. He made speculative statements and selected commentators whose viewpoints reflected his own without addressing alternative explanations. When discussing the role of individuals in international law, for example, he insisted that they have never had more than a “derivative role in the vindication of their legal rights.” Id. at 817 (Bork, J., concurring). This, Bork asserted, stems from the traditional view that international law applies only to the conduct of states. Id. (Bork, J., concurring). But in making such statements he ignored the long history of \textit{jus cogens} violations, which have held individuals accountable under international law principles for piracy and slave trading. He also ignored the assertion by many historians that eighteenth century thinking, in its reverence for the rule of law, presumed individuals were subject to natural law, embodied in international law. This was the perspective of many of the delegates to the Constitutional Convention. See generally Dickinson, supra note 101, at 35-37.
reading concluded that the statute covers only a limited set of tort actions by aliens that do not adversely affect foreign policy. 131 His somewhat disingenuous rant against judicial activism, however, highlights valid judicial concerns that are heightened by the international impact of ATCA decisions. Passing on international law can result in both domestic and global lawmaking, which raises the stakes and adds a whole new dimension to the phrase "judicial activism." 132

In the third and final concurring opinion in Tel-Oren, Judge Robb rested disposition of the case squarely on the political question doctrine and asserted that federal courts should not rule on such cases. 133 For the court to even bandy about a discussion of whether the PLO was a state for purposes of the statute, Robb observed, was to give the PLO more recognition than the executive branch ever had, and that alone represented an unconstitutional usurpation by the judiciary of executive power. 134 For Judge Robb, terrorism presented questions for which there existed no judicially manageable standards, and for which courts could not, in practical fact, exert their power in any meaningful way. 135 After all, what effect would a court order have on the PLO? Would they willingly submit to discovery or even acknowledge the power of the court in the first place? Filartiga was a rather easy case, Robb argued, because there were no objections from either the U.S. or the Paraguayan governments, and because it did not embarrass any branch of either government. 136 In this case, however, no limiting principles existed that could be applied to render questions of terrorism and state-recognition judicially manageable. 137

The Tel-Oren opinions are noteworthy for several reasons. First, the court placed no weight on the fact that only a few of the victims of the PLO bombing were American citizens, which would have allowed assertion of jurisdiction at least under the passive personality principle. Second, all three judges submitted to a legalistic view of what constitutes a nation-state, such that the PLO could never meet the standard. This, if extended, means that the PLO and other terrorist organizations forever remain unaccountable under principles of international law for atrocities committed on foreign citizens in U.S. courts under the ATCA, and represents a perhaps understandable naiveté (given the date the case came down) about the realities of terrorism. It hints at the parallel naiveté exhibited when corporations escape liability because they are non-state actors.

Finally, both Judge Edwards and Judge Bork advanced a “plain meaning” reading of the ATCA but reached vastly different conclusions, suggesting the role each judge’s ideology plays in shaping interpretation of the ATCA. Judge Edward’s plain meaning reading would limit federal jurisdiction under § 1350 to the most egregious offenses, as he believed the Filartiga court did, despite the fact that the statute does not expressly limit jurisdiction in this way. Indeed, Judge Bork accused Judge Edwards of inventing "limiting principles" under the disingenuous guise of plain meaning in order to minimize his own discomfort with the stat-

131. Tel-Oren v. Libyan Arab Republic, 726 F.2d at 822 (Bork, J., concurring).
132. See discussion of the political question doctrine infra Part III.D.
133. Tel-Oren v. Libyan Arab Republic, 726 F.2d at 823 (Robb, J., concurring).
134. Id. at 824 (Robb, J., concurring).
135. Id. at 825 (Robb, J., concurring).
136. See Id. at 826 (Robb, J., concurring).
137. Id. (Robb, J., concurring).
Judge Edwards justified this limitation by harkening back to original intent—that the purpose of the statute was to avoid international confrontations by showing the world, as a young republic, that we were capable of enforcing norms of international law and were civilized. Judge Bork, on the other hand, concluded that the statute's plain meaning suggested it was only a grant of jurisdiction. He assuaged his own discomfort with that reading by conceding that the three offenses extant at the time of the First Congress (violation of safe conducts, infringement of rights of ambassadors, and piracy) could be considered causes of action under the existing ATCA. Under a plain meaning analysis, this lacks persuasive force as well. The statute does not mention these three offenses; thus, it is unclear how a plain meaning reading could include them. These obviously are the only offenses that Judge Bork feels comfortable allowing under the statute. His competing ideologies—conservatism and textual literalism—compel this conclusion.

The attempt to mask policy considerations in statutory construction or doctrines of judicial restraint merely hides the true issue: a misunderstanding of the court's role in the enforcement of international law predicated on underlying assumptions about the distribution of power and the role of the courts. Judge Edwards conceded to some extent that the forces of power had shifted by supporting the Filartiga approach, but he could not see beyond the non-state status of the PLO. Judge Bork would only concede that utterly apolitical offenses or only those that reify the existing power structure should be cognizable under the ATCA. Judge Robb rejected the idea that courts could have any say in this type of foreign policy matter, which, it should be emphasized, is quite different from an ATCA claim brought against a corporation.

3. Extension to Non-State Actors: Kadic v. Karadzic

In 1995, the Second Circuit extended the ruling in Filartiga to allow suits against private actors for genocide, war crimes and crimes against humanity. In its analysis, the court addressed the state action requirement and the political question doctrine. The court concluded that international law dispenses with the state action requirement in certain circumstances. Although Karadzic advanced the traditionalist line, arguing that international law is only binding on states, the court rejected this argument, citing a "substantial body of law . . . that renders private individuals liable for some international law violations," namely, piracy, slavery, and war crimes.

The facts of this case were indeed compelling. Radovan Karadzic was President of the self-proclaimed Bosnian-Serb republic of Srpska, which claimed to exercise lawful authority and controlled some territory. Muslim citizens of Bosnia-Herzegovina brought suit against him, alleging that he "personally planned

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138. Id. at 820 (Bork, J., concurring).
139. See id. at 783 (Edwards, J., concurring).
140. Id. at 813-14 (Bork, J., concurring).
142. Id. at 244-45, 248.
143. Id. at 239.
144. Id.
145. Id. at 236-37.
and ordered a campaign of murder, rape, forced impregnation, and other forms of
torture designed to destroy the religious and ethnic groups of Bosnian Muslims
and Bosnian Croats. The court found a cause of action for genocide and war
crimes in spite of the fact that Srpska was not an officially recognized state.

In addressing the state action requirement, the court liberally cited the Re-
statement (Third) of the Foreign Relations Law of the United States. Because
the cause of action (whether there is a violation of the law of nations) in ATCA
cases is conflated with the jurisdictional analysis, the Kadic court summoned both
§ 702 and § 404 of the Restatement to support the proposition that some of the
offenses of “universal concern” can be committed by non-state actors. Section
702 identifies actionable violations of the law of nations committed by a state. These include those violations listed in § 404 as of “universal concern.”

The Kadic court conducted a nuanced analysis of the definition of “state”
under international law worth examining. The court recognized that a state under
international law is “an entity that has a defined territory and a permanent popula-
tion, under the control of its own government, and that engages in, or has the
capacity to engage in, formal relations with other such entities.” Further, an
entity can be a “state” for purposes of international law whether or not formally
recognized by other states. International law proscribes official torture, for
example, whether a state is “recognized” or “unrecognized” by other states.

Thus, whether or not the U.S. government officially recognizes a particular state,
it may be considered a state under international law and for purposes of ATCA
litigation. Otherwise, the court noted, “[i]t would be anomalous indeed if non-
recognition by the United States, which typically reflects disfavor with a foreign
regime—sometimes due to human rights abuses—had the perverse effect of shield-

146. Id. at 242.
147. Id. at 236-37. The allegations included genocide, rape, forced prostitution and impreg-
nation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and
ethnic inequality, summary execution, and wrongful death. Id. at 242.
148. Id. at 240.
149. Id.
150. Id. at 240 n.3.
151. Id. at 240.
152. Id. at 240 n.4.
153. Id. at 240.
154. Id.
155. Id. at 244 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED
STATES § 201 (1986)).
156. Id. (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202
cmt. b (1986)).
157. Id. at 245.
158. Id.
ing officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors." 159 In the final analysis, the court determined, the inquiry is "whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists." 160 Notable in the corporate context, the Kadic court also asserted that the "color of law" jurisprudence under 42 U.S.C. § 1983 was a relevant guide as to whether a defendant has engaged in official action for purposes of ATCA jurisdiction. 161

Finally, the Kadic court addressed the political question concerns raised by the defendant. The court rejected the approach suggested by Judges Robb and Bork in Tel-Oren, and emphasized the fact-specific inquiry necessary to determine whether the political question doctrine applied in any given case. 162 The court reiterated points made in the foundational political question cases, 163 namely, that the mere fact these cases raise questions involving foreign relations does not necessarily transform them into nonjusticiable political questions. 164 In essence, Kadic is "cited for the proposition that the ATCA covers violations of customary international law by private, non-state actors." 165

D. The Modern ATCA Framework: Jus Cogens Violations, the Law of Nations, and State Action Requirements

Human rights cases brought under the ATCA range from those seeking redress for terrorist attacks, 166 extreme environmental destruction, 167 cultural genocide, 168 arbitrary arrest and detention, 169 forced labor (equated with slavery), 170 murder, torture and rape. 171 Such violations tend to be conjoined, as one type of violation often begets another. The claim of extreme environmental destruction, for ex-

159. Id.
160. Id.
161. Id.
162. Id. at 249. It is worth pointing out that the executive branch in this case "emphatically restated... its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law." Id. at 239-40. That the court had executive branch support clearly made it much easier to reach the conclusion in this case. See discussion infra Part III.D.2.
164. See further discussion, infra Part III.D.1, of the Kadic court's political question analysis.
166. See, e.g., Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
167. See, supra note 5, for cases in which environmental claims were brought under the ATCA.
ample, will likely be accompanied by other violence and claims of cultural genocide, arbitrary arrest and detention, torture and/or murder.¹⁷²

*Filartiga* established that, pursuant to the ATCA, federal courts have subject matter jurisdiction when three conditions are satisfied: (1) an alien sues, (2) in tort, (3) committed in violation of the law of nations. Neither the courts nor the ATCA statute itself indicates *who* may be sued. The prohibition against the alleged offense must be “clear and unambiguous,”¹⁷³ and the international community must “have demonstrated that the wrong is of mutual, and not merely several, concern.”¹⁷⁴ The question of whether a corporation may be successfully sued under the ATCA depends primarily on the alleged offense (must be specific and universal) and whether the state action requirement applies.¹⁷⁵ Whether an offense against the law of nations even exists can be ascertained from the works of jurists, academicians and other commentators, as well as international treaties and conventions articulating accepted universal norms.¹⁷⁶

A hierarchy of harms exists under international law.¹⁷⁷ Whether or not state action is required depends on which offense is alleged.¹⁷⁸ Thus, the worst violations do not require state involvement to be actionable under the ATCA; the less egregious harms do require state involvement, since they become violations only when the added component of state-sanctioned abuses and misuse of governmental power exists.¹⁷⁹ The worst offenses, known as *jus cogens* violations, are “binding on nations even if they do not agree to them,” and they are so fundamental that “the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid.”¹⁸⁰ For example, the pirate under international law has been viewed for centuries as the “enemy of mankind.”¹⁸¹ The pirate invokes universal condemnation because piracy violates basic notions of an ordered system.¹⁸² To commit piracy against anyone, for example, is to commit a crime against all nations.¹⁸³ In addition to piracy, *jus cogens* violations recognized by U.S. courts to date include piracy, slavery, genocide, crimes against humanity, and war crimes.¹⁸⁴ Among these offenses, genocide, crimes against humanity and war crimes generally must be committed by a state or “under color of state authority,” pursuant to § 1983 jurisprudence.¹⁸⁵ If a violation does not rise to the level of a

¹⁷². *See generally id.; Holwick, supra* note 24. Holwick notes that “human rights and environmental non-governmental organizations . . . have come to understand that their issues are inextricably bound on a global scale, and consequently, they have joined forces in an effort to more closely monitor corporate activities abroad.” *Id.* at 188.

¹⁷³. *Filartiga v. Pena-Irala*, 630 F.2d at 876, 884 (2d Cir. 1980).

¹⁷⁴. *Id.* at 888.


¹⁷⁶. *Filartiga v. Pena-Irala*, 630 F.2d at 880.


¹⁷⁸. *See id.* at 6.

¹⁷⁹. *See id.* at 6-8.

¹⁸⁰. *Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *11 (9th Cir. Sept. 18, 2002).

¹⁸¹. *See discussion infra* Part IV.B.2, of piracy and the law of nations.

¹⁸². *See discussion infra* Part IV.B.2, of piracy and the law of nations.


¹⁸⁴. *Id.* at 240 n.4 (quoting *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 404 (1986)).

jus cogens violation, a private actor will be liable for other law of nations violations only when state action exists.\textsuperscript{186} Thus, any suit alleging something less than jus cogens violations, and even those alleging certain of the jus cogens violations, must allege state action to survive.\textsuperscript{187} Individual mass murderers or serial rapists, therefore, will not be held liable for "war crimes," unless the murders are committed pursuant to a systematic campaign of terror and murder in pursuit of a state goal.

There is a certain logic to this somewhat convoluted conceptual scheme. Certain crimes are simply so horrific that, since Nuremburg, they have been universally condemned. The horror of World War II led to a consensus that no one—no nation, person, or other legal entity—should ever be allowed to commit such crimes with impunity again. Other offenses, such as torture, or arbitrary arrest, and murder, invite international reprobation only if committed under color of state authority. Absent state involvement, that individual or group can be prosecuted in the courts of that country and the world should entrust prosecution to the local legal system. However imperfect a country's justice system may be, respect for state sovereignty supersedes the cries of individuals for justice. Further, it would be a flatly patronizing undertaking to instruct other countries on how to ensure justice inside their borders. If that state's government is involved, however, such assumptions no longer work. The state action requirement represents an understanding by the world community that if a government is acting against its own people, even if its crimes do not constitute genocide or crimes against humanity—its people face the unique predicament of having no recourse in their own courts. Thus, recourse in foreign courts is necessary and therefore justifiable.

Because of the difficulty ascertaining exactly what constitutes international law, causes of action under the ATCA have been narrowly defined.\textsuperscript{188} Courts consider (1) whether a specific, universal, and obligatory norm of international law can be ascertained; (2) whether the norm is recognized by the United States; and (3) whether plaintiffs sufficiently allege its violation in the complaint.\textsuperscript{189} A court will find a cause of action under the ATCA only if a clear and unambiguous violation of the law of nations is adequately alleged.\textsuperscript{190} Furthermore, breaches of international law occur only where "the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern."\textsuperscript{191} Some courts have declared that ATCA jurisdiction only applies when a "shockingly egregious violation[] of universally recognized principles of international law" has occurred.\textsuperscript{192} The ATCA itself, of course, does not say who may sue or whether state action is required, or that the tort alleged must be "shockingly egregious." All such notions are court-created rules of decision derived from international common law and based on broad and legitimate justiciability concerns.

The Restatement of Foreign Relations defines customary international law as law that results from "a general and consistent practice of states followed by

\textsuperscript{186} Bridgeman, \textit{supra} note 16, at 7.
\textsuperscript{187} Kadic v. Karadzic, 70 F.3d at 239.
\textsuperscript{189} Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1132 (C.D. Cal. 2002).
\textsuperscript{190} Flores v. Southern Peru Copper Corp., 343 F.3d 140, 145-55 (2d Cir. 2003).
\textsuperscript{191} Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).
\textsuperscript{192} \textit{Id.} at 167 (quoting Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (\textit{per curiam})).
them from a sense of legal obligation." Courts have had difficulty locating and defining international law, and have been understandably reluctant to apply such law, unless the prohibition is unequivocal. Courts, therefore, engage in heightened review of the complaint, examining the origins and evolution of international law as well as the scant legislative history behind enactment of the ATCA in order to determine whether a cause of action may be implied from international law.

Because no code of international law exists, to locate rules of decision judges consult the "works of jurists writing professedly on public law . . . the general usage and practice of nations . . . [and] judicial decisions recognizing and enforcing that law." Ascertaining international law, therefore, requires a court to engage in lengthy, inferential reasoning in order to arrive at general principles of law from specific treaties, accords, and the practices and expectations of nations.

The district court's opinion in *Sarei v. Rio Tinto* provides a clear example of a court struggling to locate and apply the law of nations in an ATCA case brought against a corporation for environmental and human rights abuses. With regard to the environmental claims, in particular, Plaintiffs carefully crafted their complaint, aware that intranational pollution alone would not support an international law claim. They asserted, instead, that massive environmental destruction that leads to the loss of life violates the "right[] to life and health." Specifically, plaintiffs alleged that the environmental damage constituted violations of (1) the principle of "sustainable development," which obliges "state actors to avoid serious and irreversible environmental . . . health effects from development activities," and (2) "the United Nations Convention on the Law of the Sea (UNCLOS), which prohibits" some forms of pollution to marine environments.

The court rejected the right to life and health claim founded on principles of sustainability, citing three primary reasons for its rejection: (1) that the United States had never signed or ratified the American Convention on Human Rights (ACHR), cited by plaintiffs as primary support for the universality of the right to


196. 221 F. Supp. 2d 1116 (C.D. Cal. 2002). Compare with *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), in which Indonesian citizens brought suit against domestic corporation conducting mining in Indonesia alleging environmental abuses, human rights violations, and genocide under the ATCA. *Id.* at 163. The district court granted defendants' motion to dismiss because the complaint (1) failed to support a claim for international human rights violations and genocide; (2) then-existing treaties and agreements did not contain specific enough environmental standards and were thus insufficient sources of international law; and (3) then-existing conventions, agreements, and declarations failed to identify specific conduct that would constitute acts of cultural genocide and thus were too abstract/vague to be enforceable under ATCA. *Id.* at 165-68.


198. *Id.* at 1156.

199. *Id.*
life; (2) that the ACHR does not specifically address deprivations caused by environmental degradation; and (3) that plaintiffs failed to point to a "specific, universal, and obligatory" environmental norm under international law.\(^{200}\) The court also rejected the sustainable development claim under UNCLOS because it could not "identify the parameters of the right created by the principle of sustainable development."\(^{201}\) In short, the right was not well-defined and therefore was unenforceable under the ATCA, reinforcing the underlying notion that admittedly desirable policy goals should not necessarily be transformed into "rights."

However, although the United States had not ratified UNCLOS (it has only signed it), the court noted that 166 nations had ratified it, and therefore, in spite of U.S. reservations, it represented the law of nations.\(^{202}\) Surveying U.S. case law interpreting UNCLOS, the Restatement of Foreign Relations, and a law review article, the court concluded that UNCLOS reflected customary international law and plaintiffs could therefore base an ATCA claim upon it.\(^{203}\) Rejecting defendant's arguments that UNCLOS required the exhaustion of local remedies and mandated dispute resolution in another forum, the court held that the treaty requirement did not foreclose litigation under the ATCA.\(^{204}\) The *Sarei* opinion emphasized the specificity of the violation,\(^{205}\) and the number of countries that had signed a treaty, and whether the United States was among them in both signing the treaty and enforcing the right.\(^{206}\)

### III. ATCA Litigation in the Corporate Context: Early Dismissals and Complex Litigation

*Kadic* opened the door for human rights cases to be brought against corporations under the ATCA. From these cases, there emerge two basic questions that courts ask at the jurisdictional threshold—one legal and one prudential: (1) Can this violation be committed by a private actor under international law? (legal); and (2) if so, would it be reasonable to try that private actor here in the United States? (prudential). Whether the court chooses to focus on the first or the second question may depend on how uncomfortable it is with the policy considerations inherent in the decision. It is easier to declare there is no legal violation under international law (i.e., no cause of action), than to declare that the court should refrain from ruling on the case out of deference to the political branches or fear that a foreign nation's sovereignty will be compromised.

However, corporations are less likely to commit the handful of traditional in-

\(^{200}\) See *id.* at 1156-60.

\(^{201}\) *Id.* at 1160-61.

\(^{202}\) *Id.* at 1161.

\(^{203}\) *Id.* at 1161-62. The *Sarei* court cited the following sources to support its contention that UNCLOS was binding on the United States even though unratified: United States v. Alaska, 503 U.S. 569 (1992); Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d 297 (1st Cir. 1999); *Restatement (Third) of Foreign Relations Law* § 312(3) (1987); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999); Carol Elizabeth Remy, Note, *U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection*, 16 FORDHAM INT’L L.J. 1208, 1211-12 (1993). *Id.* at 1161.

\(^{204}\) *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1162 (C.D. Cal. 2002).

\(^{205}\) *Id.* at 1132; see also *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d. Cir. 2003) ("[T]he principle must be more than merely professed or aspirational.").

\(^{206}\) *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1156-63.
ternational law violations (piracy, war crimes, and genocide) that can be applied to private actors. Indeed, "the more challenging inquiry is how corporations may be found liable under the ATCA if their conduct falls outside the 'handful of crimes' category but still violates international law." When conduct falls outside these highest tier violations, the question for the courts becomes whether the state action alleged meets the requirements of whatever standards of collusion the court chooses to apply. It is when these crimes are alleged—torture, violation of the right to life (environmental), etc.—that the vacuum of the "state action requirement" plays itself out and ultimately underscores the court's application of the old paradigm, even in the modern context of private, commercial litigation. Specifically, when state action is alleged, many other doctrines of judicial restraint are brought to bear and the courts summon multiple devices to kick these cases out of federal court. Indeed, the very fact that individual liability for jus cogens violations is the exception to the general rule that states are the true subjects of international law, highlights the belief in outdated understandings of the distribution of power in the global context.

A. Barrier 1: Limited Liability

The complexity of the TN corporate form adds another layer to the analysis at the preliminary stages of ATCA litigation. Courts must consider the relationship between the corporation against whom the suit has been brought—usually a parent company over which the court has personal jurisdiction—and the subsidiary corporation located in the plaintiff's home country where the harm is alleged to have occurred. According to a recent Supreme Court decision, "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." Indeed, "[t]he law allows corporations to organize for the purpose of isolating liability of related corporate entities." Parent companies may be involved in the supervision of the subsidiary without incurring liability; appropriate involvement of the parent company in the subsidiary's business includes "'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures.'" In corporate ATCA cases, courts must examine the level of involvement of parent compa-


208. Although it seemed clear to the Kadic court that § 1983 "color of law" standards should apply to ATCA cases, in the current Unocal case before the Ninth Circuit en banc, the primary question before the court is which standard of vicarious liability to apply—the standard under domestic federal law, state law, or the "aiding and abetting" standard under international criminal law. Unofficial Hearing Transcript, Doe v. Unocal, ___F.3d___ (9th Cir. 2003) (Nos. 00-56603, 00-56628, 00-57195, 00-57197) [hereinafter Unocal Hearing Transcript] (anticipated decision in 2004) available at http://www.earthrights.org/unocal/enbanctranscript.doc (last visited Apr. 11, 2004); see also Order Denying Defendants' Motion for Summary Judgment on Phase I at 13, n.9, Bowoto v. Chevron Texaco Corp., ___F. Supp. 2d___ (N.D. Cal. Mar. 23, 2004) (No. C 99-26061 SI) [hereinafter Chevron Texaco Order] (explaining procedural posture in Unocal case), available at http://www.earthrights.org (PDF file) (last visited Apr. 11, 2004).


210. Chevron Texaco Order, supra note 208, at 3 (citing Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993)).
nies in the operations of their foreign subsidiaries in order to assess whether joint action sufficient to constitute complicity in unlawful activity exists. The first step, then, is to show the defendant/parent corporation is directly or indirectly liable for the unlawful actions of its foreign subsidiary.

Doctrines employed to analyze the liability of a parent corporation include: piercing the corporate veil, integrated enterprise liability, agency-based liability, aiding and abetting, and ratification. 212 Piercing the corporate veil and related doctrines represent "attempts to balance the benefits of limited liability against its costs." 213 Whether to hold a parent liable for the acts of its subsidiary is a fact-based inquiry, and the general rule is to respect the corporate form "unless to do so would work an injustice upon innocent third parties." 214 While the tests fluctuate somewhat in different districts, the Ninth Circuit has shown willingness to pierce the corporate veil when "the separate identity of the corporation has not been respected and that respecting the corporate form would work an injustice on the litigants." 215 Under the integrated enterprise liability theory, courts impose less stringent requirements on plaintiffs, but only apply this theory to enforce specific federal statutes. 216 If an agency relationship between the parent and subsidiary can be shown and plaintiffs show the agent was acting within the scope of authority granted by the parent, liability under agency theory may attach. 217 In a recent ATCA case, Bowoto v. Chevron Texaco Corp., the court denied defendant's summary judgment motion because a genuine issue of material fact existed as to whether the parent, Chevron Corporation, was: (1) the agent of its partly-owned subsidiary in Nigeria alleged to have committed human rights abuses; (2) whether the parent, Chevron, aided and abetted the subsidiary's collusion with the Nigerian military; and (3) whether the parent, Chevron, ratified the behavior of its subsidiary by

212. Chevron Texaco Order, supra note 208, at 4-5.

213. FRANK H. EASTERBROOK & DANIEL R. FISCHER. THE ECONOMIC STRUCTURE OF CORPORATE LAW 55 (1991). Easterbrook and Fischel also point out that courts are generally more willing to pierce the corporate veil and allow creditors to reach the assets of corporate as opposed to personal shareholders. Id. This, they note, is consistent with economic principles, because it "does not create unlimited liability for any investor." Id. at 56. Furthermore, "the moral-hazard problem is probably greater in parent-subsidiary situations because subsidiaries have less incentive to insure." Id. at 56-57.

214. Chevron Texaco Order, supra note 208, at 5. The Chevron Texaco court quoted Judge Cardozo in a footnote, observing that "[t]he whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Id. at n.4 (quoting Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (1926)). As with assumptions about the international power structure, assumptions entrenched in the fiction of the corporate form may, in fact, be limiting the ability of courts to recognize abuses of authority and lawless behavior when they see it and to regulate accordingly.

215. Id. at 7 (citing RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 596 (9th Cir. 1985)).

216. Id. at 7-8.

217. Id. at 9-10.

To establish actual agency a party must demonstrate the following elements: "(1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking." Id. at 10 (quoting Rubin Bros. Footwear, Inc. v. Chemical Bank, 119 B.R. 416, 422 (Bankr. S.D.N.Y. 1990)).
various actions after the alleged crimes were committed. The court rejected plaintiff’s alter-ego theory because there was “no evidence to support a finding that incorporation was undertaken in bad faith or that observing the corporate form would achieve an inequitable result.”

B: Barrier 2: State Action Requirement

In addition to protections inherent in the corporate form, the state action requirement also protects against successful prosecution of ATCA cases against corporate defendants. In many ways the “color of law” analysis affirmed in Kadic parallels the parent/subsidiary joint action analysis in that it involves assigning unlawful actions to an entity (the state) that only indirectly caused the actual harm. United States courts have determined several “color of state law” tests under federal § 1983 claims: (1) the “nexus test”; (2) the symbiotic relationship test; (3) the “joint action test”; and (4) the “public function test.” The “joint action test” requires either a conspiracy or willful participation with the state actor, or “a substantial degree of cooperative action between the state and private actors.”

In ATCA cases, de facto liability of a private actor is generally found where “formalized relations between state entities and private corporations” existed.

1. Doe v. Unocal

Doe v. Unocal was the first ATCA case brought against a corporate defendant. It required the courts to wrestle with parent/subsidiary liability questions and color of law questions in the corporate context. In 1996, Burmese villagers brought suit against California-based Unocal, the Federation of Trade Unions of Burma, and the National Coalition Government for violations of forced labor, murder, rape, and torture committed by the Burmese military. Plaintiffs alleged the abuses were committed in furtherance, and for the benefit, of Unocal’s pipeline

218. Id. at 7-23.
219. Id. at 21.
221. Id. (citation omitted).
222. Id. at 1305.
223. No. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sept. 18, 2002).
The Ninth Circuit panel concluded that slavery, torture, and murder were violations of the law of nations, that rape was a form of torture, and that forced labor was synonymous with slavery. The court also found that these violations—forced labor, murder, torture, and rape ("second tier crimes")—required state involvement in order to be actionable. The court noted that only if second tier crimes were committed in furtherance of "first tier crimes" (slavery, piracy, war crimes, or genocide) could they attach to private actors not acting in collusion with a country's government.

The court also examined the parent/subsidiary liability issue. It was clear that Unocal had used all available means to distance itself from operations in Myanmar. To develop the country's energy resources, the military dictatorship in Myanmar established, in 1988, a state-owned oil and gas company (Myanmar Oil). In 1992, Myanmar Oil licensed the French oil company Total S.A. (Total) to produce, transport, and market natural gas from deposits found off the coast of Myanmar in a place known as the "Yadana Field." Total formed a subsidiary, Total Myanmar Exploration and Production (Total Myanmar), to complete this project. The project required a joint venture to achieve both extraction of the natural gas and transportation of that gas to market in Thailand. Unocal and its wholly owned subsidiary, Union Oil Company of California, acquired a twenty-
eight percent interest in both the extraction and transportation portions of the project, and set up two more wholly-owned subsidiaries to hold Unocal’s twenty-eight percent interest in the joint venture—the Unocal Offshore Co. and the Unocal International Pipeline Corp., respectively.241 Myanmar Oil and a Thai government entity also purchased interests in the project, making both the Myanmar and Thai governments financially invested in the success of the project.242 Total Myanmar (the French company) was appointed operator of the extraction and transportation joint venture.243 As operator, Total Myanmar was responsible for personnel matters connected with the operation.244

In determining liability, the Ninth Circuit focused on whether Unocal knew that the Burmese military provided security and other services for the project (state action), and whether Unocal knew that the military was committing human rights violations in connection with the pipeline project (the subsidiary’s action), facts that had to be proven for liability to attach.245 Unocal argued that it was not liable because the Burmese military, and not Unocal employees, committed the abuses.246 “The company asserted that as a ‘passive investor’ in the pipeline, totally removed from decisions or activities related to forced labor, it could not be held liable.”247 The en banc court, in its recent oral arguments, focused on which standard of joint action to apply—aiding and abetting under international criminal law or joint actor liability under domestic law—zeroing in on how much control or active involvement on the part of the parent corporation must be shown in order for color of law/state action liability to attach to the parent.248 Commentator and lead attorney for plaintiffs, Terry Collingsworth, observes, “The Unocal case raises many questions about the ability of corporations to disassociate themselves from the direct consequences of their investment choices.”249

This case makes clear that once a court concedes that the cause of action alleged by plaintiffs is valid under international law, it then asks three questions: (1) what law applies—domestic, international, or the law of the country in which the alleged harm occurred; (2) did this corporate defendant exert enough control over its subsidiaries to be held liable for their actions?; and (3) if it did exert such con-

241. Id.
242. Id.
243. Id.
244. Id.
245. Id. at* 1-15.
246. Terry Collingsworth, The Key Human Rights Challenge: Developing Enforcement Mechanisms, 15 HARV. HUM. RTS. J. 183, 188-89 (2002). In this article, Collingsworth conveys the genesis of the Unocal case as purely serendipitous. Id. at 187. The General Secretary of the Federation of Trade Unions of Burma, U Maung Maung, had escaped Burma and was living in Thailand, where he read a Reader’s Digest article about a couple in the United States who successfully sued a veterinarian for malpractice for over-anesthetizing their dog. Id. U Maung Maung was aware of the reports of atrocities connected with the Unocal pipeline project in Burma, and, notes Collingsworth, was “both amused and angered that the United States legal system” could provide a remedy for bereaved pet owners while looking the other way as human atrocities were committed by a U.S. subsidiary with U.S. investment dollars and with the apparent acquiescence of a U.S. based company. Id.
247. Id. at 189.
248. Unocal Hearing Transcript, supra note 208.
249. Collingsworth, supra note 246, at 189.
trol, was there sufficient state collusion to hold this parent corporation liable for violations of second tier torts under international law?

2. Sarei v. Rio Tinto PLC

In the recent district court case Sarei v. Rio Tinto PLC, the plaintiffs alleged personal injury, massive environmental destruction, cultural genocide, torture, and murder during the course of a ten-year civil war on the island of Bougainville, Papua New Guinea (PNG), instigated, they alleged, by mining operations conducted by Rio Tinto Limited and Rio Tinto PLC. Rio Tinto PLC, a British corporation, and Rio Tinto Limited, an Australian corporation (Rio Tinto Group), were part of an international mining group headquartered in London that operated over sixty mines and processing plants in forty countries worldwide, including the U.S. During the 1960s, the Rio Tinto Group chose to pursue mining operations in the village of Panguna, on the island of Bougainville, PNG, which required the displacement of local villages and the relocation of indigenous populations. Rio Tinto Group collaborated initially with the colonial government of Australia and later continued its operations through a relationship with the independent government of PNG. As with Myanmar Oil in the Unocal case, the PNG government negotiated a substantial interest (19.1%) in the operation. Plaintiffs alleged that the money from mining operations became a major source of income for the government and "provided [an] incentive for the PNG government to overlook any environmental damage or other atrocities Rio committed." They also alleged that this turned the copper mine into a joint venture and allowed Rio Tinto Group to operate under color of state authority.

Initially, Rio Tinto Group created, and maintained a majority interest in, a subsidiary, Bougainville Copper Limited (BCL), as a means to hold its interest in the mine. The Australian Colonial Administration then gave BCL leases for over 12,500 hectares of Bougainvillean land, and the PNG government signed the Mining Act of 1974 with BCL, which, in part, regulated waste disposal from the mine and vested authority for such regulation in the PNG government. Islanders opposed the building of the mine, and when they refused to surrender their lands to the BCL, riots ensued and the PNG military was called to defend the mine's interests.

251. Id. at 1120.
252. Id. at 1121.
253. Id.
254. Id. at 1121-22. "PNG was a colony of Australia until 1975." Id. at 1121, n.14.
255. Id. at 1121. This practice of involving local governments as business partners is typical in natural resource development projects. As the plaintiffs pointed out in Sarei, this inevitably raises a conflict of interest for the local government and puts them in a position of dependence on the foreign company. This, in turn, compromises the government's ability and/or desire to protect its citizens in the face of corporate abuses. This fact favors adjudication in a foreign forum (such as a U.S. court). Individual human rights can thereby be enforced without reliance on a government lacking clean hands.
256. Id. (alterations in original).
257. Id.
258. Id.
259. Id. at 1121-22.
260. Id. at 1122.
Eventually, the mine was completed and remained in operation for decades.\textsuperscript{261} It was tremendously profitable, both for Rio and the PNG government.\textsuperscript{262} Mining processes soon destroyed the environment upon which the local populations relied for their livelihood; the mine produced more than one billion tons of waste, much of which was dumped into the island’s river system.\textsuperscript{263} Air quality plummeted, villagers contracted respiratory illnesses, and the virtual destruction of the environment rendered the native population desperate, depressed, and prone to alcohol abuse.\textsuperscript{264} Residents accused Rio Tinto Group/BCL of, among other things, systematic racism and unrestrained chemical dumping.\textsuperscript{265} The plaintiffs alleged that BCL’s mining operations “ripped apart the culture, economy, and life of Bougainville.”\textsuperscript{266}

In the end, the local population took up arms to close the mine.\textsuperscript{267} Rio threatened to pull out of the country if conditions were not quelled, and the PNG government came to its defense.\textsuperscript{268} A ten-year civil war ensued.\textsuperscript{269} Throughout the war, plaintiffs alleged continuous human rights violations by the government’s military forces, including the imposition of a blockade preventing food and medical supplies from reaching the island (causing, plaintiffs claimed, at least 10,000 civilian deaths), “aerial bombardment of civilian targets, wanton killing and acts of cruelty,” and inhuman and degrading treatment of civilians.\textsuperscript{270} The war officially ended in 1999, but the devastation, according to plaintiffs, was nearly complete.\textsuperscript{271} The land was “ravaged,” and thousands of local Bougainvilleans had died.\textsuperscript{272} Some of the remaining population suffered severe health problems, and “an estimated 67,000 live[d] in ‘care centers’ or refugee camps.”\textsuperscript{273}

The complaint alleged “crimes against humanity; war crimes/murder; violation of the rights to life, health, and security of the person; racial discrimination; cruel, inhuman, and degrading treatment; violation of international environmental rights; and a consistent pattern of gross violations of human rights,” as well as state law claims for “negligence, public nuisance, private nuisance, strict liability, equitable relief, and medical monitoring.”\textsuperscript{274} Plaintiffs argued that because the mine was a joint venture with the PNG government, and because Rio Tinto’s threats led PNG to use force, Rio could be held accountable for the atrocities committed by the PNG military.\textsuperscript{275}

\textsuperscript{261} See id. at 1122-23.
\textsuperscript{262} Id. at 1121.
\textsuperscript{263} Id. at 1123-24.
\textsuperscript{264} Id.
\textsuperscript{265} Id. at 1124.
\textsuperscript{266} Id. (quoting First Amended Complaint ¶ 155).
\textsuperscript{267} Id. at 1125.
\textsuperscript{268} Id. at 1125-26.
\textsuperscript{269} Id. at 1126.
\textsuperscript{270} Id. at 1126-27 (quoting First Amended Complaint ¶ 203).
\textsuperscript{271} Id. at 1127.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} Id. at 1128.
Rio Tinto argued it did not act jointly with PNG to commit the atrocities. The court disagreed (upon defendant’s motion to dismiss), finding that the complaint alleged joint action sufficient to support a finding of vicarious liability. The company could thus be held liable for actions taken by the PNG government and the PNG Defense Force (PNGDF). In reaching its conclusion, the court surveyed the Unocal cases, Kadic, and several Supreme Court cases involving color of law claims. The court stated that there “must be some nexus between the wrongful act and the private entity,” and “the conduct of the state [must be] ‘fairly attributable’ to the private party before state action can be found.” The court also observed, citing Kadic, that certain violations of the law of war are of universal concern and do not require state action.

In the end, the following allegations by the Sarei plaintiffs were sufficient to support a finding that PNG’s actions were fairly attributable to Rio: (1) BCL’s Chief Executive Officer threatened to withdraw if the PNG government did not take care of the disturbances on Bouganville, knowing “that its wishes were taken as commands by the PNG government and Rio intended that its comments would spur the PNG forces into action”; (2) Rio knew it had a “great deal of control over the situation” and had Rio insisted that military action not be taken, the PNG government would have complied; (3) certain meetings occurred in which Rio’s agents encouraged imposition and continuation of the blockade, and at all times PNG understood Rio’s “encouragement” to be a command; (4) the PNG government and its soldiers acted as the agent of Rio; and (5) that the mine was a joint venture between Rio Tinto and PNG. In short, the complaint was well-pleaded, and the court appeared willing to allow discovery on these issues.

The court also concluded, applying a 42 U.S.C. § 1983 analysis, that the...
plaintiffs pled a sufficiently close nexus between PNG and Rio to make out a claim for racial discrimination. The Ninth Circuit held that alleging "something more" than mere private conduct is sufficient to move forward with a racial discrimination claim, and in this case that "something more" included the fact that PNG made its eminent domain powers available to Rio so that it could construct the mine, earned profits from the mining activities, and took no steps to "control or minimize the negative impact of Rio Tinto's mining operations" on the indigenous population.

3. Suggested Changes to the Standard of Liability for Transnational Corporations (TNs)

Unocal and Sarei highlight the complexity of claims against TNs. Determining whether the company acted jointly with the host state is complicated. First, courts must examine the corporate form and principles of limited liability to determine how far up the chain of corporate ownership to attach liability, and whether veil piercing would be appropriate. This requires reviewing the doctrines designed to circumvent limitations on liability. The question in Unocal was whether the California-based parent company had enough control over its subsidiary to be held liable for the human rights abuses, though it retained only a twenty-eight percent passive interest in the project after it had given the French company Total Mynamar control of the pipeline construction? The question in another case against Texaco was whether a U.S.-based parent company exercised enough control over its fourth-tier Ecuadorian subsidiary to be held liable for its subsidiary's actions. The underlying question in these cases is clear: How far up the chain of ownership can and should a TN's liability extend? If the defendant is found to have exercised enough control over its subsidiary's actions, the court must then determine whether there was sufficient collusion between the corporation and the local government to fulfill the state action requirement. To determine whether violations attributed to the corporation were state-sanctioned, a court will examine the joint venture and/or partnership agreements (usually involving profit-sharing) that companies establish with host country governments.

As would be expected, these agreements are also structured to minimize corporate liability. Given the instability in some developing countries, it is understandable that TNs would seek to distance themselves from foreign-based subsidiaries. But the logic for this cloak of limited liability — originally established to minimize shareholder liability (for corporate debts) and thereby encourage risk-taking and entrepreneurship — was devised in the United States under a procedur-
ally transparent system with respect for the rule of law. It is important to ask, therefore, whether the justification for limited liability—thickened by layer upon layer of wholly- and partly-owned subsidiaries as well as joint ventures across multiple countries and differing legal systems—extends so readily to TNS. Courts and commentators have already recognized that strict adherence to the impenetrability of the corporate form makes less sense when the shareholders are corporations rather than individuals.289 Perhaps it is also time to recognize that in the international context there is even less justification for maintaining the cloak of limited liability in its present form.

This is not to suggest limited liability should be done away with. Duties of companies in the international context can and should be heightened, however, given the known risks in foreign direct investment projects and the foreseeability of problems when investing in countries with questionable human rights and environmental records. This is an instance wherein, as Justice Cardozo observed, the metaphor of the corporate form no longer liberates thought but enslaves it.290 It is worth reflecting on the fact that in most ATCA cases involving corporate defendants, “the victims are from developing countries—developing not only economically but also in terms of the level of education, legal regulations, and legal institutions that the countries have achieved.”291 The courts in these countries, furthermore, may be “‘ill-equipped to handle [these] cases or the host government will not pursue enforcement against the perpetrators’” because they themselves are also implicated in the alleged violations.292

Furthermore, accountability depends on openness and a free press.293 The fact that these abuses are generally occurring in repressive societies highlights the probable inability of the host country to either expose or enforce the violation. Milton Friedman’s famous insistence that “‘the social responsibility of business is to increase . . . profits,’” depends upon the premise that in pursuing profits businesses will ultimately do the right thing because the public will demand it.294 This, however, presupposes a free society. “If the media are unable to report on abusive behavior, there will be no public relations consequences of corporate bad acts.”295 Thus, when courts defer to the right and authority of the host country to prosecute harms against its own people, they are often ignoring that (a) the country may be collaborating with the company in causing the harm, and (b) the wider public may not know about the harm because the press does not have open access to government and/or corporate records. Therefore, the sort of organic process of public pressure on bad corporate actors often cannot, and will not, occur.

ATCA litigants ask the United States to participate in the international system in ways that most prior U.S. administrations have supported—namely, to advance

289. See Easterbrook & Fischel, supra note 213, at 56, text and accompanying discussion.
290. See Chevron Texaco Order, supra note 208, at 5 n.4, text and accompanying discussion.
292. Id. at 6-7 (emphasis omitted) (quoting Anita Ramasasty, 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, 92 (2002)).
295. Id. at 63.
human rights abroad. 296 They also force courts to recognize the power wielded by TNS and to change their thinking about the system as a whole. The analysis forces confrontation with the diminished power of the nation state in the globalized context. ATCA litigation asks courts to scrutinize actions of the partners and subsidiaries of TNS with some tie to the U.S. in order to rectify both first and second tier offenses against international law—offenses that the world community has resoundingly denounced. Although asserting norms of corporate responsibility for "violations of human dignity . . . challenges the state's exclusive prerogative (what some might call sovereignty) to regulate business enterprises by making them a subject of international scrutiny; it makes them entities that have their own duties to respect human rights." 297 Such explicit application of these norms to corporations is precisely what should be done. Corporations are "entities" of a new sort. They are not private persons. They are not governments. They are immensely powerful (often more so than governments) yet highly unregulated. This, however, has always been met with resistance, primarily due to the old understanding of power relationships and the infusion of that assumption into doctrines of judicial restraint. In this context, however, territorial sovereignty should take on diminished importance, particularly given the fact that complicity in official state action is generally required, "a fact which seriously hampers the possibility of making the involved [TN] liable under the national regulatory mechanism." 298 In short, if the host country is involved in the violations, how likely are they to prosecute their partners in crime or tort?

Courts hearing ATCA human rights claims against TNS, therefore, could legitimately impose a higher duty on U.S. parent corporations that are part of a transnational network of companies. A heightened duty to know of the actions and policies of their foreign subsidiaries in the field of human rights would compel businesses to build in systematic inquiries into the activities of foreign subsidiaries, and allow the courts to more honestly balance the true interests of the parties (profits and sensitivity to the world economic system versus human life and dignity) when corporations are sued. Such a heightened duty would begin to unravel the limited liability web corporations spin, and increase enforceability of universal human rights norms. This would be accomplished by simply shifting the burden to the corporation to show that it did not know and could not have known about the abuses—thus making a critical step toward curing the phenomena of willful ignorance allowed by the insulated corporate form. Given the well-established record-keeping and oversight procedures in large corporations, such monitoring should not prove difficult.

296. I do not hold a naïve faith in the veracity of official government statements with regard to foreign affairs, but I do want to underscore what the public position has been. Given public acceptance of international human rights, by definition, suits in federal courts to enforce international human rights norms that the executive branch has embraced would not in any way embarrass the executive branch—even if the U.S. is simultaneously conducting clandestine operations that undermine those rights. Thus, the concern courts have over either contradicting the official stance of the administration or embarrassing the executive branch is misplaced.


298. Deva, supra note 291, at 8.
C. Barrier 3: Dismissals on Forum Non Conveniens Grounds

Before raising the more problematic specter of judicial restraint doctrines, corporate defendants in ATCA suits frequently move to dismiss ATCA claims on forum non conveniens grounds. When such motions are granted, courts often mask the rationale in technical, rule-bound doctrines of court procedure. In the end, the forum non conveniens analysis becomes a procedural gloss on a basically substantive decision about judicial power. While this is an important part of the court's analysis, courts tend to conflate forum non conveniens with prudential doctrines and thereby obscure the analysis used to dismiss plaintiff's claims. Often the most interesting thing about these cases is "the way in which the courts review[] the forum non conveniens issue, scrutinizing not only the interests of the parties and the forums, but the political sovereignty concerns of the states as well." 299

The ATCA, unlike the Torture Victim Protections Act,300 does not require exhaustion of local remedies before bringing a claim.301 Claims, therefore, may theoretically be brought in U.S. courts before plaintiffs have attempted litigation in the country where the alleged violations occurred. Much of the time, courts are examining forum non conveniens claims knowing that litigation in the host country has not been initiated. The sense that they are usurping the authority of another sovereign state to try these cases, therefore, is always near the surface of the forum non conveniens analysis. In wrestling with the question of whether Peru's courts were an adequate alternative forum, Senior District Judge Haight observed, "an American court will refrain from condemning as inadequate a legal remedy afforded by the courts of another nation unless it appears that such remedy is 'so clearly inadequate that it is no remedy at all.'" 302 As Judge Haight points out, the standards that the foreign forum must meet to be considered "adequate" are woefully low, largely because of the political and prudential considerations that have crept into the forum non conveniens analysis.

Any forum non conveniens analysis requires application of a two-prong test: First, the court must determine the adequacy of the alternative forum recommended by the defendant.303 If the alternative forum is deemed adequate, the court proceeds further in its analysis and weighs both the private and public interest factors

299. Rolle, supra note 188, at 165.
300. See discussion, infra Section II(A), of the passage of the Torture Victims Protection Act and its connection to the Alien Tort Claims Act.
301. See 28 U.S.C. § 1350 (2000). The TVPA Amendment expressly requires exhaustion of all local remedies before suit may be brought in the United States. Id. The ATCA contains no such exhaustion requirement. Id.
302. Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981)). In an exhaustive and thoughtful survey of the FNC arguments presented by the parties, Judge Haight spent considerable time reviewing the improvements made to the Peruvian judicial system since Fujimori's regime had been ousted. Id. at 538. He noted that both parties agreed that under Fujimori the system was utterly corrupt and justice would not have been forthcoming. Id. However, after examining the competing expert opinions Judge Haight relied on the rather low bar set by the Second Circuit—"the Second Circuit has in a number of forum non conveniens decisions cautioned district courts against blanket condemnation of the adequacy of another nation's courts"—and found Peru's courts were an adequate alternative forum. Id. at 538-39.
303. Id. at 531 (quoting Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pak., 273 F.3d 241, 246 (2d Cir. 2001)).
to determine if, in fact, the adequate alternative forum makes practical sense. 

Private interest factors include practical trial-specific concerns, such as access to evidence, the availability of a means to compel witnesses to testify, the cost of getting witnesses to testify, and the possibility of viewing and testing relevant sites where damage has allegedly occurred. "Public interest factors," while related, include the concerns of the public in the country and region in which the trial will be held. Courts look at "local interest in the controversy, court congestion, avoidance of unnecessary problems in application of foreign law, and the avoidance of imposing jury duty on residents of a jurisdiction having little relationship to the controversy." Unlike in domestic forum non conveniens challenges, choice of law considerations do not weigh heavily in a forum non conveniens analysis involving foreign defendants. Courts presumptively favor the plaintiff's forum choice and place the burden of proving its inadequacy on the defendant. However, courts give less deference to a foreign plaintiff's forum choice, except in cases where the U.S. has signed a treaty with a plaintiff's home country that accords its nationals equal access to our courts. The presumption favoring the plaintiff's choice of forum loses force in ATCA cases in part because the plaintiffs are not U.S. citizens.

The existence of a claim under the ATCA does not alter the forum non conveniens analysis. Such dismissals are often premised, however, on the condition that the defendant corporation submit to the jurisdiction of the foreign court and/or to broader U.S. style discovery requirements even though they would not be required to do so under the law of the alternative forum. Because the standard of review for a dismissal on forum non conveniens grounds is abuse of discretion, these lower court decisions are rarely overturned. Notably, environmental claims brought under the ATCA "have generally been dismissed by U.S. courts on [forum non conveniens] and comity grounds."

304. Id.
306. Id.
307. Id.
308. Rolle, supra note 188, at 160.
310. Id.
312. Id. at 553 (noting that "nothing in [the] text [of the ATCA] suggests that the United States forum should . . . be given preference over a more convenient foreign forum which is adequate to handle the case").
313. See generally Rolle, supra note 188 (comparing forum non conveniens in the United States, Canada, England, South Africa, Australia and the European Union as well as veil-piercing law in the United States, Germany and England).
date in which an appeals court has overturned a forum non conveniens dismissal of an ATCA claim.\textsuperscript{315} In that case the court reversed and remanded the dismissal of a claim against Pfizer brought by citizens of Nigeria for the use of human subjects in Nigeria for purposes of pharmaceutical research.\textsuperscript{316} The court considered several factors in its dismissal, and remanded to resolve a dispute over whether a parallel case, raising virtually the same claims, had just been dismissed in Nigeria.\textsuperscript{317} If the district court on remand were to find that this case was parallel and had been dismissed, this would provide the rare, concrete evidence of the foreign state's unwillingness to adjudicate what the U.S. court believed was a legitimate claim.\textsuperscript{318}

In \textit{Sarei v. Rio Tinto}, the plaintiffs also survived defendant's forum non conveniens motion.\textsuperscript{319} Applying the traditional forum non conveniens tests, the court found that PNG provided an adequate alternative forum because the plaintiffs' claims were cognizable in PNG.\textsuperscript{320} The court found that the unavailability of class actions and contingency fee counsel, as well as constraints on discovery, did not render PNG an inadequate forum.\textsuperscript{321} However, PNG failed the second prong of the forum non conveniens test, because the relevant private interests, specifically the fact that "PNG was plaintiffs' wartime adversary for more than a decade, and that defendants were allegedly aligned with PNG in prosecuting the war," counseled in favor of plaintiffs' forum choice.\textsuperscript{322} The court also found that although two of the four public interest factors counseled against retaining the suit, overall they did not "tip sharply in favor of the alternate forum."\textsuperscript{323} The fact that jury duty would be imposed on citizens far removed from the dispute and that the court would have to apply PNG law in some instances, did not outweigh the countervailing concerns over the congestion in PNG courts and the choice of law.\textsuperscript{324} That the U.S. court would mostly be applying international law—rather than PNG law—helped convince the court that retention of the suit was proper.\textsuperscript{325} The court also accepted plaintiffs' contention that their human rights claims would not be cognizable in Australia;\textsuperscript{326} defendant's fallback forum should the court find PNG inadequate. Ultimately, this suit, while successfully breaking the forum non conveniens barrier, was dismissed as a nonjusticiable political question.\textsuperscript{327}

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\textsuperscript{315} See Abdullahi v. Pfizer, Inc., Nos. 02-9223(L), 02-9303 (XAP), 2003 U.S. App. LEXIS 20704, **11 (2d Cir. Oct. 8, 2003) (vacating and remanding the district court’s dismissal of ATCA claims on FNC grounds; no further case history is available).
\textsuperscript{316} Id. at 739 n.78.
\textsuperscript{317} Id. at **3, **11.
\textsuperscript{318} Id. at **6-**9.
\textsuperscript{319} Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1175 (C.D. Cal. 2002).
\textsuperscript{320} Id. at 1164-75.
\textsuperscript{321} Id. at 1170.
\textsuperscript{322} Id. at 1174 (citing Jane Doe I v. Karadzic, 866 F. Supp. 734, 735 (S.D.N.Y. 1994)).
\textsuperscript{323} Id. at 1174-75.
\textsuperscript{324} Id.
\textsuperscript{325} Id. at 1175.
\textsuperscript{326} Id. at 1176.
\textsuperscript{327} Id. at 1208-09.
Conversely, in *Aguinda v. Texaco, Inc.*, the Second Circuit affirmed dismissal of ATCA claims on forum non conveniens grounds but modified the order to insist the defendants agree to submit to the jurisdiction of Ecuadorian courts, regardless of an Ecuadorian law that would have allowed them to claim otherwise. In *Aguinda*, the court considered and rejected four arguments raised to counter defendant’s challenge: (1) Ecuador was not an adequate forum because it did not recognize tort claims; (2) Ecuador did not allow class action lawsuits and did not recognize the equitable relief plaintiffs were seeking; (3) certain procedural requirements made the process in Ecuador slow, cumbersome, and overcomplicated; and (4) Ecuadorian courts were biased and incapable of rendering an impartial verdict. Taken cumulatively, the plaintiffs argued, such factors rendered the forum inadequate. The court rejected plaintiffs’ arguments, finding the following factors persuasive in reaching its conclusion: (1) other individuals harmed by Texaco’s drilling activities had successfully sued Texaco in separate lawsuits in Ecuador already; (2) the government of Ecuador could be joined as a party in Ecuador (the drilling was a joint venture between the government and Texaco and was allegedly controlled by the government); and (3) the multiple causation issues that arose over large geographic areas in Ecuador would best be tried in the location where the alleged violations occurred. The parties also argued over substantive and procedural Ecuadorian law and the impact that it would have on the case.

In the end, the court found the following evidence dispositive of the forum non conveniens dismissal: (1) that there was no evidence of impropriety on the part of Texaco or the Ecuadorian judicial officials; (2) that Ecuador was hearing cases against multinationals and no accusations of corruption had arisen in those cases; (3) the attempted military coup in 2000 had failed, which, to the court, reaffirmed Ecuador’s commitment to democratic institutions; and (4) other recent U.S. cases had held that Ecuador was “an adequate alternative forum.” The court conceded that even the State Department called “Ecuador’s legal and judicial systems . . . ‘ politicized, inefficient, and sometimes corrupt,’” yet it simultaneously insisted that these characterizations were only applicable to cases involving clashes between the police and political protestors. The court also placed heavy emphasis on the fact that Texaco was four times removed from the alleged violations, involved only via a fourth-tier subsidiary, TexPet. TexPet was not made a party to the suit, and almost all violations occurred in Ecuador.

By pointing this out in its analysis, the court conflated the question of corporate liability and Ecuador’s territorial sovereignty with the forum non conveniens

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328. 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001). See also Rolle, *supra* note 188, at 154-57, for an extended discussion of the many cases against Texaco that were ultimately consolidated into the *Aguinda* case and dismissed.


330. *Id.* at 544-46. The court dismissed the plaintiffs’ contention that the lack of a class action mechanism—a uniquely American creation—in Ecuador rendered the Ecuadorian forum inadequate. *Id.* at 540-41.

331. *Id.* at 542-43.

332. *Id.* at 544-45.

333. *Id.* at 545.

334. *Id.* at 548.

335. *Id.*
analysis. This was inappropriate, particularly when, as here, the question of a parent corporation's liability is so complex. A cursory examination of the appearance of objectivity and due process in the alternative forum, when that forum is supported by the very government alleged to be colluding with the corporation committing the crimes, fails to keep the forum non conveniens arguments analytically distinct from other prudential and political concerns. Had the court made these conceptual distinctions more carefully, the evidence of bias in Ecuador’s judicial system may very well have convinced the court that a U.S. court was the proper forum.

In ATCA cases, judges “tend to presume that foreign courts are competent to adjudicate disputes arising within their national territories.” The political question doctrine was first sketched in *Marbury v. Madison*. The political question doctrine was first sketched in *Marbury v. Madison*.338 Chief Justice Marshall distinguished between legal duties and political questions, by proclaiming that the only restraint on an individual’s right to redress a legal wrong is the Constitution.339 However, when a “discretionary” function is at issue, Marshall reasoned, the legal wrong can be subsumed and the acts of the executive would thus be “only politically examinable.”340

Writing for the Court in *Baker v. Carr*, Justice Brennan described the political question doctrine as elusive, and conceded that “in various settings” its elements “diverge, combine, appear, and disappear in seeming disorderliness.”341 Yet in *Baker*, the Court outlined the analytical framework for courts when determining whether a given claim presents a nonjusticiable political question. A given suit may present a political question if: (1) the matter is constitutionally committed to

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338. 5 U.S. (1 Cranch) 137 (1803).
339. *Id.* at 166.
340. *Id.*
a coordinate branch of government; (2) no "judicially discoverable and manageable standards" exist to guide the court's analysis; (3) it is impossible to decide the case without making an initial policy determination that should rightfully be made by a separate branch; (4) deciding the case would express "a lack of respect" to a coordinate branch of government; (5) there is "an unusual need for unquestioning adherence to a political decision already made"; or (6) the potential embarrassment to the U.S. government could arise as a result of "multifarious pronouncements by various departments on one question." Questions impacting foreign relations present unique challenges because such questions often "demand [a] single-voiced statement of the Government's views." Yet, Brennan cautioned, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." When confronted with foreign relations questions, Brennan directed courts to examine the history of the particular issue presented and then look to see if it was susceptible "to judicial handling" and to consider "other possible consequences of judicial action." This is vague guidance at best, but it is necessarily vague because of the complex questions on multiple levels raised by these cases. Such close scrutiny is necessary to justify a court's intervention or nonintervention in sensitive cases. Although courts should not blindly defer to the executive in such cases, deference is appropriate when national security decisions or matters requiring singular pronouncements arise.

This reasoning was echoed and applied in the ATCA case *Kadic v. Kardzic.*

The *Kadic* court looked at the six *Baker* factors and concluded that the first three factors (textual commitment to a coordinate branch, lack of judicially manageable standards, and the danger of making policy determinations) did not apply because *Filartiga* created manageable standards ascertainable by reference to international law. Furthermore, the ATCA itself expressly committed enforcement of international law to the judiciary. As to factors four through six, the *Kadic* court asserted their relevance "only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." Thus, in the ATCA context, the critical inquiry involves whether a given ruling would upset, embarrass, or enrage a sovereign nation, or embarrass the executive by contradicting or undermining its foreign policy statements. While ATCA claims

342. Id. at 217.
343. Id. at 211.
344. Id.
345. Id. at 211-12.
346. Id. Subsequent to *Baker,* Justice Brennan's dissent in *Goldwater v. Carter* emphasized what he viewed as the narrowness of the political question doctrine. "Properly understood," he asserted, "the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutionally commit[ted]."" Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 797 (D.C. Cir. 1984) (quoting *Goldwater v. Carter,* 444 U.S. 996, 1006 (1979)) (emphasis added). Where there has been no exercise of that judgment and no pronouncement as to U.S. policy, according to Brennan, the judiciary should hear the case. See id. There is a difference indeed between a political question, on the one hand, and a nonjusticiable political question, on the other. See id.
347. 70 F.3d 232 (2d Cir. 1995).
348. Id. at 249.
349. Id.
350. Id.
can raise political questions, the *Kadic* court affirmed that many foreign relations questions are examinable by the judiciary.351 "Indeed," observed Judge Edwards in *Tel-Oren*, "the Supreme Court has at least twice cited [the ATCA] as a statutory example of congressional intent to make questions likely to affect foreign relations originally cognizable in federal court."352 So the question becomes, when does a given case only "touch" foreign relations (and therefore remain justiciable) so significantly that it "seriously interfere[s] with important governmental interests"? What judicial standards guide—or should guide—courts in making this determination?

2. The Impact of Executive Statements of Interest in ATCA Cases on Justiciability

The Bush Administration and the business lobby tend to portray the potential economic impact of ATCA litigation as intertwined with U.S. foreign policy.353 Thus, the subject of international human rights is often swallowed by the false equation of stable state relationships with a productive world economy.354 As a result, the distinction between public and private actors breaks down, and the assumed importance of economic prosperity to global stability becomes the bridge linking private actors with national and sub-national governments. Foreign states, as well as our own government, thereby conflate TNs with the state, and the corporation is necessarily thrust into the larger political and diplomatic arena. Such conflation theoretically should help ATCA plaintiffs prove state action when that is required. However, by proving state action, plaintiffs prove too much, often assuring dismissal of the case as a political question precisely because the foreign nation is so intimately involved with the TN defendant. Once in the larger political/foreign relations arena, many question the judiciary’s competence to make well-informed decisions. Although some do believe the judiciary is as competent to punish human rights violators as the political branches,355 restraint doctrines nonetheless often justify dismissals of ATCA human rights claims.356 Unfortunately, few clarifying principles emerge from these cases that would guide future courts in their analysis. Courts have thus come to rely on court-solicited opinions of the executive branch in ATCA cases.357 However, as one commentator notes, "[f]ederal courts grant undue deference to executive positions concerning [ATCA]..."
suits, the executive branch will be able to effectively dictate which international
claims may be heard by U.S. courts." Indeed, the executive branch has filed
amicus briefs in eight ATCA cases in the last 23 years, and its current position
flatly contradicts the views it expressed in \textit{Filartiga}. Just as the relationship
between globalization, human rights, and environmental violations has become
apparent, the Justice Department has reversed course and sought to undo the
\textit{Filartiga} interpretation of the ATCA.

A joint memorandum of the State and Justice Departments filed during the
Carter Administration in the \textit{Filartiga} case (Memorandum) stated, "[I]ke many
other areas affecting international relations, the protection of fundamental human
rights is not committed exclusively to the political branches of government." The
Memorandum also declared, "there is little danger that judicial enforcement
will impair our foreign policy efforts. To the contrary, a refusal to recognize a
private cause of action in these circumstances might seriously damage the cred-
ibility of our nation’s commitment to the protection of human rights." The
\textit{Filartiga} court never raised the political question doctrine, likely because it knew
that both political branches supported its reading of the ATCA. Referencing both
"the express foreign policy of . . . [the U.S.] government" and various treaties, the
\textit{Filartiga} court comfortably applied international human rights law norms to the
foreign defendant on behalf of a foreign plaintiff.

The current Bush Administration, however, while pronouncing support for
the advancement of human rights, believes that other interests supersede individual
enforcement via ATCA litigation, even when only corporate actors are sued.
Given differing interpretations and policies of successive administrations, if judges

357. \textit{See id.} at 476 n.64. "Statements of Interest are authorized under the Attorney General’s
statutory power ‘to attend to the interests of the United States’ in pending federal or state suits.”
\textit{Id.} (citing 28 U.S.C. § 517 (2000)).
358. \textit{Id.} at 469.
360. \textit{Herz, supra} note 16, at 548. Herz, a lawyer for EarthRights International and counsel in
the Unocal case, argues that as Third World economies open to foreign direct investment it
becomes clear that no effective mechanism is in place to ensure corporate accountability for
environmental abuses, and that environmental abuses may in fact violate international human
rights norms. \textit{Id.} at 545-49. "The fact that governments and TNCs often commit brutal civil
rights violations, such as summary executions and torture, to suppress opposition to ecologi-
cally destructive projects strengthens the trend toward viewing environmental degradation itself
as a human rights abuse.” \textit{Id.} at 549.
361. \textit{See Opposition Brief to the DOJ at 2, nn.2-3, Doe v. Unocal, \textit{supra} F.3d \textit{\_\_\_\_\_\_ (9th Cir. May
2003), \textit{available at http://www.earthrights.org/unocal/index.shtml (describing the various posi-
tions taken by the Justice Department since 1980 and the differences between the positions of the
State Department and Justice Department). In Filartiga and Kadic, the Justice Department
supported the exercise of jurisdiction; in \textit{Tel-Oren v. Libyan Arab Republic, Trajano v. Marcos,
and Alvarez v. U.S. the Justice Department opposed the exercise of jurisdiction in ATCA cases.\textit{Id.
362. Memorandum for the United States Submitted to the Court of Appeals for the Second
Circuit, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), \textit{published in 19 I.L.M. 585, 603
(1980).}
363. \textit{Id.} at 604 (emphasis added).
§ 2304(a)(2) and 22 U.S.C. § 2151(a) as examples of the government’s foreign policy specifi-
cally concerning human rights. \textit{Id.} at 885 n.17. Section 2304(a)(2), quoted by the court, states
that “[e]xcept under circumstances specified in this section, no security assistance may be pro-
vided to any country the government of which engages in a consistent pattern of gross violations
allow such opinion letters to carry a lot of weight in their justiciability determination, the law will evolve according to the politics of any given administration—an influence that the doctrine of separation of powers seeks to avoid. The question then becomes, what weight should be given to these executive opinions?

First, it is important to look at what weight these opinions are actually given in current ATCA cases. Statements of interest have been filed in at least nine ATCA cases to date. The Carter Administration supported plaintiffs in Filartiga, and the Clinton Administration supported plaintiffs in Kadic and Unocal. By contrast, the Bush Administration has registered its opposition to the justiciability of ATCA claims in six cases, including the Doe v. Exxon Mobil and Doe v. Unocal cases. Doe v. Exxon Mobil involved allegations of knowing collusion with the Indonesian military in human rights abuses to further Exxon Mobil’s operations in Indonesia. A trial would have unavoidably implicated the Indonesian military, even though the government of Indonesia was not itself being sued. In a diplomatic communiqué from Indonesia’s Ambassador to the United States, the Ambassador rejected the authority of a U.S. court to adjudicate the behavior of “an Indonesian government institution . . . for operations taking place in Indonesia.” He failed to acknowledge that Indonesia itself was not on trial (Exxon Mobil was), but because of the unavoidable “color of law” analysis, Exxon’s liability was directly tied to its complicity, or lack thereof, with the Indonesian military, which by definition meant that the actions of the Indonesian military would be scrutinized.

Nonetheless, Taft attached this letter to his letter to the court and highlighted the economic considerations and his concern over prosecuting the war on terror.

of internationally recognized human rights.”

The congressional findings under § 2151(a), also quoted by the court, declare:

[t]he Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms.

Id.

365. Taft letter, supra note 353. See also Free, supra note 355, at 473. “In contrast to previous administrations,” notes Free, “the George W. Bush Administration has aggressively employed executive opinions to defeat § 1350 litigation.” Id. Free further expresses concern that the Sarei case, in particular, raises concerns about the weight given to these executive opinions. Id. at 477. See also Melody Saint-Saens & Amy J. Bann, Using National Security to Undermine Corporate Accountability Litigation: The Exxon Mobil v. Doe Controversy, 11 U. MIAMI INT’L & COMP. L. REV. 39 (2003) (examining the Doe v. Exxon Mobil case in depth and exploring the recent shift in U.S. foreign policy outlined in the Taft letter).


367. See Free, supra note 355, at 468-70 (discussing Complaint for Equitable Relief Damages at Doe v. Exxon Mobil Corp. (No. 01-1357) (D.D.C. filed June 20, 2001) (plaintiffs, eleven villagers from Aceh, Indonesia, charged Exxon Mobil with human rights violations, including extrajudicial killing, torture, and crimes against humanity, at the hands of the Indonesian military hired by Exxon Mobil to provide security for its natural gas facilities)).

368. Id.

369. Id.

Human rights abuses, Taft reasoned, are minimized when governments are stable, and stability depends to a great extent on economic growth.\(^{372}\) Thus, the more the U.S. government could do to support foreign governments as they attempted to stabilize—including by implication, looking the other way on human rights violations in the short term—the more it would be supporting human rights in the long term.\(^{373}\) Suits under the ATCA were counterproductive, Taft reasoned, because they undermined long-term human rights policies by risking corporate divestment in developing countries.\(^{374}\) This divestment would result ultimately in a weakened economy and greater instability.\(^{375}\) Adjudication of these cases would "prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries."\(^{376}\) In addition, if lawsuits proceeded against the wishes of the host country, U.S. relations with the country could be negatively impacted.\(^{377}\) This, in turn, would diminish U.S. influence over that country’s policies and harm the United States in two ways: first, by decreasing diplomatic influence over human rights issues, and second, by decreasing Indonesia’s willingness to cooperate in fighting the "war on terror."\(^{378}\) Thus, Taft concluded, (paradoxically) that all comes full circle: a suit brought in the name of human rights would backfire and result in diplomatic and economic regression rather than progress.\(^{379}\)

In *Sarei v. Rio Tinto PLC,* another Statement of Interest filed by Advisor Taft focused exclusively on the diplomatic concerns raised by an ATCA suit. In its opinion, the *Sarei* court had conveyed outrage at the injuries suffered by the plaintiffs and conceded that plaintiffs had adequately alleged several causes of action under international law, yet in the end the case was dismissed.\(^{380}\) Both sides were handed a pyrrhic victory in that case. For the first time, an environmental claim—violation of the United Nations Convention on the Law of the Sea (UNCLOS)—was found to be cognizable under international law.\(^{381}\) Furthermore, the court found that the ATCA did not require exhaustion of local remedies before suit could be brought in the U.S.,\(^{382}\) that joint private-state action was sufficiently pleaded, and the forum non conveniens motion must be rejected as to both PNG and Australia.\(^{383}\) This was all good news for ATCA plaintiffs. The political question doctrine, however, ultimately barred adjudication of the case.\(^{384}\) This was very good

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372. *Id.*
373. *Id.*
374. *See id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
381. *Id.* at 1162.
382. Although the *Sarei* court acknowledged that international law requires exhaustion of local remedies, the court found that the plain language of the ATCA does not contain an exhaustion requirement. *Id.* at 1138-39. This is an ironic conclusion. The plain language of the ATCA mandates that courts apply international law, yet here, the court uses a plain language construction to conclude that an embedded principle of international law does not apply. *Id.*
news for corporate defendants. Defendants raised the possibility that the fragile cease fire that had been recently negotiated between PNG and the Bougainville insurgents would be threatened were the Sarei case to proceed. They further argued, based only on general statements made by then Secretary of State Madeline Albright after a 1998 visit to PNG, that "official" U.S. policy was to support "the territorial integrity" of PNG, and insisted plaintiffs' claims would negatively impact U.S.-PNG relations.

Unwilling to accept press conference statements as official U.S. policy, the Sarei court requested a Statement of Interest from the State Department. In a September 31, 2001 letter—notably, 20 days after the September 11 terrorist attacks—Taft insisted that the Sarei lawsuit "would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations." The Sarei court refused to entertain plaintiff's offer of proof to counter the State Department's assertion regarding the negative effects on the PNG peace process, arguing that when the State Department submits its foreign policy position it is not for the court to "assess whether the policy articulated is wise or unwise, or whether it is based on misinformation." The court indicated that it was free to take "judicial notice" of such pronouncements from the executive branch, but it did not articulate what taking "judicial notice" meant or whether such notice bound the court. In the end, the Sarei court found that "the key inquiry for the court's purpose [was] whether there [would] be an impact on the United States' foreign relations"—not how much. Neither the court nor the plaintiffs could point to any case in which a lawsuit was permitted to proceed in the face of such unequivocal objections by the State Department. This, the Sarei court concluded, was "probably because to do so would have the potential to embarrass the executive branch in the conduct of its foreign relations." The lesson? Ask and ye shall receive: if a court asks the Bush Administration for an opinion, it will likely get an answer that will compel dismissal of the suit.

Although the persuasive authority of such statements remains unarticulated, their persuasiveness to courts in ATCA cases is clear. In the two landmark ATCA cases, Filartiga and Kadic, the executive branch supported application of the ATCA and the court ruled for plaintiffs. The Sarei court, noting that the plaintiffs failed to show any other case that had proceeded in the face of express opposition by the

383. Id. at 1129-78.
384. Id. at 1208-09.
385. Id. at 1178-79.
386. Id. at 1179.
387. Id. at 1180-81.
388. Id. at 1181 (quoting an attached letter from Mr. Taft to the Attorney General's Office that was enclosed with the Statement of Interest filed with the Sarei court by the Attorney General (acting on behalf of the Department of State)).
389. Id. at 1182.
390. Id. at 1182-83 (citing multiple sources as a foundation for the court's taking judicial notice of the government's official policy and opinion without having to recognize the underlying facts at the motion to dismiss phase).
391. Id. at 1192.
392. Id.
393. Id.
State Department, essentially conceded that dismissal rested almost entirely on the opposition expressed in the Statement of Interest. Given the impact these statements have, the question becomes to what extent should the now express opposition of the Bush Administration determine the court's analysis of the political question doctrine, and at what point would the court's deference to those opinions violate the very Constitutional principles of separation of powers the court is trying to honor by soliciting them in the first place. 394 In the end, "[i]f courts . . . practice unquestioning adherence to executive communication, they would enable politicization of the judiciary." 395

In Appellants' Reply Brief in the Unocal case, plaintiffs argued that the Justice Department possesses no special expertise in the interpretation of the ATCA, and because the question is one of statutory construction, the authority to construe the ATCA rests with the judicial branch. 396 Plaintiffs argued that courts do not defer "when the interpretation offered by the government is inconsistent with the facial requirements of the statute or plain legislative intent, especially if the government's interpretation changes over time." 397

The uses by the judiciary of State Department opinions as well as other ATCA/political question cases demonstrate an inappropriate derogation of judicial power to the executive branch. Because courts view their involvement in foreign matters as more dangerous (i.e., political) than in the domestic context, disparate articulations of the political question doctrine have emerged. 398 As one commentator notes:

[H]igh stakes in the international context are different from high stakes in the domestic context to the extent that the implication of third parties (read: foreign countries) beyond our control greatly magnifies the risk of error . . . . In the international context, the commission of the error can, at least in theory, spark a chain of events taking the matter out of our hands, so that the damage is irretrievable. And in the international context that damage has been, as a historical matter, potentially severe. 399

This unpredictability in the international context underlies the deference paid to the executive in ATCA claims, and courts vigorously defend the importance of the political question doctrine, even in the face of "sustained attack by the commentators." 400 The very fact Statements of Interest are requested underscores judicial confusion (or reticence) in the face of these claims. Unfortunately, the Statements do not necessarily speak to the proper legal response under domestic and international law, but reflect instead the political philosophy of a given administration.

3. A New Look at the Political Question Doctrine

394. See Mont. Wilderness Ass'n v. United States Forest Serv., 496 F. Supp. 880, 884 (D. Mont. 1980), for the proposition that although executive opinions "are given great weight . . . [they are] not binding on this court."
395. Free, supra note 355, at 484.
396. See Opposition Brief to the DOJ at 5-6, Doe v. Unocal, __ F.3d __ (9th Cir. May 2003), available at http://www.earthrights.org/unocal/index.shtml.
397. Id. at 5.
399. Id. at 678.
400. Id. at 676 (citation omitted).
It should not be taken lightly that the political question doctrine reverses the normal constitutional presumption in favor of judicial review, and such a reversal may no longer be warranted—at least not in its present form. Given that the global community is willing to recognize individual rights grounded in natural law and to codify those rights in treaties and domestic legal structures, the argument that courts should avoid adjudication of a case because of the potential for embarrassment on the world stage is less persuasive than it once was. So too, is the insistence that each branch of the U.S. government must speak with one voice. With the spread of economic cooperation and democracy, foreign nations increasingly understand the independence of various branches of government, because they either maintain a similar separation of powers in their own system, or they are exposed to such governments on a regular basis. Consequently, the idea that pronouncements from the judiciary will embarrass the executive, or will lead foreign governments to presume that the executive holds the same position and therefore impose sanctions, or, in the worst case, start a war against the U.S., is less persuasive than it once was. These ideas rest on the presumption that the overriding (or only) concern of international law is with inter-state relationships and their ability to (a) prevent war and (b) promote commerce. As the international reality shifts, however, so too must the paradigm governing these prudential doctrines—accounting for interdependence among the branches, the separation of powers, and the increased understanding nations have of democratic forms of government and the importance of separation of powers. Separation of powers principles themselves “prevent the executive branch from mandating which cases federal courts may hear.”

a. A Changed World Must Change the Political Question Doctrine

In his article Globalization and the (Foreign Affairs) Constitution, Peter Spiro forcefully argues for the compromise required by balancing foreign relations concerns and individual rights to shift in favor of individual rights in light of the changes produced by globalization. He points to three broad phenomena that suggest this shift is long overdue: (1) the “increased institutionalization of interstate relations;” (2) “the disaggregation of the nation-state;” and (3) “heightened international economic competition.” He encourages the legal community to catch up with other disciplines and to come to terms with the ways in which globalization impacts core legal thinking, including the way we interpret the Constitution.

As to the first phenomena, for most of history, nation-states confronted one another in a hostile world, in a “proto-anarchical arena characterized by only the...
loosest constraints on self-interested behavior."411 Today, however, interstate relations are increasingly governed by "rationalized institutional processes."412 With the increase in world governing bodies, such as the World Trade Organization, the United Nations and others, interstate relations have taken on a more structured, controlled character that has created greater stability and decreased the need for war.413 Many nations have shown themselves willing to submit to alternative dispute resolution mechanisms.414 In the past, despite the costs of war, countries have been willing to wage war when the benefits of a successful campaign outweighed the costs. However,

[i]nstitutionalization reduces the cases in which resort to force passes this cost/benefit test. If states are willing to submit to dispute-resolution processes, the incentive to use force dissipates. At least among states that accept institutionalization, an end to uncabined armed conflict ensues. This occurs (perhaps counter-intuitively) even as the overall stakes implicated by global governance regimes increase.415

While Spiro recognizes the real threat of terrorism and the dangers still remaining, he distinguishes this threat from the threat of war in the traditional sense.416 The idea of a nation-state becomes irrelevant in the terrorism context, and the "very notion of a war front" becomes obsolete.417 Terrorism, he notes, "ultimately reduces to a kind of criminal activity" and can thereby be addressed with a "law enforcement model."418 Indeed, an international consensus has emerged condemning terrorist activity as contrary to international law. By contrast, the pre-globalization, pre-terrorism world was characterized by the Cold War, and the Cold War problems could hardly have been conceptualized or solved using a law enforcement model.419 The Cold War "amounted to a competition of ideologies, each of which had secured international legitimacy."420 The relationships of nation-states, therefore, are now more stable, and "[t]his new stability is consequential for foreign relations law doctrines established on different premises. Doctrines contingent on a world of hostile, competitive interstate relations should be reexamined with the emergence of global governance systems."421

The second phenomena referenced by Spiro—"disaggregation" of the nation-state—refers to the emerging ways in which nation-states view one another and communicate.422 Previously, communication among states involved formal, highly ritualized contact in the form of diplomacy.423 States only recognized those authorized to speak for the country in such formal contexts.424 The underlying be-

411. Id. at 660.
412. Id. at 661.
413. Id. at 662.
414. See id.
415. Id.
416. Id. at 663-65.
417. Id. at 665.
418. Id. While I do not agree that terrorism can be dealt with under a criminal law paradigm, it is important to recognize that terrorism represents a nontraditional war and thus places less pressure on formal nation-state relationships. In fact, it engenders—or should engender—state to state cooperation in the face of a common, decentralized enemy.
419. Id. at 666.
420. Id.
421. Id. at 667.
422. Id. at 667-71.
lief was in "a reality of central government control and centralized relations among states in the international arena."425 Now, however, "[c]entralized diplomacy is in decline."426 Thus, governments understand that there are many actors and decision makers that comprise the government of any other nation, and states are coming to understand that the "rule of international law is advanced by disaggregating the state."427 Although it remains important to speak with one voice, the international system is no longer blind to entities other than nation-states.428

This is a particularly important concept when considering the hybrid nature of most transnational corporations. Indeed, because they are both public and private entities—public actors engaged in ventures with foreign governments, and private actors engaged in business for profit—the distinction between public and private breaks down. These hybrid entities, in turn, are viewed less and less as representing the interests of the United States. Consequently, TNs may be held to the rule of international law without disrupting the relationships among nation-states—precisely because those nation-states understand the diverse and complex relationships among actors within a state, and how those relationships play out on the international stage.

The third phenomenon Spiro articulates is economic globalization. As a result of the increased mobility of capital, "[s]tates now face a situation in which increasing regulatory burdens (including labor standards, environmental controls, and taxes) may prompt the departure of capital."429 The states with more burdensome regulations may discourage investment to the extent that an alternative, less burdensome regulatory scheme is available elsewhere.430 Furthermore, because of the disaggregation phenomena discussed above, a corporation, for example, (or any economic actor) has a heightened interest in communicating with "subnational" actors (states, municipalities). "Insofar as regulatory policy is set at the subnational level, economic actors can pit subnational jurisdictions against each other as regulatory competitors."431 In short, subnational units, such as the state of Maine, must situate themselves in the international context. Corporations must do so also. In order to maintain global competitiveness, they have to reduce "locational costs," which leads to competition among states to attract this capital. The result is that

[alt] the same time as globalization has diminished state capacity to discipline corporations . . . it has added another mechanism, one that plays out across national boundaries. To the extent that corporations face the discipline of global markets on questions of operational venues . . . they can in turn exercise leverage over governmental authorities, central and subnational.432

423. Id. at 667.
424. Id.
425. Id. at 668.
426. Id. at 669.
427. Id. at 670-71.
428. Id. at 671.
429. Id. (footnotes omitted).
430. See id. at 672.
431. Id.
432. Id.
b. Justice Jackson's Youngstown Steel Concurrence Revisited: Where is the Twilight Zone?

Justice Jackson's concurring opinion in Youngstown Steel laid out his three-tiered analysis on the scope of executive power, which attempted to account for both the separation of powers and the sharing of power between the legislative and the executive branches. Along those same lines, the boundaries and shared responsibilities between the judiciary and the executive branches can and should be articulated more carefully, and defined in terms compatible with globalization and the diffusion of power.

Several logical rules of decision make sense when Spiro's new global realities are considered. First, when a suit would directly impede national security efforts by the executive during wartime (either under emergency presidential war powers or with congressional authorization through a declaration of war), the judiciary should indeed defer to the judgment of the executive branch. This principle is well-established. However, a second type of suit occurs in the "twilight zone" of judicial/executive power, which would include ATCA cases filed in situations where the impact on foreign relations is confined to speculation that such a suit might upset an ally in the ill-defined "war on terror," or would "threaten a fragile peace" process in a civil war only brokered by the United States, such as was the case in Sarei. When presented with this second category of suits, a court should carefully and independently examine the assertions of the executive, even when Statements of Interests clearly urge dismissal of the suit, to determine if the effect asserted is substantial enough to reverse the constitutional presumption in favor of judicial review and court enforcement of federal statutes. Courts should consider factors such as whether war and peace are involved in the concerns of the executive, whether the foreign policy articulated is expressly or implicitly supported by Congress, and whether the administration's foreign policy conflicts with international law. If an executive policy does conflict with international law, courts are duty-bound by the Constitution and by a congressional statute (the ATCA, among others) to uphold international law. Courts, therefore, should not merely accept and adopt executive pronouncements that some diffuse danger exists to U.S. foreign relationships. Caution and close analysis, however, is still warranted to determine the justiciability question. In short, courts must recognize that just because a case involves a foreign country does not mean it is a matter of foreign policy.

The third category of ATCA suits involves purely economic concerns, often expressly articulated by the executive branch, and often deferred to by the courts.

433. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-48 (1952) (Jackson, J., concurring). Justice Jackson's concurrence laid out the framework for evaluating the scope of executive power. He articulated three "zones" of operation: (1) when the President acts with express or implied authorization from Congress; (2) when the President acts in the face of congressional silence on an issue; (3) where the President acts contrary to the express or implied will of Congress. Id.

434. See, e.g., Ex parte Quirin, 317 U.S. 1 (1942); Ex parte Milligan, 71 U.S. (4 Wall) 2 (1866). But see Padilla v. Rumsfeld, 352 F.3d 695 (2003) (holding that Congress—and not the President acting alone—has the sole authority to designate U.S. citizens captured on U.S. soil as enemy combatants, in spite of the broad authority granted to the President to protect national security interests in times of war), rev'd on other grounds, 124 S. Ct. 271 (2004).

In these suits, however, courts generally should not defer to the executive. Matters of international economic policy do not concern courts; violations of international law do. If a tort in violation of the law of nations occurs and is brought before a U.S. federal court, the economic impact of ruling on that case should remain outside of the court’s calculus.\footnote{See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955); Nebbia v. People of New York, 291 U.S. 502, 537 (1934); Lochner v. New York, 198 U.S. 45, 74-75 (1905) (Holmes, J., dissenting). The Supreme Court has long held the opinion first articulated by Justice Holmes in his dissent in \textit{Lochner}. Justice Holmes repudiated a form of judicial activism that would read economic policy into the Constitution. Interestingly, the Court seems to be engaging in a similar analysis in ATCA suits when it is persuaded by arguments that ruling on corporate abuse cases would impede the ability of United States-based TNs to operate in foreign countries and thereby diminish U.S. economic strength by creating risk-averse companies unwilling to invest overseas. It is important to remember that whether these cases would have such an economic impact is purely speculative, and, more importantly, is not, pursuant to declarations of our own Supreme Court, a matter appropriate for judicial concern. International economic theory should not necessarily drive the Court’s interpretation of international law in this context. Thus, without a clear statement of intent from Congress to consider the economic impact of human rights-based litigation, the court should not be considering economic impacts.} Granted, there are times when economic development initiatives are part of the government’s overall foreign policy strategy; however, this remains relevant to the aspirations of the U.S. government with regard to its own commercial self-interest and the overall development strategy for the target country, suggests that it should not influence the court in either direction. There may, in fact, be circumstances in which the economic consequences to an ATCA defendant could be so devastating to the host country that irreparable harm may be done. This, however, is pure speculation and should be addressed when the case of catastrophic divestment actually presents itself to the court, and it is clear that an economic concern has become a matter of foreign policy inappropriate for judicial resolution. Short of such a situation, the court should not base questions of justiciability on economic impact—at home or abroad. It is certainly arguable that most TNs can take financial hits in discrete pockets of their operations without suffering on the massive scale predicted by such organizations as the Institute for International Economics (IIS).\footnote{Malvina Halberstam, \textit{Belgium’s Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?} 25 \textit{Cardozo L. Rev.} 247, 247 (2003).} Even the IIS admits that “no \textit{decided} [ATCA] cases can be cited to confirm that the nightmare scenario... will come to pass.”\footnote{\textit{Id.} at 2.} If that time comes, nation-states, the World Trade Organization, the U.N., and other international development agencies can craft a response. So, too, can the United States Congress. To date, however, no domestic or international law has been passed that would remove such suits from the court’s cognizance.

IV. USEFUL MODELS AND LESSONS TO GUIDE COURTS REVIEWING ATCA CASES

\textbf{A. Belgium’s Universal Jurisdiction Law}

In 1993, Belgium passed a universal jurisdiction law, allowing Belgian courts to try persons accused of genocide, crimes against humanity, and war crimes even if neither the accused nor the victims had any connection whatsoever to Belgium.\footnote{\textit{Awakening Monster}, supra note 6, at 1-2, for predictions of divestment.}
Although this was not the first universal jurisdiction law any nation had passed, it was the broadest. In 2001, the Belgian Court of Cassation tried and convicted two Rwandan nuns and two Rwandan men for their role in atrocities committed during the 1993-94 Rwandan civil war. Also in 2001, Palestinian survivors of the 1982 massacre of refugees by Lebanese militiamen at the Sabra and Shatila camps invoked Belgium's universal jurisdiction law against current Israeli Prime Minister Ariel Sharon, who was then Israel's defense minister. In March 2003, seven Iraqi families invoked Belgium's law against U.S. President George H. W. Bush, current Vice President Dick Cheney (then Secretary of Defense), Secretary of State Colin Powell (then chairman of the Joint Chiefs of Staff), and retired General Norman Schwarzkopf for alleged war crimes committed during the first Gulf War. As previously stated, the court successfully prosecuted and jailed the Rwandans of war crimes. Furthermore, it allowed the complaint against Sharon to proceed but granted him immunity while in office. In response to U.S. protests regarding the Gulf War complaint—including Secretary of State Powell's warning that Belgium was risking its status as "diplomatic capital and the host state for [NATO] by allowing investigations of those who might visit Belgium"—the Belgian parliament proposed, and soon passed, amendments to limit the scope of the law. Soon after, Secretary of Defense Donald Rumsfeld threatened to withhold funding from Belgium for the new NATO headquarters unless Belgium rescinded its law.

To date, Belgium has changed its law in three ways: (1) universal jurisdiction was replaced by jurisdiction requiring a link with Belgium, either through the nationality of the victim or the accused; (2) immunity from prosecution was recognized for foreign heads of state; and (3) the public prosecutor was given a larger role when jurisdiction based on the passive personality principle was asserted (Belgium allows criminal indictments via plaintiff-prosecutors but amended the universal jurisdiction law to limit this power in the case of this law). Critics hold this up as proof that the use of universal jurisdictions to vindicate human rights is inherently political and cannot be applied evenhandedly. Belgium's response to Israel's protests against the Sharon indictment, for example, differed dramatically from its response to U.S. protests against the Gulf War indictment, suggesting to some that European bias against Israel animated the difference.

The most obvious contrast between Belgium's law and the ATCA is that Belgium's law was used in an unprecedented manner to indict heads of state rather than corporations. Such indictments clearly interfere in international relations,

441. Id.
442. Id. at 889-90; compare with Halberstam, supra note 439, at 265-66 (arguing the differing responses to the indictments of Israeli officials versus U.S. officials demonstrates the self-serving, inherently political purposes such statutes serve and, consequently, their inability to deliver justice).
443. Ratner, Belgium, supra note 440, at 890.
444. Halberstam, supra note 439, at 248.
445. Ratner, Belgium, supra note 440, at 890.
446. Id. at 891.
447. Id.
448. See Halberstam, supra note 439, at 265-65.
449. See generally id.
and courts should dismiss any such case as a political question (and clearly would, given current sovereign immunity doctrine). Belgium's experience does offer insights into the limiting principles that have and will continue to sustain the ATCA as an even-handed—albeit limited—tool. Belgium’s experience with its universal jurisdiction law suggests how courts may meet the “twin goals of individual accountability and public order.” Commentator Steven Ratner notes that indictments against heads of state will always create resentments and tension, and while in "some cases individual accountability is worth the price of those tensions," in cases involving corporate defendants such tensions rarely arise.

Ratner outlines the convergence of eight factors that supported successful prosecution of the Rwandans under Belgium’s law:

1. The presence of the accused in Belgium.
2. The severity of the atrocities.
3. The strength of the evidence against them.
4. The sense that the prosecution was apolitical.
5. The absence of an effective judiciary in the country where the atrocities took place.
6. The special links between the state of the crime and Belgium.
7. The political powerlessness of the defendants.
8. The lack of opposition from any state, in particular Rwanda, to their prosecution.

Ratner then gives relative weight to each factor to determine how far beyond the Rwandan convergence a court should go when asserting jurisdiction to enforce human rights norms. He concludes that links between the forum state and the state where the crime occurred, and the political powerlessness of the defendants should carry little weight, while the presence of the accused, the severity of the atrocities, the strength of the case, and the absence of an effective judiciary in the state where the atrocities occurred are critical to assertions of jurisdiction. Ratner further argues that the degree to which a given prosecution may inflame political tensions and the foreign policy repercussions flowing from a state’s objection to prosecution require a balancing test. The political power/powerlessness of the defendants and the links between the forum state and the state where the atrocities occurred need not be accorded deference by a court.

Notably, these factors are to a great extent already part of the analysis of U.S. courts when faced with ATCA cases. Personal jurisdiction rules require the presence of the defendant before the case can proceed (in the case of corporate defendants, this usually means the parent company has enough minimum contacts for a court to assert jurisdiction), the forum non conveniens analysis helps ensure that cases are dismissed if the suit can and should be heard elsewhere, and the application of the prudential political doctrines (political question, act of state, international comity) obliges the court to balance the competing interests of individual justice and political policies in the context of foreign relations. Furthermore, the test courts have devised at the threshold stage in ATCA cases—the violation must be clear, specific and obligatory on all nations—protects against the vagaries of international law. This allows for the punishment of individuals in instances where

450. Ratner, Belgium, supra note 440, at 893.
451. Id. at 894.
452. Id. at 892.
453. Id. at 894-95.
454. Id. at 894-96.
455. Id. at 894-95.
456. Id. at 895.
457. See supra, Part II(D) (discussion of the rules of decision in modern ATCA cases).
“individual accountability is worth the price of . . . tensions.” American courts already avoid the pitfalls of Belgium’s universal jurisdiction law, and with refinement of the political question doctrine and corporate liability theories, courts will be better-equipped to discern cases that should be heard from those that should not. Specifically, when courts adjust to the changes brought by globalization and accord proper weight to opinions of the executive branch, such dangers are reduced, minimizing the possibility of irresponsible assertions of universal jurisdiction of the kind seen in Belgium. Indeed, individual accountability is an important supplement to state-to-state political and diplomatic pressure (in the form of treaties, accords, and sanctions for diplomatic violation), and the ATCA provides that counterbalance.

B. Piracy Law and the Concept of the Stateless Vessel

Courts confronting TN defendants in ATCA cases are struggling with the very nature of the entity with which they are dealing. In addition to their visceral application of the political question doctrine, they inappropriately apply domestic corporate law concepts predicated on the unique legal and economic environment of the United States. As discussed above, this paradigm rests on the assumed power structure Shapiro and others challenge but which courts have yet to recognize. Courts must adjust their thinking to the new realities of globalization. At the same time, however, they should summon all legal traditions available to assist in providing this new analytical framework. One such tradition can be found in the law of piracy. Specifically, TNs that violate human rights norms are analogous to stateless ships. As the stateless vessel undermines world order because it is literally accountable to no one for its crimes, so too does the TN that maintains complex business relationships across multiple borders wielding power greater than many
of the countries in which it operates. As Professor Deva observes, "[s]ince the area of [TN's] activities defies any notion of boundaries, and since they expect uniform rules governing international trade, it is a necessary corollary that their 'home' is no longer limited to the country of incorporation. Rather, it extends to the whole world..." 461

Piracy law can provide some useful analogies to foster proper analysis of who is committing these crimes and torts in violation of international law, and the link between the actor and the nature of the crime itself. It also provides some revealing contrasts.

1. The Offense of Piracy

Piracy under international law is defined as "crime jure gentium, 'an offense against the law of nations.'" 462 There has been much dispute over what acts constitute piracy, but under both the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea (to which the United States is not a party), piracy includes "[a]ny illegal acts of violence, detention[,] or any act of depredation, committed for private ends...[o]n the high seas...or...in a place outside the jurisdiction of any State." 463 An act of piracy must be committed for a private end. 464 Piracy also encompasses "voluntary and knowing participation or incitement to commit those acts." 465 The fact that the crime of piracy, by definition, is committed for "private ends" makes it a particularly compelling analogy to crimes committed by TNs, presumably also committed for private gain. 466

Prior to the International Conventions on the Law of the Sea, 467 courts grappling with charges of piracy raised concerns very similar to those raised in ATCA cases: what is international law? where do we look to find out what it is? how do we resolve differences? Although each nation has its own definition of piracy, the definition under international law is both separate and derived from the laws of each individual state. 468 The U.S. Supreme Court in United States v. Smith defined piracy. 469 In Smith, the Court attempted to locate and articulate customary international law in much the same manner as it does in the current ATCA cases. The case involved a man who, along with others, engaged in mutiny on an Argen-

461. Deva, supra note 291, at 40.
464. Randall, supra note 61, at 797.
466. The obvious difference between piracy and violations by TNs, of course, is that most corporate abuses occur on land within the territorial boundaries of a sovereign state, further complicating the jurisdictional questions. See infra, Part IV.C textual discussion of this difference and how it might be managed.
469. 18 U.S. (5 Wheat.) 153 (1820).
tine ship. He, along with some accomplices, seized the ship and subsequently, without any authority, attacked and plundered a Spanish vessel on the high seas. The instigator was captured by the United States and brought before a federal court. The Supreme Court eventually heard the case and interpreted the piracy statute, which read: "if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof . . . be punished with death." Defense counsel argued that to define piracy simply by reference to the "law of nations" was too uncertain and imprecise. The Court, however, unhesitatingly found the law of nations to provide ample guidance to provide for a constitutional prosecution. Justice Story, writing for the majority, stated that all "writers concur . . . that robbery, or forcible depredations upon the sea . . . is piracy."

Note that the Court in Smith "ascertained the definition of piracy under customary international law to define the crime of piracy under U.S. law." The Court first looked at the Constitutional provision authorizing Congress to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations." It then examined the domestic statute under which Smith was being prosecuted. Because the Court found that both the Constitution and the statute defined piracy by incorporation of international law norms, the Court defined the law of the case by reference to the law of nations: "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." After examining many of these sources, the Court insisted it had "no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819." The Court felt no reluctance to define and punish offenses defined by the law of nations in this context.

In his dissent, however, Justice Livingston articulated one of the very same concerns that pervades today's debate over ATCA claims: that Congress should precisely define what it perceives to be the offense under the law of nations, rather than leaving it to the courts to ascertain international law with only the guidance of academics, commentators, and world opinion. As Justice Livingston lamented:

470. Id. at 154. 471. Id. 472. Id. at 153-54. 473. Id. at 154 n.a. 474. Id. at 157. 475. Id. at 158-59. 476. Id. at 161. 477. Constantinople, supra note 468, at 729. 478. U.S. Const. Art. I, § 8, cl. 10. 479. See Constantinople, supra note 468, at n.16. The U.S. Constitution provides that Congress has the authority to prosecute the crime of piracy, and present federal law on piracy is set forth in 18 U.S.C. §§ 1651-61 (1982). Id. It provides in pertinent part: "whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." Id. at 162. 482. Id. at 182.
Nor does it make any difference in this case, that the law of nations forms part of the law of every civilized country. This may be the case to a certain extent; but as to criminal cases, and as to the offence of piracy in particular, the law of nations could not be supposed of itself to form a rule of action . . . Congress [has] power to punish offences against the law of nations, and yet it would hardly be deemed a fair and legitimate execution of this authority, to declare, that all offences against the law of nations, without defining any one of them, should be punished with death.483

A similar protest against the inchoate nature of the law of nations appears again in the contemporary context in Judge Bork's concurrence in Tel-Oren, in which he stressed that it is not the proper role of the courts to "infer a cause of action not explicitly given" by Congress.484 He argued that none of the potential sources—federal common law, the law of nations, or acts of Congress—have provided a cause of action for "terrorist" activities, and urged his colleagues to view the ATCA as merely a grant of jurisdiction and nothing more.485

2. Jurisdiction over the Offense of Piracy

General international law provides that each state has jurisdiction over "non-piratical acts" on the high seas committed by persons legitimately sailing under that country's flag.486 If the act is one of piracy, however, no connection is required with the country arresting the pirate.487 According to Article 105 of the U.N. Convention on the Law of the Sea, "parties [to the convention] have the right, but not the obligation, to assume jurisdiction over piratical acts with which they have no connection. Nonparties to the convention may assert universal jurisdiction over piracy under customary international law."488 This is an exception to all recognized principles of jurisdiction on the high seas. Indeed, "the authority of every state to capture pirates and their vessels is an exception to the general rule limiting each state's jurisdiction on the high seas to its own vessels and nationals."489 One rationale for this exception, as articulated in the Harvard Research Draft, is that "by engaging in piracy, individuals and their vessels become denationalized," and the protection of the flag under which the ship is sailing is forfeited.490

Perhaps a more convincing rationale for universal jurisdiction over pirates rests on the "nature of piratical offenses" themselves.491 The pirate is considered the enemy of all people, and "[p]iracy may comprise particularly heinous and wicked

483. Id. at 182-83.
485. Id. at 810-19. See infra Part II.C.2, for textual discussion of the diverse viewpoints expressed by the three concurring judges in this case. The Supreme Court lodged a muted rejection of Justice Bork's view in Sosa v. Alvarez-Machain. See supra text accompanying note 13.
486. Randall, supra note 61, at 791.
487. Id.
489. Id. at 793.
490. Id.
491. Id.
acts of violence or depredation, which are often committed indiscriminately against the vessels and nationals of numerous states."492 Acts of piracy are particularly offensive because they occur in places where the pirate can easily take advantage of a lack of law and order due to the lack of any valid organizational structure.493 When compared with modern international law offenses, one can see that "war crimes and crimes against humanity are analogous to piracy in that they are typically committed in locations where they will not be prevented or punished easily."494 Furthermore, "piratical attacks, particularly when viewed cumulatively, may disrupt commerce and navigation on the high seas. Such lawlessness was especially harmful to the world at a time when intercourse among states occurred primarily by way of the high seas, thus making piracy the concern of all states."495

3. The Stateless Vessel

A vessel sailing under the flag of no nation or the flags of more than one nation is considered stateless under international law496 and presents a particularly difficult problem. All states, therefore, have jurisdiction over offenses committed aboard stateless vessels — whether piratical offenses or not.497 The stateless vessel, like the pirate, is viewed as particularly dangerous, since its crew could conceivably commit crimes for private gain with impunity, leading to chaos and undermining the capacity of all states to protect their citizens and their property. Interestingly, the protection of private property plays an important role in the apparent empathy in court pronouncements against stateless vessels.

In United States v. Marino-Garcia498 the Eleventh Circuit examined universal jurisdiction over stateless vessels as it applied in a drug trafficking case.499 The issue raised was whether the U.S. court may assert jurisdiction over stateless vessels carrying illegal drugs in the absence of an actual intent to distribute those drugs in the United States.500 The court concluded that 21 U.S.C.A. § 955(a) extended "the criminal jurisdiction of the United States to all stateless vessels on the high seas engaged in the distribution of controlled substances."501 The court reached this conclusion by dispensing with the "nexus requirement" and held that operators of stateless vessels may be stopped, searched, and prosecuted in the United States if they are engaged in drug trafficking, even in the absence of proof that they intended to distribute the drugs inside the United States.502 In other words, the

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492. Id. at 794.
493. Id. at 803-04.
494. Id.
495. Id. at 794-95. The modern crime of hijacking supports this idea. Because international commerce rests in large part on the reliability, safety and availability of air travel, the world community has entered into agreements condemning hijacking as a violation of the law of nations akin to acts of piracy and punishable by any nation under the theory of universal jurisdiction. Id. at 818-19.
496. United States v. Marino-Garcia, 679 F.2d 1373, 1379 n.10 (11th Cir. 1982).
497. Id. at 1382-83.
498. Id. at 1373.
499. Id. at 1377.
500. Id. at 1377, 1377 n.1.
501. Id. at 1377.
502. Id. at 1383.
requirement that there be some connection to national security and the assertion of jurisdiction over the particular vessel (the nexus requirement) previously used to justify jurisdiction in drug trafficking cases was rendered superfluous in cases where the vessel is found to be "stateless." A stateless vessel is "[a] ship 'which sail[s] under the flag[s] of two or more States, using them according to convenience.'"503 In short, a ship trying to buck the system by registering in two or more states may not be considered belonging to any one of those states and thus is subject to universal jurisdiction.

In its analysis, the court began by considering the definitions provided in the drug trafficking statute itself.504 The statute made it unlawful for "any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance."505 The issue was what Congress meant by "a vessel subject to the jurisdiction of the United States."506 The legislative history indicated that Congress intended to extend jurisdiction to the "maximum ... permitted under international law."507 Thus, the Court looked to international law principles of jurisdiction for its answer.508 After surveying domestic and international case law as well as the work of commentators and experts, the court concluded that under international law "all nations have the right to assert jurisdiction over stateless vessels on the high seas."509

C. Dissimilarity: Piracy and Stateless Vessel Rules Preserve the Economic Order—ATCA Litigation Challenges It

Underlying enforcement of the ATCA are human and environmental rights concerns rather than economic rights. ATCA cases rest on ideal moral behavior as opposed to economic self-interest. Although in the abstract, respect for human rights would ultimately stabilize the world economic order, in the short term, TNs could be negatively impacted by large money judgments, resulting in profit loss, risk aversion, and perhaps divestment in developing countries. Divestment is, of course, speculative, fueled by lobbyists such as the Institute for International Economics, but such a possibility exists and colors court opinions. A court's assumption that these economic and thus diplomatic consequences might ensue demonstrates their inability to see beyond the current power paradigm. While piracy law and assertions of broad jurisdiction in this context advance the goal of international commerce, ATCA cases are seen as a threat to the economic prosperity of

503. Id. at 1382 (quoting 21 U.S.C.A. § 955a).
504. Id. at 1379.
505. Id. at 1379 n.9 (quoting 21 U.S.C.A. § 955a).
506. Id. at 1379.
507. Id. (internal citation omitted).
508. Id. at 1380.
509. Id. at 1383.
the United States, the country where the violations occurred, and indirectly, the world.510

An offending corporation, however, resembles a corporate pirate on a stateless vessel.511 Furthermore, the use of the corporate form to avoid state affiliation and thereby escape accountability resembles the stateless vessel. The international (and U.S.) response to suits involving stateless vessels or pirates is clear. Universal jurisdiction applies and no nexus with the prosecuting state is required. ATCA claims, however, tend to be much more highly scrutinized for the requisite nexus and dismissed when foreign relations concerns might be implicated. How can we account for the differing treatment?

As Professor Deva points out, "the area of [TNs'] activities defies any notion of boundaries"—much like TNs.512 The most egregious form of corporate abuses, therefore, resemble in some compelling ways the problem of piracy and the problem of stateless vessels in admiralty law. Although the legal issues are more complex, reference to these principles can provide assistance, and perhaps more importantly, confidence, that legal precedent in other areas of international law supports the justiciability of ATCA cases.

There are important differences between piracy and international corporate abuses, to be sure. Where the stateless vessel is concerned, territorial sovereignty issues never arise because the vessel belongs to no nation, and the harm has not been committed within the boundaries of any given territory. In instances of piracy, vicarious liability is rarely at issue, at least not in the forms presented in complex corporate litigation; complicated issues of state action or theories of indirect liability of parent corporations are not implicated. However, state action is never at issue in piracy cases because, by definition, a pirate never acts on behalf of a state, though a state may endorse his conduct. Thus, the prosecuting court can ignore any declared state affiliation.

Once courts acknowledge that their reluctance flows in part from outdated conceptions of where the power lies (with nation-states) and recognize anew that individuals seeking private gain can disrupt the world order (as pirates do) and violate individual rights on a scale never-before imagined, they may be able to accept both the urgency of stemming corporate abuses abroad and the traditional

510. The idea of holding TNs accountable for human rights abuses turns this unstated assumption of international law on its head, which may explain to some degree the incomplete explanations courts provide for their reluctance to apply international law in ATCA cases. Corporate accountability could, in fact, harm the U.S. economy (and ultimately, the world economy) by driving up prices for domestic products. Such a disruption of the economic world order makes courts, companies, and nations very uncomfortable. The question is—does such concern for the world economy, completely legitimate in and of itself, encompass a value superior to the environmental and human rights of the individual plaintiffs who bring these actions? While recognizing that economic prosperity and human rights bear a complex relationship to one another, does the former justify lack of enforcement of the latter? Do the utilitarian ends of preserving the perceived economic prosperity that proponents of globalization predict provide sufficient justification? More importantly, whose economic prosperity does this policy sustain?

511. It is interesting to note that piracy has taken on a more contemporary meaning in the context of software piracy, but again, the pirate in this context is undermining the economic order by supplanting the corporation's right to earn profits from its own creations. Again, to apply the concept of piracy to entities that are not threatening commerce, and to ask courts to allow litigation to proceed that may harm economic interests, presents a greater challenge—one that forces confrontation with the dominant paradigm.

512. Deva, supra note 291, at 40.
legal principle that supports holding corporations accountable. Courts must embrace and understand both the newness of this dilemma and its familiarity.

The United States, as the world's largest economic power, has a legal and moral obligation to provide a forum for justice. Not only are U.S. courts fully functioning, open and publicly accountable, the press is free, and principles of personal jurisdiction ensure that corporate defendants possess the requisite minimum contacts with the U.S. Further, those bringing ATCA claims often do so because similar remedies are not available to them in their home country, either because they live under an oppressive regime, or they live under a farcical democracy.

The new paradigm of international relationships and the distribution of global power, combined with the continued influence of the United States on the world stage sets up a unique obligation and opportunity for courts to shift their thinking with regard to the various doctrines of judicial restraint, and to re-characterize the nature of TNs for purposes of human rights litigation. Justiciability concerns can be quelled by reference to piracy law and the stateless vessel concept. The effectiveness of the current ATCA framework is reinforced by reference to Belgium's experience and the resulting lessons learned—lessons that have already been considered and applied by U.S. courts. The additional complexities presented by principles of limited liability and the connection between economic concerns, diplomatic concerns, and the ideals of human dignity can be addressed by shifting the way courts conceive of modern power relationships—and, in particular, the political question doctrine.

V. CONCLUSION: A REFORMULATED POLITICAL QUESTION DOCTRINE, BURDEN-SHIFTING AND WELL-GROUNDED PRINCIPLES FOR CORPORATE ACCOUNTABILITY

As Justice Cardozo remarked, "'obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function.'"513 Similarly, Justice Frankfurter commented, "'[t]he intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction.'"514 The ATCA is an ambiguous statute that compels judicial construction. In ATCA cases, courts announce their conception of the role of U.S. courts in the international enforcement scheme, what constitutes "foreign relations" for political question purposes, and who is responsible within our own government for enforcement of private international law. Implicit in these decisions are assumptions about the degree to which legal constructs should interrupt rather than facilitate international commerce and advance U.S. self-interest. To refrain from ruling in an ATCA case makes as clear a policy statement as does a decision on the merits. Thus, it is

513. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 796 (D.C. Cir. 1984) (Edwards, J., concurring) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1920) (emphasis added) (responding to Judge Robb's insistence that the case should be dismissed because it presented a nonjusticiable political question)).

514. Id. (Edwards, J., concurring) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 529 (1947)).
imperative that courts clearly define the basis and policy behind dismissals and decisions—what international law principles apply and which political philosophy informs that choice. This Comment has argued that the analysis in many recent ATCA court cases is flawed, and asks that courts recognize that a paradigmatic shift has occurred as a result of globalization. This realization should alter judicial restraint doctrines and push courts toward more frequent validation of judicial review, even when foreign relations concerns arise in the commercial context. Under this suggested framework, *Sarei v. Rio Tinto, PLC* would not have been dismissed, and the *Doe v. Unocal* case would have proceeded on the merits.

Professor Saman Zia-Zarifi argues that as “home of the largest number of [TNs] in the world, [U.S. courts] can and should engage in this sort of transnational public litigation.” 515 Indeed, if the U.S. is willing to enforce rules against bribery abroad, prohibitions against drug trafficking on the high seas (even when there is no link to the U.S. and the drugs are not destined for the U.S.), then it “certainly can and should prosecute [TNs] for acts of murder, torture or slave trading.” 516 The ATCA promotes international enforcement of basic human rights law. As one commentator notes,

> The size and power of [TNs], and their imperative to seek profits wherever they can be found, often in developing countries ruled by oppressive governments, puts them in contact with acts of brutality around the globe; the private nature of corporations, and their reliance on the domestic laws of several different countries for their very existence, makes them awkward subjects for international law. The revolutionary conceptual leap of ATCA litigation against corporations is to collapse the distance between these two aspects of [TNs]. 517

The ATCA can and should be used to help fill this gap. Many current declarations of rights and principles of environmental and human rights in the international context exist but lack enforcement provisions. 518 Diplomacy is not keeping up with globalization. And even while most countries agree on fundamental human rights principles, it has proven difficult (but possible in some cases) to enforce those rights. We are playing catch-up with globalization, and a resulting enforcement vacuum exists in the area of human and environmental rights. This is why the ATCA can and should be used as a transitional tool. It is not a perfect tool, but it is a constitutional assertion of jurisdiction, valid under both domestic and international law, grounded in English and American common and admiralty law, and constrained by various judicial restraint doctrines, that presently deter companies from committing the most severe offenses, and provides for punishment and a remedy where deterrence is inadequate. With refinement of the court-created doctrines of restraint, the imposition of a higher burden on TNs to know the activities of their foreign direct investment projects and of their subsidiaries, and an understanding of the new global context in which commerce occurs, courts can and should accept the invitation extended by the ATCA to apply international law and stem the tide of corporate abuses.

_Lorelle Londis_

516. *Id.*
517. *Id.*