


Summer 2005

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Recommended Citation

Chanin, Joshua M. (2005) ""The Regulatory Grass in Greener": A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility," *Indiana Journal of Global Legal Studies*: Vol. 12 : Iss. 2 , Article 18.

Available at: <https://www.repository.law.indiana.edu/ijgls/vol12/iss2/18>

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“The Regulatory Grass is Greener”: A Comparative Analysis of the Alien Tort Claims Act and the European Union’s Green Paper on Corporate Social Responsibility

JOSHUA M. CHANIN*

INTRODUCTION

Google.com, the ultramodern measuring stick for social and political currency, lists some 17.6 million results for a search on “globalization.”¹ Front pages and op-ed pieces from major international newspapers speak to the impact of globalization almost weekly, if not daily.² The influence and relevance of the phenomenon are unquestioned, as is the diversity of opinion on the nature of its impact. In simple terms, globalization is the continued integration of economies and societies. Individual state perspectives, governments, and boundaries have ceded to multilateral organizations, global economic and political regimes, and international markets. But is the shift from a state-based society to a global society really at the heart of the issue? Is that what activists are fighting against on the streets of Seattle and Genoa? Is that what technocrats and corporate executives consistently praise? The answer is not clear, for the notion of globalization is so broad, so nebulous, that it is indeed possible to find credible evidence to support conflicting sides of the same argument. In order to gain insight into globalization, one must break the concept down into distinct building blocks, and evaluate each one individually. Along these lines, this Note attempts to evaluate the impact of multinational corporations (MNCs) on worldwide human rights

*J.D./M.P.A. candidate, May 2006, Indiana University—Bloomington. I would like to thank Professor Hannah Buxbaum, Professor John Karaagac, Carmen Brun, Joanna Sharp, Brandon Moersch, and the *Indiana Journal of Global Legal Studies* staff for their generosity, expertise, and insight. I would also like to thank my parents, John and Johann, and my sister, Zoey, for their support.

1. See <http://www.google.com> (search conducted on Jan. 28, 2005).

2. See, e.g., Alain de Botton, Editorial, *Workers of the World, Relax*, N.Y. TIMES, Sept. 6, 2004, at A17; Stephen Roach, Comment, *The Challenge of China and India*, FIN. TIMES, Aug. 31, 2004; Neil King Jr. & Scott Miller, *U.S. Could Face New Export Tariffs: WTO Authorizes Measures For Violating Trade Rules; A Setback for Bush, Congress*, WALL ST. J., Sept. 1, 2004, at A3.

standards in order to gain insight into the efficacy of particular regulatory mechanisms in the context of economic globalization.³

Today's globalized international trade regime has expanded markets for MNCs through instruments like the World Trade Organization (WTO) and agreements like the North American Free Trade Agreement (NAFTA). Production and consumption markets have moved rapidly beyond national borders. On the one hand, private businesses have seen profits rise while consumers in developed countries have seen prices drop. On the other hand, agribusinesses have replaced subsistence farmers, Wal-Mart has overwhelmed Mom and Pop, and developing countries have felt pressure to limit environmental and labor regulations in order to attract foreign direct investment (FDI). MNCs have thrived in the era of globalization, rationalizing the use of relatively unfettered access to the developing world's treasure chest of abundant resources and inexpensive labor in order to benefit their bottom lines. With that said, it is irrational to decry expanded markets and increased profits as purely negative. In the post-World War II era of globalization, overall standards of living have improved, infant mortality has declined, life expectancy has increased, and more people have access to education.⁴ Over the same period of time, the gap between the "haves" and the "have-nots" has widened. The rich have been getting richer, often at the expense of the poor who have been sinking deeper into poverty.⁵

Heightened economic incentives and increasingly ineffective legal regimes have combined to create a single-minded monolith of MNCs. These organiza-

3. For the purposes of this Note, the definition of human rights is drawn from the United Declaration on Human Rights, adopted and proclaimed by the United Nations General Assembly on December 10, 1948. See G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 183rd Plenary Mtg., at 71, U.N. Doc A/810 (1948) [hereinafter UDHR].

4. Paul Masson, *Globalization: Facts and Figures*, IMF Policy Discussion Papers, International Monetary Fund, Oct. 2001, at 7, available at <http://www.imf.org/external/pubs/ft/pdp/2001/pdp04.pdf> (last visited Apr. 11, 2005).

5. The story of the 20th century was of remarkable average income growth, but it is also quite obvious that the progress was not evenly dispersed. The gaps between rich and poor countries, and rich and poor people within countries, have grown. The richest quarter of the world's population saw its per capita GDP increase nearly six-fold during the century, while the poorest quarter experienced less than a three-fold increase (Chart 1b). Income inequality has clearly increased.

Globalization: Threat or Opportunity?, IMF Issues Brief, International Monetary Fund, Apr. 12, 2000 (Corrected Jan. 2002), available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm> (last visited Apr. 11, 2005).

tions have little incentive to respect human rights and the environment in the wake of their profit grabbing. Consider the list of MNCs operating within the boundaries of repressive states, and in some cases in conjunction with these regimes, as a telltale example. This “race to the bottom” has not gone unnoticed or unchallenged. This Note evaluates two important regulatory trends undertaken by the United States and the European Union (EU) in order to reconcile two realities of the globalized world economy: first, the corporate-led drive to lower prices and increase profit margins, and second, the disrespect for basic human rights that has resulted. Section I evaluates the effect that globalization has had on human rights, focusing specifically on the lack of existing regulation and the tricky legal environment in which this conflict must be addressed. Section II provides an in-depth analysis of the current civil-liability movement in the United States, highlighting important recent developments in Alien Tort Claims Act (ATCA) litigation. Section III analyzes the latest regulatory development in Europe, focusing specifically on the 2002 Green Paper that is supposed to shape EU policy toward corporate compliance. After examining the strengths and weaknesses of each regulatory movement, Section IV proposes a hybrid solution.

I. GLOBALIZATION’S ADVERSE EFFECT ON HUMAN RIGHTS

The erosion of borders and market barriers that underpins the globalization era has switched the balance of power from individual state-based units to private MNCs operating in the absence of an effective regulatory regime. This section describes the effect this phenomenon has had on worldwide human rights standards.

A. Strengthened Multinational Corporations

The impact of globalization is unyielding, a presence that permeates nearly every corner of the world. The once impenetrable walls of state sovereignty and cultural autonomy have crumbled in the face of global markets, trade liberalization, capital exports, and the MNC.⁶

The economic power and influence of the MNC is undeniable, surpassing that of many countries worldwide. Consider for a moment that in 2002, British

6. For the purposes of this Note, MNCs are to be defined as businesses geared toward exploitation of the global markets with limited loyalty to their country of incorporation.

Petroleum, the fifth largest global company, and the largest in Europe, had revenues⁷ that exceeded the combined gross domestic product (GDP) of fifteen countries.⁸ Consider that the total sales of the world's four largest MNCs exceed the total GDP for the entire African continent.⁹ The economic incentive for these trends to continue is clear: MNC operation, and global business in general, is a profit-driven machine. Companies must keep up with ever-increasing shareholder demands and heightened global competition. Developing countries provide easy access to untapped natural resources—oil and energy, most commonly—and cheap labor markets, which allow MNCs to keep costs down. Production, distribution, and resource extraction efforts are being moved every day from European and American soil to more fertile foreign territories.¹⁰

Globalization has created opportunities that could not have been imagined as the foundations for today's legal regimes were being laid at Bretton Woods.¹¹ Existing laws have proved incapable of regulating powerful entities like MNCs and controlling the rapid movement of labor and capital; jurisdictional complexities hinder the development of effective, robust legislation. Host-country laws that would govern the behavior of MNCs operating in their sovereign territory are either nonexistent or completely impotent in the face of huge financial investment. International law, another logical tool, traditionally does not apply to private actors, a category that includes MNCs. Jurisdictional loopholes in host-country domestic laws make it difficult for U.S. or European legislation to

7. \$178,721,000 according to the Fortune's Global 500 (July 18, 2003), available at www.fortune.com.

8. For a comprehensive list of global GDP rankings in 2002, see <http://www.countrywatch.com/includes/grank/gdpnumericppp.asp> (last visited Mar. 2005).

9. Pall A. Davidsson, Note, *Legal Enforcement of Corporate Social Responsibility Within the EU*, 8 COLUM. J. EUR. L. 529, 529 (2002) (citing European Parliament, Committee on Development and Cooperation, Report on EU Standards for European Enterprises Operating in Developing Countries: Toward a European Code of Conduct, EUR. PARL. DOC. (Final A4-0508/1998, PE 228.198/fin) (1998) 10).

10. See, e.g., Andrew Parker, *Tracking Europe's Outsourcing Stampede*, Forrester Research, May 27, 2004, at <http://www.forrester.com/Research/Document/Excerpt/0,7211,34539,00.html> (last visited Apr. 11, 2005); Stephanie Moore & William Martorelli, *Midyear 2004 Update: North American Offshore Outsourcing*, Forrester Research, July 14, 2004, available at <http://www.forrester.com/Research/Document/Excerpt/0,7211,34875,00.html> (last visited Apr. 11, 2005).

11. For a discussion regarding the changing roles of international financial banks and inter-governmental development institutions in a globalized world economy, see Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243 (2000).

govern MNC subsidiaries incorporated abroad. The unequal political and economic balance under which most bilateral investment treaties are negotiated confines host governments and heavily favors MNCs operating in foreign territories.¹² Chapter 11 of NAFTA provides a well-documented example: not only are shareholders granted the right to sue foreign governments, but the provision allows these investors to dictate the forum and circumstances for the dispute settlement.¹³ The issue of how to monitor and regulate MNC behavior, particularly in the context of an MNC's functioning within the boundaries of a foreign territory, is becoming a major global issue worthy of increased focus.

As the forces of economic and social globalization continue to exert pressures in new and underregulated areas, attention must be paid to the results of these situations. Corporate behavior, and its effects on global human rights standards, is an ideal prism through which to examine these issues. The inclusion of human rights in this discussion provides not only a way to illuminate an area of

12. See Peter Hardstaff, *The Flexibility Myth: Why GATS Is a Bad Model for a New WTO Investment Agreement*, Paper presented to Seminar on WTO Investment Agreement, Geneva, Mar. 20, 2003, at <http://www.wdm.org.uk/campaigns/cambriefs/flexmyth.pdf> (last visited Apr. 8, 2005) (discussing the perils of bilateral negotiation, including a lack of capacity—economic, intellectual, and political—smaller, developing countries face throughout the bilateral negotiation process). In this same context, the Ambassador of Bangladesh to the WTO stated:

When you go into a bilateral format of the negotiations, you are vulnerable. Why? Because against a major developed country, you simply cannot withstand the level of scrutiny. And you do not have the strength in the numbers that you get in the multilateral process. This is exactly what happens bilaterally in the WTO. Within a multilateral context, in the WTO, sometimes developed countries are unable to get their way with us. But when you come to the bilateral mode, we find that where they are unable to persuade us to agree to something multilaterally, they apply pressure bilaterally to get it done.

Id. at 4 (quoting the Ambassador of Bangladesh to the WTO). For the text of the model U.S. Bilateral Investment Treaty, see http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Apr. 8, 2005).

13. See North American Free Trade Agreement, Dec. 17, 1992, arts. 1101–1120, 32 I.L.M. 289 (1993). For a discussion of the myriad issues related to the development of Chapter 11 jurisprudence, see generally Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43 (2001); William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563 (2002); Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301 (2004); see also Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 229 (2001); Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 256–58 (1988).

international jurisprudence and international relations that remains underregulated, but also highlights an inherent conflict between the most basic metric of justice and dignity—human rights standards—and the global drive for economic advancement. Part B provides the first step in this analysis: a look at the existing international regulatory regime and the role it currently plays in the interaction of the MNC with human rights standards.

B. The Ineffectiveness of Existing International Covenants

The international and domestic legal difficulties in regulating MNC behavior are compounded by ineffective compliance mechanisms in modern human rights law. Current human rights doctrine grew from a seed planted following the conclusion of World War II. The Universal Declaration of Human Rights (UDHR),¹⁴ a nonbinding U.N. General Assembly Resolution, first gave individuals international legal rights, and loosely set out the principles now solidified in two binding international covenants: the International Covenant on Civil and Political Rights (ICCPR)¹⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁶ While binding only on the official actions of state signatories, these three documents outline what has become the accepted definition of global human rights standards. The ICCPR protects civil and political rights, including the rights to life and liberty, and also protects individuals against genocide, slavery, and forced labor.¹⁷

While the two international covenants outline general rights for individuals worldwide, in many cases their texts do not enumerate each of the individual rights established. For example, the ICESCR guarantees the right to economic self-determination, the right to have safe and healthy working conditions, the right to unionize, and the right to a minimum standard of living, but it does not mention specific wage levels, minimum ages, or the acceptable minimum for environmental working conditions.¹⁸ International organizations like the Interna-

14. UDHR, *supra* note 3, at 71.

15. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

16. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), 21 U.N.GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

17. See ICCPR, *supra* note 15, at 53–54.

18. See ICESCR, *supra* note 16, at 49–50.

tional Labour Organization (ILO) have been created to provide more detailed guidance in certain areas. Founded in 1919, the ILO has developed a binding international covenant, The Tripartite Declaration of Principles Concerning Multi-national Enterprises and Social Policy (the Tripartite Declaration), which establishes minimum labor standards and rights, defines the right to organize, sets minimum age requirements, and abolishes forced labor.¹⁹ Another issue that prevents existing international covenants from handling specific human rights-related problems is their inherently voluntary nature. States may choose to ignore these agreements altogether, or choose to selectively ratify certain provisions while ignoring others. The impact of this discriminatory state support for international covenants like the ICCPR and the Tripartite Declaration is clear: MNCs will seek out and exploit states that have chosen not to ratify certain global compacts, in the process, essentially nullifying both substantive and policy-based advancements reached by these agreements.²⁰

C. A Well-Documented Problem

The ILO established the World Commission on the Social Dimension of Globalization in February 2002 to evaluate how best to deal with changes in societal conceptualizations of human rights that result from globalization.²¹ Some view these changes as purely negative—increasing the economic and cultural distance between developed and developing countries, adding to already widespread poverty, poor labor conditions, famine, and disease.²² Others contend that globalization has begun to close this gap between rich and poor. There are more jobs, there is more capital injected into struggling economies, and thus there is a higher standard of living characterized by increased life expectancy, lower infant mortality rates, and an improved health care and education infrastructure.²³

19. See International Labour Organization, *ILO Mandate*, at <http://www.ilo.org/public/english/about/mandate.htm> (last visited Apr. 8, 2005).

20. Indeed, there is one school of thought that uses empirical statistical evidence to highlight an apparent lack of compliance to various human rights treaties by states signatories. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

21. See International Labour Organization, *World Commission on the Social Dimension of Globalization*, at <http://www.ilo.org/public/english/wcsdg/index.htm> (last visited Apr. 8, 2005) (describing the program).

22. See Vandana Shiva, *Globalization and Poverty*, RESURGENCE, Sept.–Oct. 2000, at 15.

23. See *Globalization, Growth and Poverty: Building an Inclusive World Economy*, at <http://econ.worldbank.org/prr/subpage.php?sp=2477> (last visited Apr. 8, 2005).

Regardless of how one perceives these effects, an undeniable byproduct of economic globalization is a strengthened MNC, increasingly willing and able to operate in foreign territories and exploit varying human rights standards. Whether host governments choose to defend the human rights of their citizens in the face of mounting global economic pressure and increasing MNC influence remains to be seen. What is clear, however, is that MNCs must be held accountable for their own behavior and brought into check through the development of strengthened regulatory mechanisms.

Can the drive for corporate profits, facilitated and exacerbated by economic globalization, be made to coexist with universal notions of respect for human rights? For several reasons, the answer to this question is, and must be, "yes." Commentators contend that existing market forces are enough to guide corporate behavior.²⁴ If the majority of investors desires a corporate focus on labor standards and human rights, the market will certainly bear that out. Indeed, there is a nascent market of consumers who believe that profits are only part of what makes a company attractive. Socially responsible investment companies²⁵ are becoming more abundant, as are business models built on a socially conscious ethos,²⁶ and products packaged specifically to notify consumers of fair trade practices, child labor standards, and environmental consciousness.²⁷ With a strong human rights track record and a progressive social stance, corporations may also be able to attract otherwise unattainable, socially conscious professionals. The sector of professional, investor, and consumer markets driven by factors other than the bottom line remains small, however. Public image and brand-sensitive marketing do not reflect a change in policy and will have no major ef-

24. See, e.g., Thomas Donaldson, *The Promises of Corporate Codes of Conduct*, HUM. RTS. DIALOGUE, Fall 2000, at 16, available at http://www.cceia.org/media/634_hrd2-4.pdf?PHPSESSID=db8ed6b7c64b1d68e03d1400cf3911c2 (last visited Apr. 8, 2005).

25. For an example of investment companies built around the notion of socially conscious investment strategies, see Domini Social Investments, *Home Page*, at <http://www.domini.com> (last visited Apr. 8, 2005); see also KLD Research & Analytics, Inc., *Socially Responsible Investing Research*, at <http://www.kld.com/> (last visited Apr. 8, 2005); SocialFunds.com, *Home Page*, at <http://www.socialfunds.com/> (last visited Apr. 8, 2005).

26. See Satya Menon, *The Socially Conscious Corporation: Can Companies Do Well By Doing Good?*, CAPITAL IDEAS, Fall 1999, available at <http://gsbwww.uchicago.edu/news/capideas/fall99/menon.html> (last visited Apr. 8, 2005).

27. See Kathleen C. Lonergan et al., *Socially Conscious Investing and Its Influence on Brand Image*, at <http://130.195.95.71:8081/WWW/ANZMAC2001/anzmac/AUTHORS/pdfs/Lonergan.pdf> (last visited Apr. 8, 2005).

fect in practice. The fact is, socially driven market forces are a long way off from moving corporate behavior away from the profit-driven bottom line.

Some international observers are requiring more from MNCs than just profits, demanding that corporations recognize their societal obligation to adhere to and respect the basic human rights norms laid out in documents like the ICCPR and the Tripartite Declaration. The increased presence of human rights-focused nongovernmental organizations (NGOs), such as Amnesty International and Human Rights Watch, has intensified the focus on the importance of human rights, raised public interest levels, and fueled international media coverage.²⁸ Corporations that are exposed as human rights violators are often publicly shamed into changing their policy.²⁹ These developments, while certainly not comprehensive or widespread, are good indications of efforts to address the problem of MNC human rights violations. With traditional legal mechanisms, market forces, and media pressure being largely ineffective, MNCs continue to invest and operate in countries where massive human rights violations continue to occur. Two fairly recent developments in global jurisprudence are endeavoring to remedy this worrisome trend, by attempting, in diverse ways, to hold corporations accountable for their actions.

II. CIVIL LIABILITY, AMERICAN STYLE

The United States and the EU are unquestionably two of the world's geopolitical³⁰ and economic³¹ leaders. In addition to the incorporation of many of the world's largest and most powerful MNCs,³² divergent American and EU regu-

28. See, e.g., Dzidek Kedzia, *Submission by Amnesty International under Decision 2004/116 on the "Responsibilities of Transnational corporations and related business enterprises with regard to Human Rights,"* AI Index: POL 34/006/2004, Sept. 29, 2004, available at <http://web.amnesty.org/library/index/ENGPOL340062004> (last visited Apr. 11, 2005).

29. See, e.g., Human Rights Watch, 1999, *Human Rights Watch: World Report 1999, Special Issues and Campaigns*, at <http://www.hrw.org/worldreport99/special/corporations.html#corporate> (last visited Apr. 11, 2005) ("Royal Dutch/Shell responded to criticism by unveiling programs to highlight its performance on human rights.")

30. The United States, France, and Britain are 3 of 5 permanent members of the United Nations Security Council, the most powerful multinational geopolitical organization in the world.

31. Consider that the United States, France, and Britain are 3 of 5 permanent members of the United Nations Security Council and, according to the WTO, home to 8 of the world's top 10 exporters. World Trade Organization, *Leading Exporters and Importers in World Merchandise Trade, 2002*, at http://www.wto.org/english/res_e/statis_e/its2003_e/section1_e/i05.xls (last visited Apr. 8, 2005).

32. See Fortune's Global 500, *supra* note 7.

latory trends make the two regions together a perfect place from which to begin evaluating the developments in corporate governance and the regulation of MNCs. A comparative analysis of these developments in the United States and the EU will provide valuable learning on the path to finding an acceptable solution to the existing regulatory problems. This section focuses on advances being made in the United States, specifically through the civil liability created by the Alien Tort Claims Act (ATCA). Part A examines the ATCA's historical development; Part B considers *Doe v. Unocal*, the most important case currently on the U.S. federal docket; Part C analyzes the potential impact of *Doe*; and Part D suggests strengths and weaknesses of the ATCA-led civil liability regulatory model.

A. ATCA Conception

The ATCA is one of the shortest pieces of legislation found in the catalogue of U.S. federal legislation. Adopted in 1789 as part of the original Judiciary Act,³³ the law states simply, "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."³⁴ As short and as seemingly direct as the statutory language is, rarely has there been a law that has been at the root of so much international debate.

1. Cause of Action, Jurisdiction, Nature of Defendants Made Clear

After almost 200 years of obscurity, the ATCA was the vehicle by which a foreign citizen circumvented traditional notions of jurisdiction and state sovereignty by attempting to gain access to U.S. federal courts in order to bring a human rights-based claim against another foreign citizen. In 1980, members of the Filártiga family—Paraguayan expatriates living in Brooklyn—filed suit against Americo Norberto Peña-Irala (Peña), another Paraguayan citizen. The Filártiga family alleged that Peña had tortured and murdered seventeen year-old Joelito Filártiga while Peña served as the Inspector General of Police in Asuncion, Paraguay.³⁵ In a groundbreaking decision, the Second Circuit granted jurisdiction and allowed the Filártiga family to bring their suit against Peña. The Second Circuit adopted a literal interpretation of the ATCA language, finding Peña's torturing of Joelito to

33. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000).

34. 28 U.S.C. § 1350 (2005).

35. *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

have violated the “law of nations” threshold.³⁶ The *Filártiga* holding extended U.S. jurisdiction into areas normally settled by the laws of the foreign state where the events in question occurred, as required by principles of international law.

Filártiga opened the jurisprudential floodgates, and in the process, raised many more questions than answers. Despite the controversy surrounding it, *Filártiga* has led to a relatively consistent interpretation of the plaintiff’s causes of action under the ATCA and jurisdictional allowances. The Ninth³⁷ and Eleventh³⁸ Circuits agreed that the ATCA “open[ed] the federal courts for adjudication of the rights already recognized by international law.”³⁹ Both the jurisdictional- and international-claim standards were recently solidified by the Supreme Court of the United States in *Sosa v. Alvarez-Machain*.⁴⁰

Since *Filártiga*, the U.S. federal appellate courts have been consistent in defining the types of actors that may be named as defendants in these suits. The language in *Filártiga* that definitively created liability for certain acts conducted under the color of state law⁴¹ has been consistently affirmed. While it is clear that suits based on official state acts are barred from being heard in U.S. courts under the Foreign Sovereign Immunities Act (FSIA),⁴² the question of private-actor

36. 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. Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for the purposes of civil liability, the torturer has become like the pirate and slave trader before him—hostis humani generis, as enemy of mankind.

Id. at 890.

37. See *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994).

38. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

39. *Filártiga*, 630 F.2d at 887.

40. We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations. . . . We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filártiga v. Peña-Irala* [citation omitted] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.

Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004) (citation omitted).

41. See *United States v. Classic*, 313 U.S. 299, 326 (1941) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”).

42. 28 U.S.C.A. § 1602 (2000). FSIA provides immunity for official state acts, with two major exceptions: there is no immunity for substantially commercial acts and foreign states have the power to waive the right immunity granted. *Id.* §§ 1602–1605.

liability for state action remained unanswered until 1994, when the Second Circuit declared private actors liable for violations of international law in *Kadic v. Karadzic*.⁴³

2. Specifics Regarding Actors and Claims

Defining violations of international law under the ATCA has proved much more problematic than the procedural issues that were effectively settled by *Filártiga*. The question of which international law violations constitute legitimate claims depends on who has committed them, and forces U.S. courts to identify a tenet of customary international law, distinguish the boundaries of the principle, and enforce it in contexts and ways that they have seldom, if ever, done.⁴⁴ The *Sosa* Court, through comprehensive historical analysis and careful jurisprudential interpretation, solidified a form of the *Filártiga-Kadic* standard, which allowed for “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world.”⁴⁵ This reasoning is in line with the general trend of U.S. appellate court decisions, which rely on customary international law to find private actors liable under the ATCA for violations of *jus cogens* norms (whether committed under the color of state law or not), but *not* liable in U.S. courts for common torts.⁴⁶ The term *jus cogens* refers to certain principles from which no derogation is permitted, regardless of treaty obligations.⁴⁷ Suits against private actors that fall within this universally applicable realm, including

43. 70 F.3d 232 (2d Cir. 1995) (concluding that activities of “universal concern” constitute violations of the law of nations, or international law, not only when they are committed by state actors, but when committed by private actors as well).

44. See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 82 (1999).

45. *Sosa*, 124 S. Ct. at 2761.

46. Compare the standard developed in *Sosa*, 124 S. Ct. at 2761 (“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 [of its original enactment].”) with that developed in *Kadic*, 70 F.3d at 241–42 (identifying offenses of “universal concern” as crimes punishable in civil arenas by standards of international law through domestic vehicles like the ATCA). Also of note is the distinction drawn by *Flores v. S. Peru Copper*, 343 F.3d 140, 156 (2d Cir. 2003) between “‘wrong[s]’ that are ‘of mutual, and not merely several, concern’ to States” (quoting *Filártiga*, 630 F.2d at 888) (emphasis added). “Matters of ‘several’ concern among States are matters in which States are separately and independently interested.” *Flores*, 343 F.3d at 155.

47. *Jus cogens* is defined as “a mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.” BLACK’S LAW DICTIONARY 695 (7th ed. 1999).

genocide, war crimes, piracy, slavery, torture, and summary execution, have been consistently allowed to be heard in U.S. federal court.⁴⁸

In summary, thus far, the basic jurisprudential value of the ATCA-based suits is clear on the following issues. First, the ATCA provides both subject matter jurisdiction and a cause of action in U.S. federal court.⁴⁹ Second, in order to state a valid claim under the ATCA, the claim must: (1) be made by a foreign plaintiff; (2) allege a tortious act; and (3) constitute a violation of the law of nations. Not so clear, however, are answers to questions seeking detail.⁵⁰ For instance, how is an international violation to be defined? To what extent are international violations committed by joint state-private actors justiciable in U.S. federal court? What level of complicity must a private actor be guilty of in order to risk liability? Is there any difference in liability faced by specific classes of private actors with respect to various international law violations? That is, do *jus cogens* violations require a different standard of legal evaluation than individual cases of torture? These questions, among others, were raised in a 1997 case brought by a group of Burmese villagers in the Central District Court of California under the aegis of the ATCA.

The suit accused the Burmese government of massive human rights violations—including forced labor, torture, rape, and murder—and attempted to implicate an American oil company, Unocal Corporation (Unocal), and a French energy conglomerate, Total, S.A. (Total), in the violations.⁵¹ *Doe v. Unocal* had, and continues to have, profound implications for the world of American corporate behavior and human rights. The plaintiffs in *Doe* attempted to expand upon principles established in *Filártiga* and *Karadzic* by using the U.S. federal

48. See, e.g., *Flores*, 343 F.3d at 167 (“Our position is consistent with the recognition in [*Filártiga*] that the right to be free from torture embodied in the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948), has attained the status of customary international law.”).

49. *Doe v. Unocal Corp.*, 110 F. Supp.2d 1294, 1303 (C.D. Cal. 2000) [hereinafter *Doe V*].

50. For a comprehensive discussion on the details of ATCA litigation and its impact, see generally BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989); Roger O’Keefe, *Civil Actions in US Courts in Respect of Human Rights Abuses Committed Abroad: Would the World’s Oppressors Be Wise to Stay at Home?*, 9 AFR. J. INT’L & COMP. L. 15 (1997); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1 (2002).

51. *Doe V*, 110 F. Supp. 2d at 1303.

system to hold MNCs liable for violations of international law committed in their behalf by the Burmese government.

B. Doe v. Unocal

Despite the deep, ongoing political unrest in Burma, and the ruling government's poor human rights record, both Unocal and Total contracted with Burma in order to exploit its oil reserves. In order to protect physical and infrastructural investments from local political instability and a festering civil war, as well as to help manage local labor, both companies employed members of the Burmese military. It was this group of Burmese military operatives that was accused of violating international standards on which the complaint was based. Over the past six years, the U.S. District Court for the Central District of California and the Ninth Circuit Court of Appeals have attempted to determine if, and to what extent, Unocal⁵² is to be held liable for the human rights violations committed by the Burmese military operatives. In essence, the issue was whether Unocal could be held liable for the actions committed by members of the Burmese military while these individuals were working to protect Unocal's investments.

In September of 2000, the District Court provided the initial answer to this question in an opinion known as *Doe V*. The court in *Doe V* granted Unocal's request for summary judgment, finding insufficient evidence of official state action in order to hold Unocal liable.⁵³ Until *Doe V*, ATCA doctrine required a showing of official state action in the commitment of an international law violation. While rejecting the claim on that ground, *Doe V* affirmed the application of *Filártiga*'s jurisdictional and cause of action allowances in the MNC context. *Doe V* also discussed two critically important issues previously unaddressed in ATCA jurisprudence. First, the case addressed the degree to which, if at all, an individual MNC is liable for violations of international law committed under the color of state law on behalf of the MNC. Second, *Doe V* raised questions regarding what specific activity, if any, is required to attach an MNC in a suit alleging violations that fall short of violating *jus cogens* norms—such as individual cases of forced labor, torture, rape, and murder.⁵⁴

52. Both Total and the Burmese military were dismissed from the action.

53. *Doe V*, 110 F. Supp. 2d at 1296.

54. *See id.* at 1304.

The distinction between *jus cogens* violations and violations of international law that fall short of *jus cogens* is a critical one. As noted above, clear violations of *jus cogens* norms automatically warrant a claim in U.S. federal court. Prior to *Doe V*, the standards for violations falling short of *jus cogens* had been unclear. The question of how the U.S. system should classify a single murder committed under the color of state law rather than a systematic string of murders committed as part of a genocidal movement (a catastrophe that would certainly classify as a violation of *jus cogens* norms), was the major question underpinning the *Doe V* case. While not explicit on this particular question, the *Sosa* Court makes clear that a conservative approach to the application of an international law standard must be taken in the future.⁵⁵

Although the District Court cleared Unocal of all liability (it found the evidence tying Unocal to the human rights violations insufficient), it did set forth a number of important principles concerning ATCA application to MNC liability in these two stated areas.⁵⁶

In its review of *Doe V*, the Ninth Circuit Court of Appeals focused primarily on the same two issues: is an MNC liable for the actions committed on its behalf, and if so, what types of violations are required in order to attach the MNC as a defendant in the suit? While the specific tests employed by each court (the district court used U.S. domestic standards,⁵⁷ while the court of appeals relied on international standards)⁵⁸ to determine MNC complicity in state action are fascinating,

55. *Sosa*, 124 S. Ct. at 2761 (“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.”).

56. *Doe V*, 110 F. Supp. 2d at 1294.

57. The *Doe V* court used a test known as the “joint action” test, borne out of U.S. Civil Rights Act (42 U.S.C.A. §1983) litigation. See *Doe V*, 110 F. Supp. 2d at 1307. In granting the summary judgment request, the court found “no evidence that Unocal ‘participated in or influenced’ the [Burmese] military’s unlawful conduct” or “evidence that Unocal ‘conspired’ with the military to commit the challenged conduct.” *Id.* at 1306–07.

58. The Ninth Circuit employed international human rights legal standards rather than U.S. federal standards to evaluate the allegations. *Doe I v. Unocal*, 395 F.3d 932, 949 (9th Cir. 2002) [hereinafter *Doe VI*]. The Ninth Circuit panel focused on the international criminal standards developed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. *Id.* at 950. The panel deemed the evidence sufficient to satisfy both the required *mens rea*—that Unocal “knew or had reason to know” that the military had the intent to commit the offense elements for complicity, *id.* at 951, 953 (quoting *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000), at <http://www.ictt.org/>), and *actus reus*—that Unocal’s “practical assistance or encouragement . . . ha[d] a substantial effect on the perpetration of the . . . forced labor.” *Id.* at 952.

the relevance of each is of less than critical importance, especially in light of the Ninth Circuit's pending *en banc* opinion. What is of supreme importance, however, are the implications of Unocal's potential civil liability for human rights violations conducted by Burmese citizens in order to facilitate Unocal's oil drilling project.

Determining specifics regarding the second issue—namely, which individual allegations (rape, murder, torture, forced labor) require proof of official state action in order to attach an ATCA claim—is not critical. Once again, however, the general principle to be gathered from the doctrinal analysis by each court has far-reaching implications for regulation of MNCs. Whether the *en banc* opinion affirms the broader doctrinal analysis employed by the Ninth Circuit⁵⁹ or chooses to adopt a more conservative approach,⁶⁰ the general principle of MNC liability established in *Doe V* and affirmed in *Doe VI* is what really matters in terms of implications for MNC human rights-related behavior.⁶¹

C. Short-Term Implications Unclear

The future of ATCA doctrine as it relates to MNC liability is clear in some areas, but cloudy in others. At this point, it seems fairly certain that the U.S. fed-

59. The *Doe VI* opinion made clear that forced labor is a modern form of slavery and thus requires no state action to constitute a violation of the law of nations. *Id.* at 946 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring)). In the same vein, the opinion also made clear that while murder, rape, and torture require state action to constitute a law of nations violation when committed *in isolation*, those same violations do not require state action when committed “*in pursuit of genocide or war crimes*,” slavery, or forced labor. *Id.* (discussing *Kadic*, 70 F.3d at 242–43).

60. The only related issue the *Doe V* Court chose to address was whether a modern definition of slavery necessarily included forced labor. The Court relied on a report filed by the International Labour Organization Commission of Inquiry to conclude that the historically narrow definition of the “term ‘slavery’ now encompasses forced labor.” *Doe V*, 110 F. Supp. 2d at 1308 (discussing International Labour Organization, *Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, ILO, Pt. IV.9.A ¶198 (1998)).

61. The *Sosa* Court declined the opportunity to discuss the merits of ATCA suits that name private party defendants (including MNCs), outside of documenting the existence of the issue in a footnote: “A related consideration [to whether an international norm is sufficiently definite to support a cause of action] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.” *Sosa*, 124 S. Ct. at 2766 n.20.

eral court system will remain an open forum for foreign individuals to sue corporations. The requirements for plaintiffs have been explicitly laid out: (1) a claim by an alien; (2) alleging a tort; and (3) a violation of the law of nations.⁶² While the *Sosa* opinion solidifies much of modern ATCA doctrine, its application to cases naming MNCs as defendants is yet to be determined. Protestations from the Bush Administration⁶³ and probusiness commentators alike⁶⁴ ensure that the jurisprudential developments will be followed closely by all.

The notion that plaintiffs attempting to show violations of international *jus cogens* norms are not required to show official state action to attach MNCs to their claim is quite clear. Despite their divergent interpretations of previous appellate court holdings, the district court in *Doe V*⁶⁵ and the Ninth Circuit in *Doe VI*⁶⁶ affirmed this standard. Beyond solidifying these widely accepted principles, however, the differences in the two opinions leave two major questions open, each with potentially large short-term implications for individual plaintiffs and MNC defendants alike.

The standards used to determine MNC complicity in acts committed under the color of state law have yet to be clarified. As mentioned earlier, *Doe V* used the “joint action” test developed by U.S. civil rights litigation to hold that because it did not willingly participate in the alleged activity, Unocal was not liable under the ATCA. *Doe VI* instead used a method of evaluation borne of recent international human rights criminal proceedings. The Ninth Circuit found Unocal liable on account of the MNC’s knowing practical assistance of the human rights violations committed by the Burmese military.

62. See *Doe V*, 110 F. Supp. 2d at 1303.

63. In a recent *amicus* brief submitted to the Ninth Circuit on behalf of Unocal, the Bush Administration declared any interpretation of the Act as providing a cause of action as improper: “Reading the ATS [ATCA’s] grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court’s repeated refusal in recent decisions to recognize an implied private cause of action.” See Brief for the United States of America at 12, *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 0056628). The brief went on to say that “[t]his Court’s approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily asserted against our allies in that war.” *Id.* at 3.

64. See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 55 (2003) (“Recent efforts by the executive branch to limit the expansive interpretation of the ATS are commendable and should continue to guide courts in reading the ATS.”).

65. See *Doe V*, 110 F. Supp. 2d. at 1304.

66. See *Doe VI*, 395 F.3d at 949.

These two tests are certainly not the only standards available. Among the many theories suggested,⁶⁷ two stand out for their historic operability and potential legitimacy. The first theory draws from international environmental law, where private actors responsible for violations are held to the same standards as sovereign nations.⁶⁸ The second proposal suggests adoption of U.S. tort standards used to determine joint and several liability. Given the limited precedence of MNC-related ATCA litigation from which to draw, future courts might choose to do any number of things.

The immediate implications of these uncertainties cut both ways. Plaintiffs obviously favor the more liberal *Doe VI* model, but a reversal by the Ninth Circuit's *en banc* panel will not foreclose future litigation. Various other circuits believe strongly in the merits of ATCA litigation, and based on past opinions, would likely offer the forum in which a similar case could be brought and won. As in any contentious jurisprudential debate, apart from Congress, only the Supreme Court can completely stop forum shopping that results from a circuit split. The *Sosa* Court was clear about the limited role of the ATCA as a vehicle for reaching U.S. federal court, reserving viable complaints to allegations of specific international law violations.⁶⁹

For MNCs, the implications of the currently accepted doctrine and the forthcoming Ninth Circuit *en banc* opinion are much more urgent. An affirmation of *Doe VI* would certainly result in an explosion of litigation. The "dozen current cases cit[ing] corporate defendants for their operations in Asia, the Middle East, Africa and Latin America...[with] damages claimed exceed[ing] \$200 billion"⁷⁰ would only be a start. Unfortunately for MNCs and probusiness interests, an increase of ATCA-based litigation is not necessarily predicated on an affirmation of the *Doe VI* holding. Even if the Ninth Circuit *en banc* panel rejects the *Doe VI* analysis, plaintiffs are free to bring cases in other circuits,⁷¹ which can

67. See generally Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359, 1380–82 (2001) (discussing the various standards courts apply under the Alien Tort Claims Act).

68. This theory was applied in the famous Trail Smelter Arbitration. See *Trail Smelter Arbitration*, 3 REP. INT'L ARBITRAL AWARDS 1905 (1937); see also Kurt Taylor Gaubatz & Kathleen Kane, *The Trail Smelter Case*, at <http://www.gwu.edu/~jaysmith/Trail.html> (last visited Apr. 8, 2005).

69. See *Sosa*, 124 S. Ct. at 2754 ("[W]e think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

70. HUFBAUER & MITROKOSTAS, *supra* note 64, at 7.

71. *Id.*

adopt whatever means of interpretation they so choose. Despite that, an affirmation of *Doe VI* will surely be seen by MNCs as the first domino to fall.

Different interpretations of the second issue left unclear by the *Doe VI* holding—what level of state action is required to attach MNCs to claims of violations falling short of *jus cogens*—each have unique implications. Both *Doe V* and *Doe VI* affirmed the notion that claims alleging *jus cogens* violations require no showing of state action in order to attach MNCs. Genocide, war crimes, slavery (including forced labor), and piracy committed in behalf of MNCs always yield liability. It is just as clear that lesser tortious acts—battery, for example—will never be grounds for MNC liability. Policy concerning activity that lies somewhere in between the two—individual occurrences of murder, rape, and torture—remains unsettled. *Doe VI* held that state action was required to attach Unocal to claims of rape and murder, but not torture;⁷² *Doe V* was largely silent on this issue. *Doe VI*'s evaluation of these claims was predominantly based on fact, but the Court's implication was that occurrences of these “middle ground” violations committed in isolation (not to be deemed committed in furtherance of a violation of *jus cogens*) requires a showing of state action to attach.⁷³

The near-term implications of this discrepancy do not affect either plaintiffs or MNCs on a large scale. Despite the divergent requirements, the upper and lower limits of *jus cogens* and simple tort policies remain unchanged. Plaintiffs know which claims are available to them, with and without the presence of state action, and are able to determine whether to file suit based on the conservative standard put in place by the *Sosa* opinion. Allegations concerning “middle ground” violations are obviously not as well established. That said, MNCs must determine their potential for liability and their defense strategies with respect to each of the three categories in the same way that plaintiffs must evaluate their claims.

D. Doe v. Unocal and its Effect on Corporate Compliance

An evaluation of the effect of the ATCA on corporate compliance doctrine must be made while considering the entire body of litigation, not simply the immediate ramifications of the Ninth Circuit's impending opinion of the *Doe VI* appeal. Potential ongoing MNC liability under the ATCA will have broad ram-

72. See *Doe VI*, 395 F.3d at 954.

73. *Id.* at 960.

ifications reaching areas of international human rights, international trade and FDI, global geopolitics, and U.S. foreign policy.⁷⁴

1. In Support of MNC Liability

Analysis of the impact on global human rights of continued MNC liability for crimes committed by host governments on behalf of the government's MNC investors must begin with a review of the direct effect such a holding would have on MNC behavior. Just as joint ventures like the one between Unocal and Burma at issue in *Doe v. Unocal* fuel corrupt governments and propagate shameful human rights violations, potentially far-reaching liability will translate into real incentives for MNCs to become accountable for their choices and prompt a change in the "bottom-line-only" ethos by altering specific investment and employment policies. Would heavy potential liability in U.S. federal court mean that MNCs would no longer do business with abusive regimes? Are these merely the fanciful meanderings of overly idealistic NGOs, or are they steeped in a measure of reality that will yield concrete results? I believe the key to this question, in part, lies in the answer to another very practical question: how much money will successful plaintiffs actually get? If plaintiffs receive anywhere near what most are asking,⁷⁵ the impact of these court cases will quickly shift MNC policy away from oppressive governments and toward a clearer respect for basic human rights. These are, after all, the types of bottom-line messages that come in loud and clear to the cost-benefit analysis-focused MNC management teams.

Even if damage awards continue to be impossible to extract,⁷⁶ a plaintiff's ability to exact a measure of justice from MNCs for involvement in the alleged crimes is still a large, consistent factor in a plaintiff's use of the ATCA as an avenue to U.S. federal court. Beyond simply offering a forum, U.S. courts offer due process guarantees many plaintiffs would never receive in their home countries. Notions of systemic integrity and impartiality—speedy, impartial trials, for example—are unheard of in many places, particularly under corrupt politi-

74. See Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 466 (2001).

75. HUFBAUER & MITROKOSTAS, *supra* note 64, at 7.

76. See Human Rights Watch, *Myths and Facts about the Alien Tort Claims Act*, at <http://www.hrw.org/campaigns/atca/myths.htm> (last visited Apr. 8, 2005).

cal regimes.⁷⁷ For many of these plaintiffs, the ability to seek personal vindication is of primary concern, and a worthwhile end in itself.⁷⁸ These “justice-related” gains and the guarantee of a fair trial to address grievances are motivation enough to continue with litigation. The more cases that are filed, and the longer the jurisprudence continues, the more likely there will eventually be significant financial redress.

Of course, there are limitations to the current ATCA doctrine. The first limitation is directly attributable to the Act’s narrow procedural construction. The forum is a difficult one to reach, as basic principles of jurisdiction found in U.S. and international law prevent most claims from ever reaching the trial stage.⁷⁹ U.S. corporate law, constructed to protect individual employees of U.S. businesses, also plays a role in limiting the types of defendants named and the specific circumstances under which claims may be brought.⁸⁰ In addition, the costs and time involved with filing suits against MNCs can be prohibitive.⁸¹ Foreign governments, the true perpetrators in many ATCA suits, are largely immune from U.S. law.⁸² The doctrine also severely limits the types of allegations that qualify under the Act. Because of the ATCA’s language, which limits valid claims to violations of the “law of nations,” traditional labor-related concerns like sweatshop conditions, low wages, and long hours are typically not justiciable.⁸³ Despite their legitimacy, these problems seem insignificant when compared to the potential for regulating corporate behavior and raising the level of global human rights standards in the process.

77. Following the kidnapping, torture, and murder of Joelito Filártiga by Noberto Peña-Irala, the then-Inspector General of Police in Asunción, Paraguay, Joelito’s father, Dr. Joel Filártiga “commenced a criminal action in the Paraguayan courts against [Peña] and the police . . . As a result, Dr. [Filártiga’s] attorney was arrested and brought to the police headquarters where, shackled to a wall, [Peña] threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.” *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

78. Human Rights Watch, *supra* note 76.

79. *Forum non conveniens*, Foreign Sovereign Immunity, and the Act of State Doctrine are each major hurdles for plaintiffs to overcome.

80. Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT’L LAW. 69, 84 (2003).

81. Terry Collingsworth, *Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy* (2003), at <http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/874> (last visited Apr. 8, 2005) (Report from the Achieving Global Justice seminar held at the Carnegie Council on February 6, 2003).

82. *See* Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602 (2000).

83. Collingsworth, *supra* note 81, at 2.

2. Criticism of MNC Liability

MNCs are quite concerned with the trend in ATCA jurisprudence and, along with the U.S. government, are aggressively attempting to close what they see as a loophole in a very probusiness body of U.S. legislation. The legal attack on the ATCA begins with the “cause of action” allowance⁸⁴ and stretches to specific doctrinal interpretation issues, including the standards chosen to evaluate the law of nations standard, the failure of courts to enforce statute of limitation requirements, and the requirement that plaintiffs exhaust all local remedies before seeking a forum in the United States.⁸⁵ Until the Supreme Court determines the matter, juridical arguments, no matter how thoroughly constructed or logically powerful, are often not where such large battles will be won or lost. Rhetorical and statistical pleas to the public (and ultimately the legislature) are where the opponents to the Act are placing the most effort and making the largest gains.

Probusiness commentators Gary Clyde Hufbauer and Nicholas K. Mitrokostas envision a “nightmare scenario,” in which ATCA suits threaten U.S. foreign trade and cripple both inbound and outbound FDI while striking a huge blow to the economies of target export countries.⁸⁶ This scenario, fostered by unchecked ATCA litigation against MNCs, could diminish U.S. merchandise trade (imports plus exports) by \$50 billion to \$60 billion, cost the United States more than 100,000 manufacturing jobs, and raise oil prices drastically. They further claim that adverse ATCA decisions could prompt firms to divest from U.S.-based investments en masse, as they did in South Africa during the apartheid era.⁸⁷ This level of divestment would result in conservatively projected losses of \$55 billion to U.S. FDI.

In attempting to weigh the potential impact of ATCA litigation on MNCs, Hufbauer and Mitrokostas draw a parallel to the economic damage caused by the heavy stream of asbestos claims in the United States. If ATCA damages approach the same heights as the asbestos awards, mass divestment is likely to result, with foreign-based MNCs deciding to avoid the United States altogether in hopes of escaping liability.⁸⁸

Whether these types of scenarios are likely, or even plausible, is a question better handled by economists and political scientists. Given the fact that a single dol-

84. See, e.g., Brief for the United States of America, *supra* note 63, at 5.

85. HUFBAUER & MITROKOSTAS, *supra* note 64.

86. *Id.* at 1.

87. *Id.* at 40.

88. *Id.* at 42.

lar has never reached the pocket of any plaintiff, these worries can be fairly characterized as speculative. The impetus for the business world to plead for changes to ATCA doctrine is clear, however, and many of their complaints are warranted. The ad hoc judicial decisions have created an array of doctrine, with many potential interpretations and varying standards, which may be difficult for MNCs to follow and adhere to. Additionally, the concerns voiced about forum shopping may be warranted.⁸⁹

3. *The Bottom Line*

The current ATCA doctrine is an extremely complex area of law with potentially enormous implications in many areas of global society. It provides a limited means for foreign plaintiffs to exact justice from MNCs that participate in human rights violations committed by foreign governments. Despite that, the ATCA has not resulted in any financial reparation, and thus cannot yet be considered a concrete threat to MNC livelihood. If and when it reaches a point where its effects can be seen to shape corporate behavior, there will have to be some judicial or legislative changes made. MNCs must have reliable standards to follow and must know explicitly the rules of the game they are playing. A close look at what is being done by the EU to promote a uniform solution to the problems of corporate behavior and human rights will provide valuable lessons for the United States in attempting to find a solution viable to all parties.

III. THE CORPORATE CODE OF CONDUCT MOVEMENT

Another recent, broad-based development in the global initiative to regulate corporate behavior is the phenomenon known simply as the “Corporate Code” movement. Ranging in scope from individual MNC internal codes⁹⁰ and industry-

89. *Id.* at 50.

90. See Davidsson, *supra* note 9, at 535 (citing European Parliament, Committee on Development and Cooperation, Report on EU Standards for European Enterprises Operating in Developing Countries: Toward a European Code of Conduct, EUR. PARL. DOC. (Final A4-0508/1998, PE 228.198/fin), 14).

specific initiatives⁹¹ to national⁹² and international standards,⁹³ the movement is increasingly widespread and influential. Despite the momentum of the initiative, there are inherent weaknesses in its lack of consistency and decidedly ad hoc nature. In an effort to guide European MNCs in the face of the pressures of globalization and combat the lack of uniformity of the Corporate Code movement, the EU decided to attempt to develop a code of its own. This section analyzes the voluntary corporate code movement in the EU, its influence on MNC behavior, and the resultant impact on global human rights. Part A addresses the context of corporate codes and the Green Paper in broad terms; Part B analyzes the strengths of the Green Paper; and Part C focuses on its shortcomings.

A. The Green Paper in the Context of Corporate Codes

In response to what the European Commission deemed “new concerns and expectations from citizens, consumers, public authorities, and investors in the context of globalization and large scale industrial change,”⁹⁴ a green paper entitled “Promoting a European Framework for Corporate Social Responsibility” was submitted to the European Community (EC) in June of 2001.⁹⁵ For the EU, a multinational organization with roots in the principles of free trade and a common commercial policy, this was its most aggressive move to date in attempting to promote corporate social responsibility (CSR). Intended as the first step in a move toward a uniform set of compliance standards throughout the EU, the Green Paper is neither binding nor explicit in its suggestions. EU green papers, by nature, are policy papers intended to stimulate discussion among interested

91. For an example of one of the many international nongovernmental organizations working toward corporate compliance in the area of labor standards, see Clean Clothes, *Home Page*, at <http://www.cleanclothes.org> (last visited Apr. 8, 2005).

92. See, e.g., Promoting a European Framework for Corporate Social Responsibility: Green Paper from Directorate-General for Employment and Social Affairs Unit, COM(01)366 final at 17 (July 2001) (“The Danish Social Index is a self-assessment tool developed by the Ministry of Social Affairs for measuring the degree to which a company lives up to its social responsibilities.”) [hereinafter Promoting a European Framework].

93. See U.N. Global Compact, *The Ten Principles*, at <http://www.unglobalcompact.org> (last visited Apr. 8, 2005).

94. Promoting a European Framework, *supra* note 92, at 5.

95. *Id.*

nongovernmental actors in a specific policy area.⁹⁶ The focus of the document was to spark debate on the merits of an EU corporate code in hopes of developing the most innovative, credible, and, ultimately, effective set of standards possible.⁹⁷ As EU green papers often “provide the impetus for subsequent legislation,”⁹⁸ a closer look at the content of the Green Paper and analysis of the range of solicited responses is a relevant and useful exercise. Part B evaluates the positive aspects of the Green Paper; part C suggests areas in which it may be strengthened. Despite the criticism, the Green Paper is a sound initial step toward a very worthwhile end.

B. The Successes

In order to begin the process of building a framework for uniform standards of corporate conduct, the EU takes four important steps. First, the EC makes a powerful statement simply in the Green Paper’s release, one that immediately raises awareness of the issue. The message is clear: there is an institutional expectation that European MNCs are to balance a drive to generate profits with contributions to social and environmental objectives.⁹⁹ In other words, the EC has declared that MNC behavior will not go unchecked or ignored, and the EU will no longer be amenable to ignoring MNCs’ sacrificing human rights standards for the bottom line. In addition to emphasizing inherent moral responsibilities, the Green Paper attempts to appeal to the bottom-line nature of multinational corporations. In so doing, the Green Paper uses market-based indicators of public support for the movement, including social and eco-labels¹⁰⁰ and socially responsible investment schemes.¹⁰¹

96. See European Union Documents, *Documents of Individual Institutions: European Commission*, at http://europa.eu.int/documents/comm/index_en.htm (last visited Apr. 8, 2005) (discussing the role and purpose of Green Papers and White Papers in the European Commission).

97. See Promoting a European Framework, *supra* note 92, at 3.

98. European Union Documents, *supra* note 96.

99. See Promoting a European Framework, *supra* note 92, at 5.

100. See *id.* at 19–20 (discussing the usage of product labels that indicate social and/or environmental consciousness, e.g., “no child labor”).

101. See *id.* at 20–21.

Second, the fact that the Green Paper is an open, inclusive process that solicits the opinions of member states,¹⁰² MNCs,¹⁰³ NGOs,¹⁰⁴ industry-specific organizations,¹⁰⁵ and academics¹⁰⁶ shows a strong sense of common purpose and a willingness to cut through red tape to accomplish its goals. This process-based inclusiveness will necessarily yield a more effective product than would an isolated mandate from the EC. This commitment to transparency will help to avoid the type of contentious struggle occurring in the United States between the business community and those singularly committed to raising the base level of human rights standards to which European MNCs are held.

Third, through support of major, widely accepted international standards, the Green Paper sets out uniform, applicable baselines in the critical areas of labor and human rights to which EU-based MNCs are expected to adhere. The UN Global Compact establishes a baseline for the role of human rights and environmental protection in the global economy.¹⁰⁷ The Tripartite Declaration specifies base levels for wage levels, working conditions, and child labor standards.¹⁰⁸ The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises provide voluntary principles

102. See, e.g., Poland's response at Green Paper—Active Country Perspective (Poland), at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/044-COMPNETNAT_Responsible-Business-Forum_Poland_011221_en.pdf (last visited Apr. 8, 2005).

103. See, e.g., British Petroleum, British Petroleum's Submission to the European Commission, Green Paper on Promoting a European Framework for Corporate Social Responsibility, at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/046-COMP_BP_UK_020104_en.pdf (last visited Apr. 8, 2005).

104. See, e.g., Oxfam International, The European Commission's Green Paper: Promoting a European Framework for Corporate Social Responsibility, at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_OXFAM_INT_020121_en.pdf (last visited Apr. 5, 2005).

105. See, for example, the European Round Table of Industrialists' response at European Round Table of Industrialists, ERT Position on Corporate Social Responsibility and Response to Commission Green Paper, at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/043-COMPNETEU_ERT_EU_011122_en.pdf (last visited Apr. 8, 2005).

106. See Response by Dr. Rosamund Thomas, Director of Centre for Business and Public Sector Ethics, Cambridge, UK, to the European Commission on its Green Paper Promoting a European Framework for Corporate Social Responsibility, at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/098-ACA_Rosamund-Thomas_UK_011208_en.htm (last visited Apr. 8, 2005).

107. See U.N. Global Compact, *supra* note 93.

108. See International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, 424–28 (Nov. 16, 1977).

and standards for responsible business conduct in a variety of areas, including human rights.¹⁰⁹ Given the enormous amount of material produced to guide corporate behavior, this move by the Commission attempts to set a baseline standard to which each company must adhere.

In support of these three documents and the uniform guidelines each sets forth, the EU's Green Paper establishes uniform standards in critical areas and eliminates the many compliance issues caused by the current lattice of private compliance codes (MNC self-regulation), state-based codes (the French standard varies drastically from the English requirements), and industry-based standards (various international labor organizations have wide-ranging policies regarding working conditions, for example). With the institution of the Green Paper's general guidelines, MNCs will no longer be forced to question which standards apply to an individual investment situation, nor will these corporations be able to pick and choose when to adopt standards and when to conveniently ignore them. While short of overt guidance, proxy support of these three major documents is a worthy first step toward a comprehensive, uniform corporate compliance code.

Fourth, in perhaps its most important substantive message, the Green Paper emphasizes the significance of consistent and uniform reporting mechanisms. Given the importance placed on self-reporting by voluntary corporate compliance codes generally, and reinforced in the language of the Green Paper, uniform reporting metrics, frequency, and depth of analysis must be required. The numerous problems that exist in the current compliance code hodgepodge are magnified by a lack of consistency among reporting requirements: "The multiplicity of incompatible benchmarking tools burdens companies with unnecessary costs and makes it difficult for them to reach their stakeholders through reports that are clear and easily understood."¹¹⁰ The Green Paper makes a clear case for the movement toward a global consensus in the type of information to be disclosed in each report, the reporting format to be used, and the reliability of the evaluation and audit procedure.¹¹¹

109. Organisation for Economic Co-operation and Development (OECD), Declaration on International Investment and Multinational Enterprises, 15 I.L.M. 969, 970–72 (June 21, 1976).

110. Davidsson, *supra* note 9, at 537–38.

111. Promoting a European Framework, *supra* note 92, at 6, 18.

C. The Failures

While the Green Paper's four major advancements are indeed steps in a positive direction, the document falls short in many critical areas. First, the standards laid out by the EU's Green Paper are entirely voluntary. As the Council of the EU points out, the code is intended to apply to behavior by businesses beyond existing state-based legal requirements, which, the Council suggests, should continue to be properly enforced.¹¹² The Council's statement, while technically true (although it seems to undermine the very aim of the Green Paper, which intends to establish a *uniform* standard, not something that is to be tacked on to variable Member State standards) is only applicable to MNC behavior within the boundaries of the EU. Well-established international legal principles preclude extra-jurisdictional application of EU and Member State law to activity occurring in other territory outside of the EU. In cases where European MNCs operate on foreign soil, these corporations are not bound by the existing "legal requirements" to which the Council Resolution refers. That said, the Green Paper addresses the primary issue in the area of MNC regulation: compliance and enforcement of basic human rights standards among MNCs faced with economic incentives and the pressure of competing in profit-driven capital markets to do otherwise.

Neither media attention, public pressure, nor the threat of brand devaluation¹¹³ is strong enough to overcome the cost-benefit analysis driving the corporate machine. As Professor Paul Redmond states so precisely, "[t]he contest between code compliance and firm profits is not an equal one."¹¹⁴ In the worst-case scenario, these voluntary codes will be completely ignored; in other situations, they will be selectively applied:

An ILO study of voluntary labor codes adopted by multinational companies has concluded that there is both a tendency to be selective in the inclusion of core ILO standards—less than 50% of the codes

112. Resolution of the Employment and Social Policy Council on CSR, 2002 O.J. (C 086) 3 (December 2–3, 2002), available at http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_resolution.html (last visited Apr. 8, 2005).

113. See Redmond, *supra* note 80, at 93–94 (discussing brand devaluation).

114. *Id.* at 94.

reviewed included a clause on child labor—and a failure to develop standardized monitoring practice or to ensure transparency.¹¹⁵

In either case, this is an issue that must be addressed.

The second line of criticism is also tied directly to the evaluation of MNC behavior outside the EU. While the Green Paper states that “[i]n a world of multinational investment and global supply chains, corporate social responsibility must also extend beyond the borders of Europe,”¹¹⁶ the Green Paper does not place enough focus on regulation of FDI in general, and specifically in the context of human rights. This issue would be more appropriately addressed directly through the development of a specific set of human rights and labor standards for MNCs operating outside the EU.¹¹⁷ Instead of developing unique internal standards and definitions of individual responsibilities, and the logistical problems that would go along with these new standards, the EU would be better served adopting existing internationally recognized standards, beginning with the UDHR, ICCPR, ICESCR, and ILO.¹¹⁸

Third, the Green Paper is not specific enough in its suggestions for implementation of the code. Logistical considerations, including, but certainly not limited to issues concerning overall adoption, systemic implementation, and internal and third-party auditory systems are almost entirely left out of the code. Given that the Green Paper was intended to be a first step rather than a definitive guideline, these omissions are perhaps justified on some level. For this document to achieve the level of success that its potential allows, these global standards must be included in any further movement toward a controlling regulation.

115. Save the Children's Response to the EU Green Paper on 'Promoting a European Framework for Corporate Social Responsibility,' § 2 (2001), at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Save-the-Children_INT_011219_en.pdf (last visited Mar. 5, 2005) (citing Janelle M. Diller, Director, Multinational Enterprises Department, ILO, in presentation to RIIA Conference in Legal Dimensions of Corporate Responsibility, Nov. 2001).

116. Promoting a European Framework, *supra* note 92, at 11–12.

117. See Allen White, Response to the Green Paper of Corporate Social Responsibility, Global Reporting Initiative (GRI), at 2, at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/031-ORGINT_GRI_Int_011024_en.htm (last visited Apr. 8, 2005).

118. See Amnesty International, Submission from Amnesty International on the European Commission 2001 Green Paper: Promoting a European Framework for Corporate Social Responsibility, Amnesty International, § 2.1, at http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Amnesty-International_int_011219_en.htm (last visited Mar. 5, 2005).

The Green Paper represents an overt step by the EU to address issues of corporate compliance on an institutional level. While admirable in its effort to raise awareness, the Paper falls critically short in addressing the problem of corporate responsibility outside of Europe, and as a result leaves human rights advocates wanting more.

IV. THE GRASS IS “GREENER”: A HYBRID SOLUTION

The civil liability model, made possible in the United States by the ATCA and the Corporate Code of Conduct movement, exemplified by the EC’s Green Paper, can each be strategically altered by adopting successful principles from each model in order to create a more effective regulatory tool in each forum.

A. Binding Codes for the EU

The primary weaknesses highlighted by the examination of the EU’s Green Paper concerned the code’s voluntary nature. The Green Paper was intended to serve as a supplement to existing EU and national laws, urging MNCs to voluntarily set higher standards in hopes of attracting socially conscious consumers and investors, while appealing to the moral and social mandate of the EU itself. The Commission must remember the original goals of the EU—the establishment of a common European market and promoting free movement of labor and capital between Member States. Certainly, free trade was promoted, in part, to increase the economic power of the EU, as well as individual Member States and European business interests. The incentive to draft legislation that strictly regulates business interests is counterintuitive to this notion. Laws may exist, but they are not strong enough. In addition to existing probusiness regulations, there is clear disincentive to adopt time laden, labor intensive measures voluntarily. Free market capitalism is a profit-driven principle: international organizations, states, and MNCs aiming to succeed in this arena must appeal first and foremost to a bottom-line ethos. In many cases, conducting business in foreign territories governed by oppressive regimes increases an MNC’s competitiveness. Increasing costs to comply with optional codes, including the standards presented in the Green Paper, does not square with this philosophy unless there are heavy penalties that shift the cost-benefit analysis in favor of doing so. Damages awarded for suits filed in EU courts against MNCs that have violated standards laid out in

the Green Paper would serve exactly that purpose. In order to accomplish this, the Green Paper standards must be binding.

Creating legally binding standards for MNCs within the EU would not detract from the Green Paper's stated goal, nor would it be a drastic departure, at least from a logistical perspective, from instituting voluntary codes. The institution of binding codes would involve, among other things, the development of a penalty system and a public relations campaign intended to placate the corporate interest. Neither of these issues is overly burdensome, especially for a bureaucracy as accomplished as the European Commission is at passing legislation. There is little question that once a binding code with appropriate corporate incentives has been implemented, it would be much more effective in shaping corporate compliance with basic human rights standards than the voluntary code proposed by the Green Paper. Binding codes would force MNCs to adhere to certain standards and prevent them from applying codes selectively, or from ignoring them altogether.

Developing binding codes for MNCs operating outside of the EU would be a much more challenging and controversial undertaking for the EC. If the EU is serious about promoting socially responsible corporate behavior, creation of a binding code with potential liability for violation is a must. To that end, the doctrinal advancements—holding MNCs liable to foreign claims without a required showing of official state action—that have occurred in the United States through ATCA litigation are invaluable as a point of reference. This standard of liability should be solidified by the EC. This piece of legislation would create a baseline standard to which MNCs must adhere, and avoid the inevitable gray areas that develop as a result of litigation in a common law system. It also sends a strong message: MNCs that have any involvement with foreign governments committing *jus cogens* violations will open themselves up to heavy penalties.

With this baseline standard set in place, the EC must take steps to outline policies concerning MNC liability with respect to labor and human rights violations falling short of the *jus cogens* definition. While binding regulations for these standards would be the most satisfactory solution for human rights advocates, the costs to business interests and difficulties with implementation and regulation render this option unfeasible. That said, the EC must state explicitly the expected labor and human rights standards with which MNCs are required to comply when operating in foreign territories. These standards should be identical to those existing throughout Europe: minimum working conditions and age limits, for example, should be the same in Nigeria as they are in Germany. ILO, UDHR,

ICCPR, and ICESCR definitions would be an ideal place to begin articulating this policy. Uniformity, consistency, and regulatory schemes must be addressed in earnest.

In brief, the EU must consider adopting American civil liability principles in order to set a functional baseline of corporate compliance, both inside and outside of the EU. The threat of potentially huge civil liability will shift the cost-benefit analysis in favor of adjusting human rights policies to meet the *jus cogens* baseline. The Green Paper's voluntary scheme should be further developed to include specific standards detailing corporate responsibility in the areas of human rights and labor standards. By adopting existing international norms in these areas, the EC would provide a lucid, easy-to-follow standard, which, given proper regulatory and auditory mechanisms, would prove an effective tool for both MNCs and human rights advocates.

B. Reworking the ATCA

It is clear from a basic analysis of ATCA litigation that Congress must be called upon to act in order to correct basic problems that exist with the current structure. While the effects of the current doctrine and its virtually limitless MNC liability are positive from a human rights perspective and useful in shaping corporate behavior in foreign territory, the ATCA doctrine, in its current form, creates a number of problems. Apart from the "nightmare scenarios" that have been forecasted, the law has proven difficult to interpret and even more difficult to follow. Each circuit has developed its own set of tests and methods of analysis, and in the process they have created a jumbled doctrine with few clear principles or guidelines. Despite these shortcomings, U.S. federal courts have been clear on one thing: MNCs are to be held liable for *jus cogens* violations committed by foreign regimes. As in the EU, civil liability along these lines should remain possible in the United States, codified by a specific pronouncement from Congress. The suggested legislation would benefit from construction similar to the Torture Victims Protection Act (TVPA).¹¹⁹

The TVPA benefits from its explicit nature with respect to both the violations covered and the list of possible defendants; the new law must obviously ex-

119. Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 (2000) (creating a cause of action for foreign citizens for torture or extrajudicial killing committed by anyone acting under actual or apparent authority, or color of law, of any foreign nation).

pand the list of covered violations to include all *jus cogens* norms and specify terms of corporate liability. The benefits of this legislation would be threefold. First, the law would maintain the current level of pressure placed on corporations by the ATCA, resulting in increased MNC compliance and an improvement in global human rights standards. Second, it would provide clear guidelines for both MNCs and plaintiffs to follow. Third, it would appease the Bush Administration and corporate America by limiting potentially frivolous suits and the undue liability that necessarily results from this. As a top priority, this legislation dealing with violations of *jus cogens* norms for MNCs and other defendants, should be among the first enacted.

Congress must develop a standard to address MNC liability for international crimes that do not fall under the *jus cogens* umbrella—gross labor violations, torture, rape, and murder. The benefit of corporate liability for complicity in the commission of these crimes is simply too great to eliminate a cause of action entirely. Development of corporate requirements must be done to make the standards truly effective as a method of shaping MNC behavior. While delivering justice to victims is positive, *preventing* corporate involvement in these violations altogether must be the law's ultimate goal. Congress must take measures to outline specifics in two key areas: first, what crimes are to be included,¹²⁰ and second, a clear definition of the applicable level of complicity in state action.¹²¹

Similar to the approach concerning labor and human rights violations short of an international crime suggested for the EU, the United States would benefit from developing a binding code that standardizes expectations for corporate reporting and transparency of MNC policy, regardless of industry, internal, and third-party auditory requirements.

CONCLUSION

The problem of reconciling basic human rights expectations in a world so dominated by capitalism and its resultant profit-first ethos is extremely complex, and made increasingly so by the movement toward a more integrated global economy. With a reduction in the barriers to international trade and global busi-

120. Again, good places to begin include the UDHR, *supra* note 3; the ICCPR, *supra* note 15; and the ICESCR, *supra* note 16.

121. The *Doe VI* standard has been suggested. That standard was derived from international criminal law and rendered Unocal's mere knowledge enough to attach liability.

ness, the increased movement of labor and capital, foreign direct investment, and cultural exchange have created conditions in drastic need of regulation. Each stakeholder in the global equation—intergovernmental organizations, states, corporations, and NGOs—is attempting to develop individual schemes that accomplish their own goals, be they focused on human rights or driven by economics. Positive steps have been taken, both in the United States and in the EU. Ultimately, however, concerted action is required. Real progress will only be made when there is a collective realization that basic human rights for all must neither be optional, nor be reduced to a factor in a cost-benefit analysis, but must be rights that through the vehicles of social legislation and insightful, effective court decisions, are guaranteed to all. It is only after this realization that any significant change will come about.