CORPORATE RESPONSIBILITY FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

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I. INTRODUCTION

Doe v. Unocal[1] reveals the critical importance of establishing contemporary legal principles regarding corporate liability for international human rights violations.[2] Unocal's partnership with Myanmar (formerly known as Burma) has purportedly compromised the lives of innumerable individuals.[3] Myanmar is a nation that the U.S. Department of State, Human Rights Watch, and Amnesty International have identified as a site of continual human rights atrocities.[4] Allegedly, Unocal actualized its Yadana pipeline project by taking advantage of Myanmar's "long and well-known history of imposing forced labor on their citizens."[5] The pipeline spans Myanmar, and is anticipated to provide $400 million per year to the nation's government, essentially funding the operation of a military regime.[6]

The government of Myanmar is called the State Peace and Development Council (SPDC); however, Amnesty International has described the government's operation as far from peaceful.[7] It has reported that Myanmar uses "civilians for forced labour duties throughout the country. Hundreds of thousands . . . have been forcibly removed from their ancestral lands without compensation. Some 1,500 political prisoners remain in Myanmar jails in appalling conditions, and torture remains

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[1] *See generally* Doe v. Unocal, Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (order that the case be reheard by the en banc court); Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Dec. 3, 2001) (denying Unocal's summary judgment motion); Doe v. Unocal, 963 F. Supp. 880 (1997) (holding that sovereign immunity protects Myanmar from being prosecuted, and granting Unocal's motion for summary judgment).

[2] *Unocal*, 2002 WL 31063976, at *25.

[3] *Id.*

[4] *Id.* at *5, *36 nn.6 & 9.

[5] *Id.* at *4.

[6] Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 492 (2001).

[7] Amnesty International, *Public Statement: Myanmar and Premier Oil*, AI INDEX: ASA 16/02/00, *available at* http://web.amnesty.org/802568F7005C4453/0/92BC1FFA9445D819802568C10056A12E?Open&Highlight=2,Mymar (last visited Mar. 15, 2003).

widespread in Myanmar's secret military intelligence centres."[8] Such allegations indicate that Myanmar may have one of the most repressive regimes in the world today.

Human Rights Watch's 2003 World Report on Burma discussed the systematic rape of women and girls by the Myanmar military.[9] Additionally, Amnesty International states that women in Myanmar have been subjected to multiple instances of rape and extra-judicial executions.[10] The Shan Women's Action Network (SWAN) and the Shan Human Rights Foundation (SHRF) have issued a report that documented 173 rapes, revealing that Myanmar's military commits over 83 percent of the nation's rapes. [11] The majority of the nation's rapes are reportedly gang-rapes, and 25 percent result in death.[12] For instance, in 1998, a twelve-year-old girl was taken by members of the SPDC to act as a guide in the town of Myawaddy.[13] Military officials allegedly gang-raped the girl.[14] When she tried to escape, they raped her again and then shot her to death.[15] When the girl's naked body was retrieved, a bullet was found to have entered her body at the vagina and exited at the chin.[16] The SPDC compensated the girl's family by giving them one sack of rice, one measure of sugar, and one tin of condensed milk.[17]

The government of Myanmar also allegedly tortures its citizens, using child soldiers to perpetuate violence throughout the nation. In 2001, the Myanmar military purportedly interrogated a man by torturing him with fire.[18] Members of the SPDC held a flame to his eye, while lighting his mustache and setting fire to his mouth.[19] According to Human Rights Watch's 2003 report, Myanmar's military continues to engage in human rights violations as its government draws increasing numbers of youngsters into military service.[20] In 2002, Human Rights Watch asserted that Myanmar "has the largest number of child soldiers in the world and the number is growing."[21] Today, Myanmar forcibly recruits eleven-year-old

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[8] *Id.*

[9] Human Rights Watch, *World Report 2003: Burma*, *available at* http://www.hrw.org/wr2k3/asia2.html (last visited Mar. 12, 2003).

[10] Amnesty International, *Unsung Heroines: The Women of Myanmar*, AI-index: ASA 16/004/2000, *available at* www.amnesty.org (last visited Mar. 12, 2003).

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] Amnesty International, *Unsung Heroines: The Women of Myanmar*, AI-index: ASA 16/004/2000, *available at* www.amnesty.org (last visited Mar. 12, 2003).

[16] *Id*.

[17] *Id*.

[18] Human Rights Watch, *World Report 2002: Human Rights Developments*, *available at* www.hrw.org (last visited Mar. 12, 2003).

[19] *Id*.

[20] Human Rights Watch, *World Report 2003*, *available at* http://www.hrw.org/wr2k3/asia2.html (last visited Mar. 1, 2003).

[21] Human Rights Watch, *Burma: World's Highest Number of Child Soldiers*, New York, October 16, 2002, *available at* www.hrw.org (last visited Mar. 1, 2003).

boys, making them engage in combat, burn villages, carry out executions, and oversee forced labor.[22] These children are the means through which the government furthers its control over opposition groups.[23] Young boys have no choice but to "commit human rights abuses against civilians."[24] If they try to escape from the military regime, they are beaten to death.[25]

In 1997, the U.S. government deemed Myanmar a human rights violator and restricted new investment in the nation.[26] By building an alliance with Unocal, the SPDC secured its financial well-being and thereby established control over the nation.[27] In *Doe v. Unocal*, multiple plaintiffs have alleged that during the construction of Unocal's pipeline, the government of Myanmar inflicted systematic human rights violations upon its citizens.[28] Plaintiffs have asserted that because of the pipeline project their families were forcibly displaced, and they were required to work without compensation.[29] Testimony indicates that the Yadana pipeline's workforce existed in a condition tantamount to slavery.[30] Plaintiffs allege that individuals were threatened with death, and were raped and murdered while being forced to work on the pipeline.[31]

Testimony has provided evidence of the conditions under which forced laborers were made to work. John Doe I's testimony described the alleged consequences of refusing to participate in forced labor.[32] He indicated that soldiers tried to kill him when he attempted to escape from a forced labor program.[33] Furthermore, as a means of punishing him, soldiers threw his wife and baby into a fire.[34] While John Doe I's wife was severely burned and suffered numerous other injuries, his baby burned to death.[35] This incident illustrates the human rights abuses that Unocal has been accused of propagating through its involvement with the Yadana pipeline project.

In September 2002, the Ninth Circuit denied Unocal's motion for summary judgment, finding sufficient evidence to indicate that Unocal may have violated the "law of nations."[36] The Court asserted that Unocal could be held liable for the multiple counts of murder and rape that members of

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[22] Human Rights Watch, *Child Soldier Use 2003: Myanmar (Burma)*, *available at* www.hrw.org (last visited Mar. 12, 2003).

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] Bob Egelko, *Suit Over Slave Labor Reinstated by Court*, S.F. CHRON, Sept. 19, 2002, at A3.

[27] *Id*.

[28] *Id*.

[29] Doe v. Unocal, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *1 (9th Cir. Dec. 3, 2001).

[30] *Id*. at *14.

[31] *Id*. at *6.

[32] *Id*. at *16.

[33] *Id*.

[34] *Unocal*, 2002 WL 31063976, at *16.

[35] *Id*. at *3.

[36] *Id.* at *8. The "law of nations" will be discussed in detail in Part II of this note. It is a term from the 18th century that is synonymous with international law. Many scholars assert that the "law of nations" incorporates international human rights standards.

the Myanmar military committed while exacting forced labor from the pipeline's workers.[37] This decision is particularly noteworthy, as it marks the first time that alien victims of alleged international human rights violations have been able to bring a claim asserting liability against a corporation in an American court.

Evaluating Unocal's summary judgment motion, the Ninth Circuit highlighted evidence indicating that the corporation's own consultants and non-governmental organizations had informed it about the SPDC's perpetuation of human rights violations.[38] Prior to acquiring an interest in Myanmar, Unocal hired a consulting company called the Control Risk Group.[39] This company apparently told Unocal that "the government habitually makes use of forced labour."[40] Nevertheless, in 1993, Unocal formally joined a French company called Total and the government of Myanmar to pursue the drilling project.[41] Records reveal that Unocal's consultant, John Haseman, told Unocal that the "Myanmar Military was, in fact, using forced labor and committing other human rights violations in connection with the Project."[42] Thus, Unocal may have knowingly aided and abetted the Myanmar government in subjecting individuals to human rights violations. The awareness that human rights violations were occurring in Myanmar did not seem to deter Unocal from participating in the pipeline project. Nor did it lead Unocal to actively monitor and prohibit the systematic abuse of pipeline workers.

Doe v. Unocal is a unique instance in which a domestic court sits in judgment of a corporation's international conduct. It signals the growing importance of developing standards of international corporate liability. Although corporations now own over one-fourth of the world's assets, their legal responsibilities have yet to be clearly enunciated.[43] This note discusses the significance of *Doe v. Unocal* as a marker of corporate responsibility in the international arena. Furthermore, it evaluates the usage of the Alien Tort Claims Act (ATCA) as a mechanism for imposing liability on corporations. Moreover, it argues for the expansion of the ATCA's application to corporations that commit or condone international human rights violations.

Part II considers the application of the ATCA as a mechanism through which liability may be imposed upon Unocal for alleged violations of human rights norms. Judicial interpretation of the statute, as well as legal standards hindering its application to corporations are considered. Additionally, the limited scope of the ATCA is analyzed in light of jurisdictional concerns, the Act of State Doctrine, and the Political Question

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[37] *Id.* at *15.
[38] *Id.* at *4.
[39] *Unocal*, 2002 WL 31063976, at *4.
[40] *Id.*
[41] Doe v. Unocal, 963 F. Supp. 880, 885 (1997).
[42] *Unocal*, 2002 WL 31063976, at *5.
[43] Stephen G. Wood & Brett Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 539 (2002).

Doctrine. In essence, the Supreme Court's tendency to expand the application of the ATCA to breaches of modern international law and to private parties is assessed in light of legal standards that protect corporations such as Unocal from liability.

Part III discusses the three primary elements of the ATCA, emphasizing legal standards and norms that have been used to define the "law of nations." Jurisprudential attempts to limit or enlarge the definition of the "law of nations"[44] are evaluated, and the appropriateness of applying international law in a domestic forum is considered. Additionally, the use of a criminal standard of liability is weighed against the employment of a strict liability regime. This section contends that the "law of nations" should be interpreted as an evolving and expanding body of law that includes modern international human rights standards.

Finally, Part IV highlights the practical consequences of finding corporations such as Unocal liable for international human rights offenses. It discusses the practicality of regulating and establishing control over corporations through the imposition of legal liability and corporate codes of conduct. It also asserts that economic concerns, moral responsibility, and national interest favor the judiciary's expansion of the ATCA's scope, as this will impose legal liability on corporations that violate international human rights norms.

This note asserts that the ATCA is a potent, jurisprudential tool through which international standards of human rights should be advanced and imposed upon corporations. By expanding the scope of the ATCA, domestic courts can hold corporate human rights offenders responsible for international violations of human rights. In an era in which corporations have attained tremendous wealth and power, few legal constraints limit their financial goals. Thus, by extending the grasp of the ATCA, the United States can effectively hold corporations accountable for their actions. This will further the enforcement of international human rights standards and impose a level of morality and responsibility on corporations.

II. UNLEASHING THE ALIEN TORT CLAIMS ACT

The shocking human rights violations that allegedly accompanied the construction of Unocal's pipeline led many individuals to flee from Myanmar.[45] Myanmar's former General Secretary of the Federation of Trade Unions of Burma (FTUB), U Maung Maung, was one of many people who escaped from the brutal SPDC regime to Thailand.[46] In 1994, U Maung Maung read an article about an individual in the United States

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[44] *Unocal*, 2002 WL 31063976, at *12 (Judge Pregerson's majority decision stating that "the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context.")

[45] Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 187 (2002).

[46] *Id*.

who sued a veterinarian because his dog was over-anesthetized.[47] U Maung Maung reasoned that if the United States provided a cause of action for an individual whose dog had been harmed, it should provide a cause of action for individuals who had been irreparably injured by an American corporation's use of forced labor to construct a pipeline.[48] He requested the legal activists who were advising the FTUB to find a cause of action that would enable the people of Myanmar to bring a suit against Unocal in the United States.[49]

In response to U Maung Maung's request, the ATCA was unleashed as the mechanism through which Unocal might be held accountable for human rights violations.[50] The ATCA, a 200-year-old statute, was part of the first Judiciary Act in 1789, and rarely applied until very recently.[51] The statute states, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[52] Thus, it provides a cause of action and a forum for aliens who have been subjected to a violation of the "law of nations."[53] The ATCA was enacted because of the Founding Fathers' desire to provide protection to individuals who were injured by transgressions of the law by various nations.[54] It was initially perceived as an assurance to European nations that the United States would not harbor pirates or assassins.[55] In recent years, the ATCA has been used more frequently, and its application has been expanded to address issues regarding human rights violations by states and private parties.[56] Thus, the statute has been increasingly applied to a broader range of defendants. Plaintiffs in *Doe v. Unocal* contend that the ATCA's scope should be widened to impose liability upon corporate human rights offenders.

A. JUDICIAL INTERPRETATION OF THE ATCA

The ATCA was awakened in 1980, and has increasingly been applied in the context of human rights violations, creating precedent that victims of the Myanmar government have been able to rely upon.

In *Filartiga v. Pena-Irala*,[57] the plaintiffs were Paraguayan citizens who brought an action against a former Paraguayan police inspector who

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[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 89 (1999).
[52] Alien Tort Claims Act, 28 U.S.C.A. §1350 (1789).
[53] Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 822 (2002).
[54] Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COM L. REV. 401, 404-05 (2001).
[55] Paul Magnusson, *Making a Federal Case Out of Overseas Abuses*, BUS. WK., Nov. 25, 2002, at 78.
[56] *See id.*
[57] 630 F.2d 876, 878 (2d Cir. 1980).

had tortured to death a family member.[58] Although the district court dismissed the case for lack of jurisdiction, the Second Circuit reversed, finding federal subject matter jurisdiction.[59] The Court held that the "law of nations" equated to international law and asserted that international law should be applied based upon present interpretations, rather than 1789 standards.[60] It described international law as that which could be found through "the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law,"[61] and stated that international law was continually evolving.[62] Applying the ATCA, the Second Circuit found that torture was prohibited by international law, even if it was inflicted by a state on its own citizens.[63] This case established valuable precedent for *Doe v. Unocal* by defining the "law of nations" as a modern tool through which defendants may be held accountable for the infliction of certain human rights violations.

In 1995, *Kadic v. Karadzic*[64] extended the applicability of the ATCA to non-state actors, establishing that precedent may support the expansion of the scope of the ATCA to Unocal, a private corporation.[65] In *Kadic v. Karadzic*, the head of an unrecognized Bosnian Serb regime was accused of gross human rights violations that included "genocide, torture, and war crimes."[66] The Second Circuit asserted that liability based on the ATCA is based in international law and identified longstanding practice and scholarly recognition as the grounds for international laws on genocide and certain war crimes.[67] It stated that international norms do not merely apply to state actors, but to private actors who acted "in concert with" a governmental system as well.[68] Furthermore, the Court asserted that liability could be imposed upon private actors who act independently, when genocide and war crimes such as slave trading are involved.[69] This decision broadened the responsibility of private actors to act in accordance with international standards of human rights.

Thus, *Filartiga v. Pena-Irala* and *Kadic v. Karadzic* show the Second Circuit's willingness to broaden the scope of the ATCA by imposing it upon state and non-state actors who violate international human rights norms. Since the Supreme Court has not indicated its stance toward the application of the ATCA, these landmark Second Circuit decisions may

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[58] Ivan Poullaos, *The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations*, 80 WASH. U. L.Q. 327, 333 (2002).

[59] *Id*. at 334 *(*discussing the Second Circuit's emphasis on applying modern international law*).*

[60] *Id*.

[61] *Filartiga*, 630 F.2d at 880 (citing *United States v. Smith*, 18 U.S.153, 160-61 (1820)).

[62] Poullaos, *supra* note 58, at 334.

[63] *Filartiga*, 630 F.2d at 884-85.

[64] 70 F.3d 232 (2d Cir. 1995).

[65] *See id.*at 239.

[66] *See id.*at 236-37.

[67] *Id*.

[68] Stephens, *supra* note 54, at 407.

[69] *Kadic*, 70 F.3d at 242-43.

have paved the way for Unocal, a non-state actor, to be tried for violations of international law.

In 1996, the Ninth Circuit applied the ATCA in *Hilao v. Estate of Ferdinand Marcos*,[70] revealing the Court's willingness to apply the ATCA in favor of victims of human rights violations. The plaintiffs alleged that the Marcos regime in the Philippines had subjected them to torture.[71] When the case went to trial, the jury found sufficient evidence to show that individuals had been subjected to a broad range of torture, in violation of the international norm against torture.[72] The decision referenced various international documents, highlighting the importance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and illustrating the Ninth Circuit's readiness to apply international standards within a domestic setting.[73]

Thus, the Ninth Circuit has countenanced the importance of international law in prior decisions and may be amenable to the imposition of international human rights standards upon defendants such as Unocal. Despite the apparent judicial trend toward a broader application of the ATCA, the statute has made little headway as a means of holding corporations in check. Although the concept of corporate liability had been asserted in several cases involving the ATCA, almost all such claims have been dismissed. As of today, no case has resulted in a final judgment in favor of the victims of human rights violations committed by a corporation. However, the plaintiffs in *Doe v. Unocal* were the first to achieve a modest level of success, suggesting that corporations may eventually be held to certain standards of international law.

B. DETERMINING THE SCOPE OF THE ATCA IN DOE V. UNOCAL

Doe v. Unocal was filed in 1996 on behalf of Myanmar citizens who asserted that the government had used soldiers to force individuals to work on Unocal's pipeline project.[74] Charges were brought again Unocal, as well as against its partners, the government of Myanmar, and Total.[75] Although the district court initially dismissed the case, in September 2002 a three-judge panel of the Ninth Circuit Court of Appeals found evidence to support triable issues of fact.[76] The panel denied Unocal's motion for summary judgment and remanded the case to the district court.[77] However, the panel upheld the district court's ruling on jurisdictional issues regarding

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[70] 103 F.3d 767 (9th Cir. 1996).

[71] *Id*.

[72] Donald Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L. J. 153, 167-68 (1998).

[73] *See id.*

[74] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *5 (9th Cir. Dec. 3, 2001).

[75] *Id.* at *6.

[76] *Id.* at *7.

[77] *Id*.

the application of the ATCA to the government of Myanmar and Total, affirming the dismissal of charges against them.[78]

Judge Harry Pregerson's opinion denying Unocal's summary judgment motion is monumental, as it has opened the doorway for plaintiffs to bring ATCA claims against corporate violators of international human rights.[79] The opinion stated that private actors could be held responsible for breaches of human rights norms that include genocide, slavery, and war crimes, even in the absence of state action.[80] Establishing that forced labor is tantamount to slavery, an incontrovertible *jus cogens* norm that applies to both states and private parties, the Court found that private corporations may be held liable under the ATCA.[81]

The precedential value of this decision was brought into question by the Ninth Circuit's February 2003 order requiring an en banc rehearing of the case.[82] However, Judge Pregerson's opinion is noteworthy, as it provides a first glimpse into the Ninth Circuit's interpretation of the ATCA with respect to multinational corporations accused of human rights violations. The Court and legal scholars now face a developing body of legal rules and standards with respect to the ATCA, requiring that doctrines fundamental to American jurisprudence be addressed and analyzed in light of evolving international norms and practical considerations. Jurisdictional issues, the Act of State Doctrine, and the Political Question Doctrine are all legal strictures that limit the scope of the ATCA.

1. Lack of Jurisdiction

a. The Sovereign Immunities Act – Lack of Jurisdiction Over the Government of Myanmar

Although the district court and the Ninth Circuit diverged on whether or not Unocal could be brought to trial, the courts concurred in holding that an ATCA claim against the government of Myanmar is barred because of the Foreign Sovereign Immunities Act (FSIA).[83] When the FSIA prevents plaintiffs from bringing suits, the ATCA cannot provide jurisdiction for such claims.[84] The FSIA provides that a sovereign state can only be

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[78] *Id.*

[79] *Unocal*, 2002 WL 31063976, at *1.

[80] *Id.* at *9.

[81] *Id.*

[82] *Id.*

[83] Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a), 1603(a), 1605-1607. "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . "

[84] DAVID WEISSBRODT, FITZPATRICK & NEWMAN, INTERNATIONAL HUMAN RIGHTS 794 (Anderson Publ'g Co. 2001).

brought to trial in the United States if there is an exception to immunity.[85] Exceptions may be found where a state has carried out business practices within the United States or has carried on commercial activities elsewhere that have had a direct effect on the United States.[86]

The Supreme Court has clearly established that the FSIA is the sole means through which jurisdiction can be obtained over foreign sovereigns, generally preventing the ATCA from applying to them.[87] Nonetheless, the Ninth Circuit considered the plaintiffs' contention that jurisdiction over Myanmar could exist based upon FSIA exceptions.[88] The plaintiffs argued that the FSIA should not apply because their claim involved acts done in the United States "in connection with a commercial activity" pertaining to Myanmar.[89] They also contended that jurisdiction existed because the acts of Myanmar resulted in a "direct effect" on the United States.[90] However, the Ninth Circuit asserted that the acts at issue did not occur within the United States and that a "direct effect" must occur at "the locus of the injury directly resulting from the sovereign defendant's wrongful acts." [91] Since the alleged human rights atrocities did not occur within the United States, the Court held that jurisdiction could not be exercised over Myanmar, and, therefore, the country could not be subjected to the ATCA.[92]

Myanmar's position was well supported by the Ninth Circuit's 1993 decision, *Siderman de Blake v. Republic of Argentina*.[93] The case involved individuals who had allegedly been detained and tortured by the Argentine military.[94] In evaluating the plaintiff's claim of torture, the Court indicated that *jus cogens* considerations should outweigh sovereign immunity, since *jus cogens* are peremptory norms of international law that no nation may abrogate.[95] However, the Court gave greater importance to Congress' intent, asserting that it wanted to govern questions of sovereign immunity through the FSIA alone.[96] Thus, although Myanmar may have violated *jus cogens* norms, the FSIA prevents an ATCA claim from being brought.

b. Personal Jurisdiction – Total Lacks "Minimum Contacts"

The Ninth Circuit has affirmed the district court's dismissal of claims against Total because personal jurisdiction does not extend to the company.[97] Under California law, if "minimum contacts" in the forum are

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[85] *Id*.
[86] *Id*.
[87] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).
[88] *Id*.
[89] Doe v. Unocal, 963 F. Supp. 880, 886-87 (1997).
[90] *Id*.
[91] *Id.* at 888 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 n.11 (9th Cir. 1992)).
[92] *Id*. at 887-88.
[93] *Siderman de Blake*, 965 F.2d at 699.
[94] *Id*.
[95] WEISSBRODT, FITZPATRICK & NEWMAN**,** *supra* note 84, at 799.
[96] *Siderman de Blake*, 965 F.2d at 718.
[97] Doe v. Unocal, 248 F.3d 915, 923 (2000).

substantial, continuous, and systematic, a foreign corporation may be subject to suit on matters that are unrelated to its contacts within the forum.[98] Total's joint venture with Unocal was not found to avail of the benefits and protections of the law that are necessary in order to establish a basis for personal jurisdiction.[99] The contractual relationship between the two corporations was related to the Yadana pipeline project in Myanmar.[100] Telephone conversations and meetings outside the United States did not provide sufficient contacts for personal jurisdiction.[101] Since an agency relationship could not be found between Total and its American subsidiaries, Total's contacts with California did not constitute sufficient contact with the forum to establish personal jurisdiction.[102]

The application of the ATCA to corporations that are not based in the United States is therefore limited by jurisdictional constraints. While the ATCA may be expanded to apply to cases regarding corporations that have sufficient contacts with the United States, most multinational corporations will be unconstrained by the ATCA and free to use their wealth and influence without being held responsible for observing human rights standards.

2. The Act of State Doctrine

The Act of State Doctrine was created by judges and embraced as a part of federal common law.[103] It is used to prevent the court of one nation from judging and convicting the government of another.[104] In 1897, the Supreme Court delineated the scope of the Act of State Doctrine in *Underhill v. Hernandez*, asserting that "[e]very sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[105] However, the Supreme Court's more recent opinions have described the doctrine as a "consequence of domestic separation of powers,"[106] rather than as an instrument of foreign policy. Arguments for and against the application of the ATCA to corporations have drawn on the Supreme Court's past and present analysis of the doctrine.

a. The Act of State Doctrine Does Not Protect Myanmar's Sovereignty

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[98] *Id*.
[99] *Id.* at 930-31.
[100] *Id.* at 920.
[101] *Id.* at 930-31.
[102] *Unocal*, 248 F.3d at 929.
[103] WEISSBRODT, FITZPATRICK & NEWMAN**,** *supra* note 84, at 813.
[104] *Id.*
[105] 168 U.S. 250, 252 (1897).
[106] W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990).

In *Doe v. Unocal*, the Ninth Circuit recognized that a discussion of the Act of State Doctrine was important.[107] In order to hold Unocal liable, the Court might have to determine that the government of Myanmar violated international law.[108] The Court emphasized the Supreme Court's original rationale for the doctrine, and accordingly assessed the value of protecting Myanmar's acts from investigation.[109] It cited the opinion in *Kadic*, which asserted, "it would be a rare case in which the act of state doctrine precluded suit under [the ATCA]."[110] Additionally, it emphasized that the value of an ATCA claim should outweigh the importance of protecting a sovereign's wrongful acts.[111]

The Ninth Circuit analyzed four elements in order to determine whether the Act of State Doctrine should preclude Unocal from potential liability.[112] It applied the three-factor balancing test that the Supreme Court had established for the analysis of Act of State Doctrine issues,[113] and added a fourth factor.[114] The Court analyzed the following elements: (1) existing international consensus regarding international law; (2) implications on the United State's foreign relations; (3) the current status of the government of Myanmar; and, (4) the public interest involved.[115] The United States' desire to avoid offending the government of Myanmar was noted as the only factor that might justify exempting Unocal from the ATCA claim.[116] However, the Court reasoned that international consensus on the inappropriateness of murder, rape, and slavery, the United States' prior denunciation of Myanmar's human rights abuses, and the harm caused to citizens in Myanmar outweighed the use of the Act of State Doctrine as a defense.[117]

Thus, the Ninth Circuit was not persuaded by Unocal's argument that the Court should not inquire into Myanmar's actions because it is a sovereign whose internal actions are exempt from scrutiny.[118] The Court stated that the plaintiffs' allegations of forced labor or slavery indicate that Myanmar may be violating international norms, weighing against the application of the doctrine as a means of protecting Myanmar's acts from investigation.[119] Governmental acts or national laws that contravene *jus cogens*, binding norms of international law, should therefore be void.[120] Thus, it is possible that the Act of State Doctrine may not be used to protect

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[107] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *19 (9th Cir. Dec. 3, 2001).
[108] *Id.*
[109] *Id.*
[110] *Id.* at *20 (citing *Kadic*, 70 F.3d 232, 250 (2d Cir. 1995).
[111] *Id.*
[112] *Unocal*, 2002 WL 31063976, at *20.
[113] *Id.* at *20 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Unocal*, 2002 WL 31063976, at *20.
[118] *Id.*
[119] *Id.*
[120] *Id.*

the acts of governments that engage in violations of international human rights standards. In discussing the Act of State Doctrine, the Court expressed a readiness to evaluate the actions of Myanmar in order to assess Unocal's liability under the ATCA.[121]

b. The Act of State Doctrine and Separation of Powers

There has been a growing sense that the Act of State Doctrine's function lies in preventing the judiciary from interfering with the roles of other governmental branches by precluding courts from ruling on the acts of foreign nations.[122] The Ninth Circuit's *Doe v. Unocal* decision did not discuss the Supreme Court's recent interpretation of the doctrine as a mechanism for separating the duties of the various governmental branches. Nonetheless, the separation of powers argument was the basis of Unocal's defense against the use of the ATCA.[123]

In 1997, District Court Judge Richard Paez considered Unocal's contention that the Act of State Doctrine prohibits the court from adjudicating the plaintiffs' claims because a judicial decision would "interfere with the foreign policy efforts of Congress and the President."[124] Unocal emphasized that the current Supreme Court views the doctrine as a mechanism for separating the functions of the judiciary, legislature, and executive branches.[125] It argued that the lawsuit was an unwarranted attempt to involve the courts in the development of economic and foreign policy regarding Myanmar.[126] Additionally, Unocal asserted that the Court's intrusion into the acts of Myanmar would hinder the United States government's attempts to encourage the military regime to reform its human rights agenda.[127] It also emphasized Congress' cautious approach toward allowing the President to limit investment in Myanmar, indicating that each branch of the government needed to be held accountable to the others.[128]

Unocal's argument that the Court should dismiss the ATCA claim because the judiciary would invade the sphere of the executive and legislative branches failed.[129] The district court emphasized evidence that Congress and the President had already acknowledged that Myanmar commits human rights violations against its own citizens.[130] Judge Paez considered congressional and presidential decisions to "encourage reform by allowing companies from the United States to assert positive pressure . .

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[121] *Id.*
[122] Zia-Zarifi, *supra* note 51, at 132.
[123] *Id.*
[124] Doe v. Unocal, 963 F. Supp. 880, 892 (1997).
[125] *Id.*
[126] *Id.* at 894 n.17.
[127] *Id.*
[128] *Id.*
[129] *Unocal*, 963 F. Supp. at 894 n.17.
[130] *Id.*

. through their investments in Burma."[131] The apparent consensus between the legislative and executive branches indicated that the judiciary's investigation of Myanmar's activities would not contradict or interfere with the American foreign policy agenda with respect to Myanmar.[132] Additionally, it would not interfere with the separation of power between governmental bodies.[133]

The judiciary's refusal to apply the Act of State Doctrine to dismiss the ATCA claim against Unocal illustrates that the government can further the same foreign policy agenda from different angles. However, the decision leaves open the possibility that ATCA claims may not be adjudicated by the Court if they directly contravene the executive or legislative branch's foreign policy. .

3. The Political Question Doctrine

In *Baker v. Carr*,[134]the Supreme Court defined the circumstances in which the Political Question Doctrine would apply.[135] It emphasized that the judiciary should refrain from deciding a case when there is the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of the government."[136] The district court's 1997 *Doe v. Unocal* opinion emphasized that, by ruling on the plaintiff's ATCA claim, it was not expressing any sentiment that was contrary to what the legislative and executive branches of the United States government had already articulated.[137] Thus, even though Unocal did not assert that the action presented a political question,[138] the district court indicated that the Political Question Doctrine would not bar the adjudication of the ATCA claim.[139]

Although the Ninth Circuit did not directly address the Political Question Doctrine in its decision, it also did not politicize the case. The Court refrained from defining the plaintiffs' ATCA claim as a non-justiciable, political issue.[140] Even though the case directly involves the Myanmar government's acts and policies, the Court did not allow foreign policy to prevent it from considering the case. Rather, the Ninth Circuit expressed a willingness to look into the acts and policies of Myanmar, a sovereign state, in order to determine whether Unocal should be held liable for human rights violations.[141] Thus, the ATCA could be the mechanism

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[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] 369 U.S. 186 (1962).
[135] *Id.* at 216.
[136] *Id.*
[137] *Unocal*, 963 F. Supp. at 894 n.17.
[138] *Id.* at 892.
[139] *Id.*
[140] *Id.*
[141] *Id.*

through which the judiciary expands the scope of its decision-making authority to issues involving multinational corporations and foreign states.

III. JUDICIAL INTERPRETATION OF THE "LAW OF NATIONS" CLAUSE OF THE ATCA

Doe v. Unocal emphasizes that corporations must be cautious regarding their international investments, as they may be held accountable for violations of "the law of nations."[142] The Ninth Circuit's September 2002 dismissal of Unocal's summary judgment motion was unprecedented, as it acknowledged the potential for foreign plaintiffs to bring a multinational corporation to trial within the American federal courts.[143]

The district court originally granted Unocal's motion for summary judgment on the grounds that the plaintiffs could not provide evidence that Unocal had engaged in state action or that it had controlled the Myanmar military, actively forcing laborers to work.[144] Assuming the position of a passive investor, Unocal rebutted assertions that the corporation was liable for the Myanmar military's acts, disassociating itself from the alleged human rights abuses that occurred in conjunction with the Yadana pipeline.[145] Although Unocal's defenses were effective in district court, the corporation was unable to convince the Ninth Circuit that no issues of material fact were present, and that summary judgment was appropriate.[146]

Viewing "the evidence in the light most favorable to the nonmoving party,"[147] the Ninth Circuit asserted that Unocal's liability would turn on whether or not it aided and abetted the SPDC in carrying out human rights violations.[148] Thus, Unocal need not have engaged in state action or controlled the Myanmar military in order to be held liable. Judge Pregerson's majority opinion espoused a broad understanding of the "law of nations." It advanced the modern international trend toward viewing forced labor as a violation of international human rights standards and affirmed the use of the ATCA as a means of furthering corporate responsibility for human rights violations.[149]

The Ninth Circuit constructed a standard of liability based on legal norms developed by international criminal tribunals,[150] applying international precedent to charges brought in a domestic forum. However, international precedent primarily stems from ad hoc criminal tribunals that addressed cases involving individuals accused of crimes. Thus, the legal

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[142] *Making a Federal Case Out of Overseas Abuses*, BUS. WK., Nov. 25, 2002, No. 3809.
[143] *Plaintiffs Win Ninth Circuit Victory over Unocal*, NEWS & PRESS, Sept. 18, 2002.
[144] Doe v. Unocal, 2002 WL 31063976, at *6 (9th Cir. Dec. 3, 2001).
[145] Lisa Girion, *U.S. Ruling Says Firms Liable for Abuse Abroad*, L.A. TIMES, Sept. 19, 2002.
[146] *Unocal*, 2002 WL 31063976, at *23.
[147] *Id.* at *7.
[148] *Id.* at *12.
[149] *See id.*
[150] *Id.* at *12-13.

standards developed by such tribunals may require a level of knowledge or intent that should be attributable to a corporate actor.[151]

Nonetheless, the Ninth Circuit held that Unocal's liability would turn on whether or not it engaged in "knowing practical assistance or encouragement which has had a substantial effect on the perpetuation of the crime."[152] The salience of the issues raised in this case led the Ninth Circuit to call for an en banc rehearing of the case. Over a year later, the Ninth Circuit's decision is still pending. The significant consequences of imposing human rights standards on international corporate actors require a careful examination of the law.

In order to bring an ATCA claim, three elements must be present: (1) an alien sues; (2) over a tort; (3) committed in violation of the law of nations.[153] The Ninth Circuit found all three elements of the claim to be well supported, asserting that Unocal may be held liable if the evidence shows that it aided and abetted the perpetuation of alleged human rights violations.[154]

First, the requirement that aliens bring the suit is met because the plaintiffs are "villagers from Myanmar's Tenasserim region, the rural area through which the Project built the pipeline."[155] Second, the Court has defined the tort as that of aiding and abetting the government of Myanmar.[156] Therefore, under the ATCA, Unocal may be held responsible for its involvement in the subjugation of Myanmar's people. Third, the ATCA grants federal courts subject matter jurisdiction over torts that violate the "law of nations."[157] Therefore, in considering the validity of the plaintiffs' claim, the Ninth Circuit inquired into the current status of the "law of nations," analyzing its applicability to instances of forced labor.[158] Judge Pregerson's opinion highlighted the United States' involvement in discerning and enforcing evolving international human rights standards, emphasizing the nation's commitment to uphold the "law of nations."[159]

Judge Pregerson asserted that a threshold issue regarding the application of the ATCA was whether the tort alleged was a violation of the "law of nations."[160] In assessing the plaintiffs' allegations of human rights violations, the Court emphasized that torture, murder, and slavery contravene the "law of nations."[161] However, in an unprecedented move, the Court equated forced labor with slavery.[162] Since slavery is

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[151] *Unocal*, 2002 WL 31063976, at *13.
[152] *Id.* at *10.
[153] Alien Tort Claims Act, 28 U.S.C. § 1350 (1948).
[154] *Id.*
[155] *Unocal*, 2002 WL 31063976, at *3.
[156] *Id.*
[157] *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2036 (2001).
[158] *Unocal*, 2002 WL 31063976, at *9-10.
[159] *See id.*
[160] *Id.* at *8.
[161] *Id.*
[162] *Id.*

internationally perceived as a violation of *jus cogens*,[163] a mandatory, international norm, the Court asserted that the ATCA must afford a basis for adjudicating such claims.[164] By emphasizing that the plaintiffs' allegations of murder and rape were tied to the perpetuation of forced labor practices, Judge Pregerson centered his opinion on the premise that today, forced labor violates the "law of nations."[165]

A. DELINEATING THE "LAW OF NATIONS"

The Supreme Court recognized the importance of respecting international rules and standards in *Chisholm v. Georgia*, stating, "[B]y taking a place among the nations of the earth, [the U.S. has] become amenable to the laws of nations."[166] Today, the "law of nations" is perceived as international law, and international human rights standards have become a significant part of that law.[167] While there is no definitive measure for determining the presence of human rights standards, wide acceptance among several states is essential.[168] The international community has increasingly viewed forced labor as an unacceptable practice, broadening the definition of "law of nations" to incorporate prohibitions against forced labor.[169] Therefore, Judge Pregerson's decision rightly recognizes that the ATCA's "law of nations" clause should apply to a growing body of international human rights standards.

The Ninth Circuit espoused a broad definition of the "law of nations" in *Doe v. Unocal*, indicating that all "specific, universal, and obligatory" international norms are included.[170] This perception of the "law of nations" opens the door for a wide array of ATCA claims to be brought, revealing the growing grasp of the statute.

1. The Expanding Domestic Interpretation of the "Law of Nations"

Historical definitions of the "law of nations" and recent judicial opinions suggest that international norms should be developed gradually through international consensus. The Ninth Circuit espoused this opinion, indicating that the "law of nations" clause of the ATCA imposes potential legal liability on those who perpetuate forced labor.[171]

Nonetheless, some critics disagree, asserting that ATCA claims should not incorporate modern conceptions of international law.[172] They contend

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[163] *Unocal*, 2002 WL 31063976, at *8.
[164] *Id.*
[165] *See id.*
[166] 2 U.S. 419, 474 (1793).
[167] *See* WEISSBRODT, FITZPATRICK & NEWMAN**,** *supra* note 84, at 22.
[168] *Id.* at 697.
[169] *Id.*
[170] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *7 (9th Cir. Dec. 3, 2001).
[171] *Id.* at *15.
[172] Michael Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 118 (2002).

that the "law of nations" is a static body of historically recognized international law, which cannot be expanded by judicial interpretation.[173]

Historically, the "law of nations" was viewed as a complete, unalterable body of laws that governed international relations.[174] It arose from the Roman concept of "jus gentium," an understanding of natural law.[175] Hugo Grotius, a man described as the father of the modern "law of nations," argued that the very natural law governing relationships between individuals regulated interactions between nations.[176] He asserted that the "law of nations" was static and could be identified through reason or through the study of civilized nations throughout the centuries.[177] According to Blackstone, the "law of nations" acts as a "system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[178] Meanwhile, other scholars have described the "law of nations" as being "either of divine origin or derivable from reason."[179]

Thus, the term "law of nations" originated in natural law, and was initially associated with the belief that certain core principles governed interactions between nations. Such laws were deemed unchanging and eternal, emblazoned within the consciousness of mankind.[180] Based on this perspective, treaties and agreements between nations could not expand the "law of nations."[181] Furthermore, domestic courts would not possess the power to expand the scope of the "law of nations," as the Ninth Circuit did in *Doe v. Unocal*.

The Supreme Court has never given a clear analysis of the ATCA or a clear definition of the "law of nations."[182] In *Filartiga v. Pena-Irala*,[183] the seminal 1980 decision that first applied the ATCA to a case involving human rights violations, the Second Circuit emphasized that international law could be discerned by "consulting the works of jurists . . . or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[184] This opinion established that international law evolves, and described it as a body of norms to which states give their mutual consent.[185]

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[173] *Id.* at 118-19.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 123.
[177] Michael Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 123-24 (2002).
[178] *Id.* at 129.
[179] *Id.* at 119.
[180] *Id.* at 119.
[181] *Id.*
[182] Michael Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 139 (2002).
[183] 630 F.2d 876 (2d Cir. 1980).
[184] *Id.* at 881.
[185] *Id.*

However, in *Tel-Oren v. Libyan Arab Republic*,[186] Judge Robert Bork rejected the holding in *Filartiga* and espoused a very narrow definition of the "law of nations." He asserted that the "law of nations" clause of the ATCA was confined to offenses that were violations of international law in 1789, when the statute was passed.[187] These included three offenses: "violation of safe conducts or passports, infringement of the rights of ambassadors, and piracy."[188] Judge Bork emphasized that when the ATCA was passed by the legislature, there was no conception of human rights, and therefore, human rights could not be read into the meaning of the "law of nations."[189] His limited reading of the "law of nations" would constrain the use of the ATCA to select violations of international law, providing no basis for enforcing international human rights standards. Thus, Judge Bork's interpretation of the ATCA suggests that the Ninth Circuit's reading of the "law of nations" in *Doe v. Unocal* is inappropriate and unduly broad.

The legislature and the judiciary have not adopted Judge Bork's limited view of the "law of nations." By passing the Torture Victim Protection Act (TVPA), the legislature affirmed the holding in *Filartiga*, expressly overruling the decision in *Tel-Oren*.[190] A historical analysis of the origins of the ATCA reveals that Congress did not intend to limit the "law of nations" to an exhaustive list of offenses.[191] Rather, Congress wanted tribunals to be vested with the power to "decide on offenses against the law of nations, not contained in the . . . enumeration."[192] Furthermore, post-*Tel-Oren* decisions quickly rejected a limited interpretation of the "law of nations" by recognizing the importance of incorporating modern human rights standards into international law.[193] Thus, the Ninth Circuit's expansive assessment of the "law of nations" is supported by the intention of the Framers, legislature, and judiciary. Moreover, it is in accord with the views of the international community today.

2. The International Community's Expansion of the "Law of Nations"

There has been a growing international recognition that the ban on slavery has resulted in subtle means of enslaving individuals and exacting labor from them.[194] Although Judge Pregerson's opinion did not overtly discuss modern treaties and covenants regarding the abolition of forced

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[186] *See generally* 726 F. 2d 774 (D.C. Cir. 1984) (Bork, J., concurring).

[187] *Id.* at 813.

[188] Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 A. J. INT'L L. 461, 469 (1989).

[189] *Id.*

[190] Matthew Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self After WIWA*, 16 EMORY INT'L L. REV. 187, 194 (2002).

[191] *See generally* William Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 224 (1996).

[192] *Id.* at 242 (citing 21 Journals of the Continental Congress 1774-1789, at 1136-37 (Library of Congress, 1912)).

[193] *Id.* at 242.

[194] *See* Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1569 (1998).

labor, the Court's decision can be seen as a response to the times. It reflects the international community's conscience and expands upon the scope of the "law of nations." The Ninth Circuit's decision implicitly acknowledges the worldwide trend toward the abolition of forced labor and emphasizes the importance of extending the ATCA to corporate human rights violators.[195]

Established international human rights law is discernable when a norm is generally practiced by nations and involves a sense of legal obligation.[196] This can be recognized through international instruments such as treaties, national laws, and the practice of states.

The International Covenant on Civil and Political Rights (ICCPR)[197] illustrates how an international instrument may be used to encourage nations to generally observe human rights standards. Ratified by over one hundred and forty states,[198] the covenant asserts that no one shall be held in slavery or servitude and that "[n]o one shall be required to perform forced or compulsory labor."[199] The United States ratified the ICCPR in 1992 and has also ratified other important international agreements that prohibit slavery and forced servitude.[200] Thus, the Court's assertion that "forced labor is a modern variant of slavery"[201] may be viewed as adherence to international practices and standards that impose an obligation upon the United States.

Nonetheless, the Ninth Circuit used American law to establish that forced labor is synonymous with slavery.[202] Judge Pregerson cited the Thirteenth Amendment as evidence of the legislature's desire to oust both slavery and forced labor throughout the United States.[203] Thus, the Court used the United States Constitution to establish an international basis for describing forced labor as a form of slavery. This move broadened the ATCA's scope by aligning prohibitions against forced labor with the "law of nations." In this manner, Judge Pregerson effectively used domestic law to justify the application of international standards of human rights within a domestic forum.

The practices of states reveal that forced labor constitutes a violation of international law, supporting the advancement of international standards that prohibit forced labor. The willingness of European nations and the United States to diminish economic ties with Myanmar reflects the

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[195] *See generally* Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Dec. 3, 2001).

[196] *See* WEISSBRODT, FITZPATRICK & NEWMAN**,** *supra* note 84, at 697.

[197] International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm.

[198] *Id.*

[199] Cleveland, *supra* note 194, at 1572.

[200] *Id.* at 1573.

[201] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *9 (9th Cir. Dec. 3, 2001).

[202] *Id.*

[203] *Id.*

international community's united objection to forced labor.[204] Additionally, certain Australian cities have enacted laws restricting purchases from Myanmar on account of its forced labor practices.[205] Thus, the international community has expressed a general consensus regarding the abominable nature of forced labor by holding Myanmar to heightened human rights standards.

In light of the international trend toward establishing prohibitions against forced labor, the Court's decision can be viewed as a step forward in the nation's recognition of international needs. It demonstrates a willingness to give effect to the ICCPR and to expand the definition of the "law of nations." It also expresses jurisprudential respect for evolving international standards and signals a readiness to use the ATCA as a means of enforcing international human rights norms.

B. IMPOSING LIABILITY FOR VIOLATIONS OF THE "LAW OF NATIONS"

An ATCA action must involve an alleged violation of the "law of nations."[206] However, in order to adjudicate the claim, various bodies of law may be applied.[207] The law of the forum state, the law of the state where the incidents in question occurred, or international law may be used.[208] In arguing its summary judgment motion before the Ninth Circuit, Unocal asserted that the law of Myanmar should apply to the ATCA claim because the allegations of forced labor were solely related to Myanmar.[209] The corporation contended that international law should not be applied, stating that it was unnecessary in this instance.[210] The Ninth Circuit, however, found that the law of Myanmar should not be applied.[211] It stated that forced labor, a form of slavery, violates *jus cogens* norms,[212] norms of international law that are "binding on nations even if they do not agree with them."[213] Establishing that forced labor is tantamount to slavery, the Court emphasized the futility of applying any law other than international law, since domestic laws that contravene *jus cogens* norms are automatically invalid.[214] Therefore, the Ninth Circuit held that international criminal law should be used to determine Unocal's responsibility for the alleged human rights violations.[215]

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[204] WEISSBRODT, FITZPATRICK & NEWMAN**,** *supra* note 84, at 233 (stating that the European Union withdrew trade privileges from Burma in 1997).

[205] *Burma and the Investors in Terror*, *available at* http://www.geocities.com/CapitolHill/3108/ (last visited on Mar. 27, 2003) (discussing investment in Myanmar).

[206] *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2004).

[207] *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000).

[208] *Id.*

[209] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *11 (9th Cir. Dec. 3, 2001).

[210] *Id.*

[211] *Id.*

[212] *Id.* at *10.

[213] *Id.* at *11.

[214] *Unocal*, 2002 WL 31063976, at *11.

[215] *See id.*

However, Judge Reinhardt's concurrence in *Doe v. Unocal* criticized the majority opinion's adherence to international law, asserting that traditional civil tort principles should be used to adjudicate the ATCA claim.[216] His opinion emphasized that since the ATCA is domestic legislation, domestic law should be applied to the claim.[217] Although Judge Reinhardt's concurrence is practical, it gives little importance to the evolution of international human rights law through the judiciary. In contrast, Judge Pregerson's decision highlighted an incontrovertible norm banning forced labor and emphasized the international criminality of such violations of human rights.[218]

Judge Pregerson enunciated four rationales regarding the use of international law, instead of the law of Myanmar, the law of California, or federal common law.[219] These rationales involved: (1) the needs of the international community; (2) avoidance of the imposition of domestic foreign policy; (3) promotion of certainty, predictability, and uniformity of result; and, (4) provision of a tort remedy for a violation of international law.[220]

The Court emphasized that the objective of providing a remedy through the ATCA was to afford relief for violations of the "law of nations" and that the needs of the international community would best be met by applying internationally created law.[221] The Ninth Circuit promoted the importance of promulgating internationally established legal precedent.[222] Furthermore, it expressed a desire to encourage uniformity in the enforcement of worldwide prohibitions against forced labor.[223]

1. Establishing the Basis for Liability

In a controversial move, Judge Pregerson attempted to align international criminal law with domestic tort law, establishing a novel standard for aiding and abetting.[224] The Court reasoned that in the case at hand, the distinction between criminal and domestic laws was not highly relevant, as the objective was simply to afford a remedy to the victims of international human rights violations.[225] Essentially, the Ninth Circuit crafted a unique definition of aiding and abetting, imposing an unprecedented legal standard upon Unocal.

The Court discussed the norms of international law through an analysis of decisions by the International Criminal Tribunal for the former

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[216] *Id.* at *26.
[217] *Id.*
[218] *Id.*
[219] *Unocal*, 2002 WL 31063976, at *12.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *See id.*
[224] *Unocal*, 2002 WL 31063976, at *11.
[225] *See id.*

Yugoslavia and the International Criminal Tribunal for Rwanda.[226] It attempted to glean a standard for aiding and abetting from contemporary applications of international criminal law.[227] Through this approach, the Ninth Circuit practically and symbolically expanded the use of the United States court system, transforming it into a forum in which ATCA claims can be adjudicated based upon current international standards of criminal law.

The International Criminal Tribunal for the former Yugoslavia's decision in *Prosecutor v. Furundzija* became the basis for the legal standard that the Ninth Circuit shaped.[228] The decision held that the *actus reus* for aiding and abetting must involve "practical assistance, encouragement, or moral support which has a substantial effect on the perpetuation of the crime."[229] The Ninth Circuit also looked to the opinions of international tribunals in order to determine the *mens rea* requisite for aiding and abetting.[230] It cited the International Criminal Tribunal for Rwanda, which stated that the *mens rea* for aiding and abetting consists of knowledge of the assistance that was provided to the commission of a crime.[231] Thus, based on the law established by the international tribunals, a party's knowledge of its involvement in the commission of a crime is central to its liability.

In crafting a unique and internationally based definition of aiding and abetting, the Ninth Circuit also attempted to equate the norms of international law with those of domestic tort law.[232] The Court cited the Restatement (Second) of Torts § 876 (1979),[233] asserting that the norms of international criminal law are practically synonymous with those of domestic tort law.[234] It determined that "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" should constitute the legal standard for aiding and abetting in an ATCA claim.[235]

Throughout its decision, the Ninth Circuit made an overt effort to identify the common characteristics between the United States and international law, emphasizing that domestic law was not necessarily being displaced.[236] It was, the Court asserted, simply being reshaped into a legal standard that was virtually the same in meaning, but which had international authority.[237] Judge Pregerson's fluid application of international law to a domestic statute reflects Jeremy Bentham's perception of international law. Bentham viewed international law as the

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[226] *Id.* at *12.
[227] *Id.*
[228] *Id.* (citing *Prosecutor v. Furundzija*, Case No. IT-95-17/1 T, December 10, 1998).
[229] *Unocal*, 2002 WL 31063976, at *12.
[230] *Id.*
[231] *Id.* at *13.
[232] *Id.*
[233] *Id.*
[234] *Unocal*, 2002 WL 31063976, at *13.
[235] *Id.*
[236] *Id.*
[237] *Id.*

basis for interaction between individuals from different nations, enabling all nations to exist in a world governed by shared rules and mutual respect.[238] He asserted that through consensus, nations could shape international laws, creating a body of law that continually evolves.[239] Accordingly, Judge Pregerson's opinion in *Doe v. Unocal* demonstrates the evolution of international law, as it ties different standards of international law to domestic law. Extending the scope of the ATCA to international crimes, it enables international and domestic law to intersect.

However, the unprecedented means through which the Ninth Circuit crafted its standard of aiding and abetting seems to create a haphazard basis for the adjudication of corporate international human rights violations. The recent establishment of international criminal tribunals indicates that their standards may not necessarily embody the norms of the international community. Furthermore, such tribunals are temporary constructions of the United Nations (U.N.). They rely very little on precedent in the formulation of legal standards, and have been crafted to further specific, international political agendas. Thus, a more appropriate means of implementing international standards prohibiting forced labor may need to be developed with respect to corporations.

2. Criminal Intent Versus Strict Liability

The legal standards that international criminal tribunals have used to adjudicate cases regarding individuals may not provide an appropriate means of handling allegations of corporate human rights offenses. In 1993, the U.N. Security Council authorized an international tribunal to try individuals responsible for violations of international humanitarian law in the former Yugoslavia.[240] Similarly, in 1994 the U.N. Security Council created a second tribunal in order to prosecute individuals who perpetrated genocide in Rwanda.[241] In order to find an individual guilty, the standard of aiding and abetting used by such tribunals required proven knowledge or intent regarding the crime.[242] However, unlike individuals, corporations are collective actors, and an investigation of their knowledge or intent is often impractical. Therefore, the imposition of strict liability upon corporate actors may provide a more feasible means of holding corporations accountable to international human rights norms.

The standard of aiding and abetting that the Ninth Circuit emphasized may disadvantage the plaintiffs, as it requires that Unocal's knowledge or intent be established in order for liability to be imposed upon the corporation. The Court did assert that testimony and corporate documents established a material question of fact regarding Unocal's knowledge that human rights violations occurred in conjunction with the pipeline

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[238] Jeremy Bentham, The Principles of International Law, *available at* http://www.la.utexas.edu/research/poltheory/bentham/pil/pil.e01.html.

[239] *Id.*

[240] WEISSBRODT, FITZPATRICK & NEWMAN**,** *supra* note 84, at 11.

[241] *Id.*

[242] *Id.*

project.[243] Nonetheless, by requiring that Unocal's knowledge be established, the Ninth Circuit has diminished the likelihood of finding the corporation liable.

In adjudicating claims against collective actors such as corporations, the knowledge or intent of an alleged human rights violator is generally not discernable. Today, legal scholars increasingly view corporations as aggregations of contractual relationships, incapable of espousing a particular intent.[244] Therefore, agreements made by corporate representatives may merely provide insight into the objectives of individuals, but not into the corporation's intent. Similarly, statements such as, "[if] forced labor goes hand in glove with the military yes there will be more forced labor,"[245] can be characterized as the perspective of a representative, and not that of the corporation. Thus, although the Ninth Circuit emphasized that Unocal might have known about the alleged human rights violations,[246] establishing the corporation's knowledge or intent may be impossible.

Therefore, it may have been preferable for the Court to have imposed a standard of strict liability on Unocal.[247] The imposition of strict liability upon actors that engage in internationally harmful activity is becoming an established norm of international law.[248] Today, this approach is increasingly used with regard to collective actors such as states, holding them responsible for harm regardless of their intent.[249] Strict liability would eradicate the need to determine Unocal's knowledge or awareness of human rights violations and would hold the corporation responsible for the harm inflicted on the pipeline's workers.

However, the establishment of a strict liability regime could chill international corporate activity. While corporations may be responsible for certain breaches of human rights standards, they are also capable of improving the standard of living in poor nations by bringing economic opportunities to them. The threat imposed by strict liability could discourage corporations from investing in foreign nations, and diminish the economic growth of countries that are reliant upon the resources of international corporate investors.

Nonetheless, the international advantages of subjecting corporations to strict liability for violations of human rights may outweigh any potential disadvantages. The threat created by a strict liability regime would motivate corporations to engage in a rigorous analysis of the risks

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[243] *Id.*

[244] Wood & Scharffs, *supra* note 43, at 543.

[245] Doe v. Unocal, Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *14 (9th Cir. Dec. 3, 2001) (quoting Unocal's President statement).

[246] Doe v. Unocal, 963 F. Supp. 880, 884 (1997).

[247] *See* Larry DiMatteo, *The Doha Declaration and Beyond*, 36 VAND. J. TRANSNAT'L L. 95, n.55 (2003) (discussing strict liability for international polluters).

[248] Joni Charme, *Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability*, 4 J.L. & TECH. 75 (1989).

[249] *Id.*

associated with their actions. Such liability would encourage corporations to act responsibly and force them to perpetuate human rights standards whenever they engage in international activities. Additionally, strict liability would enhance the ability of the ATCA to impose responsibility upon corporate human rights offenders, holding them accountable for the consequences of their business endeavors regardless of their intent.

Although Judge Pregerson's use of an international criminal standard of liability falls short of strict liability, it is a step toward expanding the power of the ATCA and imposing a greater level of accountability on corporations. However, the Ninth Circuit's decision to rehear *Doe v. Unocal* en banc indicates that the judiciary may have been hesitant to impose such liability upon corporations. The en banc Court faced the responsibility of weighing the cost of discouraging corporate investment against the benefit of promoting adherence to human rights standards. Its interpretation of the "law of nations" clause of the ATCA may reveal the Court's fidelity to the evolution of international human rights law, showing its willingness to expand the application of the ATCA to international corporate human rights offenders.

IV. HOLDING CORPORATIONS RESPONSIBLE FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

The decision to have *Doe v. Unocal* reheard by the en banc Court reveals the controversial nature of Judge Pregerson's opinion.[250] The denial of Unocal's motion for summary judgment marked the first time that plaintiffs were able to bring an ATCA claim against a corporation for international violations of human rights.[251] The Ninth Circuit's discomfort with this ruling and its eagerness to rehear the case en banc is indicative of the significant impact that *Doe v. Unocal* could have on the future of corporate liability. Precedent created by this case could make it easier for judges to find for plaintiffs, requiring companies to reshape their business models and rethink the cost of investing in places where gross human rights violations purportedly occur.[252] A ruling against Unocal could usher in a new era of corporate responsibility, as corporations within the jurisdiction of American courts may now be subject to ATCA claims for breaches of international human rights standards. Thus, the expansion of the ATCA to corporate actors invokes many practical concerns regarding the extent to which corporations can be held liable for violations of international human rights standards.

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[250] *See generally* Doe v. Unocal, Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

[251] *See generally* Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *1 (9th Cir. Dec. 3, 2001).

[252] Joshua Kurlantzick, *Globalism in the Dock*, THE AMER. PROSPECT, Nov. 4, 2002, at 19.

A. IMPOSING LEGAL DUTIES ON CORPORATIONS

The sudden empowerment of corporations indicates that the law needs to keep abreast of the increasingly globalized economy by defining standards of liability for corporate violations of human rights. Two hundred years ago, there were approximately 300 corporations while there are over 35,000 multinational corporations today.[253] Transnational or multinational corporations now possess about one-fourth of the world's assets and, as a result, they have tremendous economic clout and greater stability than many small nations.[254] Nonetheless, the international market is still a lawless arena in which the economic and political powers of corporations have risen without the constraints of legal liability.[255] The perception that corporations should be held responsible for violations of human rights that occur in connection with their international operations is becoming increasingly common.[256] Thus, the ATCA provides a necessary means through which corporations like Unocal can be held accountable for the consequences of their financial investments. In many respects, it may be viewed as a statute that fills a void in the United States' regulation of corporate actors.

1. *The United States as a Domestic Forum for Imposing Corporate Liability*

In the absence of an international forum through which multinational corporations may be held accountable for human rights violations, the United States court system may be the only feasible forum for prosecuting corporations such as Unocal. The human rights violations allegedly committed by Unocal's host country make Myanmar an inappropriate location to bring the company to trial. While various countries have differing jurisdictional laws, the United States has personal jurisdiction over a defendant even if the events at issue did not take place within its territory.[257] Thus, the United States provides a forum in which the ATCA can be applied as a means of imposing liability upon corporate human rights offenders.

Nonetheless, the argument for allowing host countries to regulate the actions of corporate human rights violators is strong. Nations have the authority to regulate what goes on within their borders. However, the increased globalization of the world economy has changed the extent to which corporate activity in foreign nations can be perceived as wholly domestic. International investment by multinational corporations is now a global affair. Problems arise when a powerful corporation overruns the authority of a sovereign state or when a government supports corporate

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[253] Wood & Scharffs, *supra* note 43, at 539.

[254] *Id.* at 539.

[255] *See id.*

[256] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 448 (2001).

[257] *Id.*

violations of human rights standards.[258] For instance, nations such as Myanmar may emphasize their financial interests, giving little heed to the welfare of their citizens. Such states may encourage corporations to forgo the observance of human rights standards. In such instances, a corporation's host country may not be an effective human rights watchdog.

Thus, a corporation's nation of incorporation may provide a more appropriate forum. Although home country enforcement may threaten the ability of third world countries to govern corporate activity within their own territories, international pressure may encourage host countries and their corporate partners to observe human rights norms. Therefore, the most practical and efficient means of holding Unocal accountable for the alleged rapes, murders, and forced labor inflicted upon citizens of Myanmar[259] may be through the United States' judicial system.

Although there is the possibility that American courts may render decisions favoring national corporations at the expense of foreign plaintiffs, the ATCA's emphasis on the observance of the "law of nations" diminishes the ability of the judiciary to apply domestic law in a manner that favors American corporations.[260] The ATCA provides jurisdiction over corporate human rights offenders and a cause of action for injured plaintiffs, while retaining an emphasis on the international character of human rights issues.[261] Thus, it provides a unique mechanism through which corporations can be held accountable to international standards, and subjected to international law, under the auspices of the United States court system.

2. *Corporate Personhood and Liability*

Although the ATCA provides a forum in which corporate human rights offenders can be tried, corporations such as Unocal contend that they lack the personhood requisite for liability to be imposed upon them.[262] However, in 1896, the Supreme Court established that corporations are persons within the provisions of the Fourteenth Amendment, emphasizing that corporations can have legal rights and duties.[263] Since then, the scope of corporate rights and duties has been evolving, while corporations have grown in power and wealth throughout the years.[264] The limited extent to which liability has been imposed upon them reflects a narrow view of the role that corporations play in society. Additionally, it reveals the difficulty associated with pinning down corporate personhood and imposing liability for human rights violations. Today, multi-national corporations have the power and ability to commit human rights atrocities that are as grave as

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[258] *Id.*

[259] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, *17 (9th Cir. Dec. 3, 2001).

[260] Alien Tort Claims Act, 28 U.S.C. § 1350 (2004).

[261] *Id.*

[262] *See generally* Wood & Scharffs, *supra* note 43, at 531.

[263] *Id.* at 540.

[264] *Id.* at 541.

those committed by some nation-states.[265] Therefore, the world needs to scrutinize the corporate behavior and hold them accountable for the unacceptable killings, abuse, and forced labor that their organizations sometimes perpetrate.[266] Corporations have gained tremendous control over the enjoyment of basic human rights and do not have a legal duty to uphold such rights.[267] *Doe v. Unocal* threatens the sanctity of corporate enterprises by opening up the possibility for corporate liability for human rights violations. It draws to light the reality that corporations need legal limitations to be imposed upon the large degree of economic and social power that they now wield.

An outdated notion of corporate identity has resulted in a failure to impose liability upon corporations for human rights violations. Initially, corporations were viewed as fictional or artificial bodies, whose powers were derived from and limited by the government.[268] The rights and duties of a corporation were narrowly defined by a state, and were generally narrower than those held by natural persons.[269] As the realm of corporate activity has grown, corporations have contended that greater rights and duties should not be imposed upon them, since an artificial entity could not be held responsible for human rights violations.[270]

Since the 1980s, corporations have been increasingly seen as an aggregation of contractual agency arrangements, involving multiple relationships between shareholders, directors, creditors, and others.[271] A corporation is therefore "not viewed as an entity in its own right."[272] This theory of corporate personhood is problematic for those who advocate the application of the ATCA to corporations that violate human rights. It shields corporations from liability by asserting a lack of responsibility for the actions of the individuals involved in corporate decision-making. The theory enables a corporation to avoid responsibility by asserting that market mechanisms govern contractual agency relations, thereby eliminating a corporation's accountability.[273]

Unocal has drawn upon this theory by arguing that it was not responsible for the human rights violations that were purportedly suffered by Yadana pipeline workers.[274] One of Unocal's lawyers, Daniel Petrocelli of O'Melveny & Myers, has contended that because Unocal did not explicitly authorize the mistreatment of citizens of Myanmar, it did not

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[265] Paust, *supra* note 53, at 802.

[266] *See Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2036 (2001) (hereinafter *Corporate Liability*).

[267] *Id.*

[268] Wood & Scharffs, *supra* note 43, at 541.

[269] *Id.* at 542.

[270] *Id.*

[271] *Id.* at 543.

[272] *Id.* at 544.

[273] Wood & Scharffs, *supra* note 43, at 543.

[274] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *2 (9th Cir. Dec. 3, 2001).

transgress human rights standards.[275] This assertion emphasizes the manner in which the aggregate theory can be used to disclaim responsibility for the consequences of corporate development in foreign nations.[276] Since Unocal is comprised of various individuals who each have different interests, and since no one can be identified as having directly sanctioned the human rights violations, the entire corporation is exempt from responsibility.[277]

Petrocelli's contention has been countered with the "Nuremberg Principle,"[278] an international principle that has been used to pierce the veil created by organized bodies of human rights violators. It was originally used as a means of imposing responsibility upon business leaders who benefited from slave labor that the Nazis provided.[279] Terry Collingsworth, an initiator of the suit against Unocal, has argued that corporations should not be able to shirk responsibility for reaping the benefits of slave labor.[280] He uses the "Nuremberg Principle" as an example of the importance of holding corporate actors to human rights standards.[281] Thus, practical use of the ATCA with respect to corporate actors is heavily influenced by perceptions of corporate identity. Today, the world is globalized, and corporations are active participants in international economic development. The Court's unease regarding the Ninth Circuit's denial of Unocal's summary judgment motion reveals the novelty of holding corporations to human rights norms.

3. *Defining the Scope of the ATCA: When Liability Should be Imposed*

While the application of the ATCA to corporations signals a much needed move toward imposing rights and duties upon corporations, lines need to be drawn regarding the scope of corporate liability. Human rights attorney, Terry Collingsworth, has stated that corporate liability may stem from knowingly assisting regimes that are identified as human rights abusers.[282] Additionally, the House of Representatives has emphasized the importance of keeping the ATCA "intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[283] This reveals the legislature's willingness to expand the scope of the ATCA to norms that are accepted by the international community. Thus, in the future, the ATCA may increasingly be applied to

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[275] *See* Egelko, *supra* note 26. *See generally* Pui-Wing Tam, *Appeals Court Reinstates Suit Against Unocal*, WALL ST. J., Sept. 19, 2002, at A10.

[276] *Id.*

[277] *Id.*

[278] Terry Collingsworth, *Holding Businesses and Burma's Government Responsible for Human Rights Abuses*, OPEN SOCIETY NEWS, Fall/Winter 2002-2003 (on file with author).

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *See* Egelko, *supra* note 26.

[283] Ryan Goodman, *Congressional Support for Customary International Human Rights as Federal Common Law*, 4 ILSA J. INT'L & COMP. L. 455, 462 (1998) (citing the House Report's willingness to expand the scope of the ATCA's application).

corporations that are responsible for, or associated with, human rights violations.

Yet, the Ninth's Circuit's emphasis on protecting justified expectations, as well as the "certainty, predictability, and uniformity of the result,"[284] reveals the Court's belief that corporate liability should be imposed in a predictable and practical way. Although the legislature enacted the ATCA, the judiciary has the responsibility of specifying and clarifying rights and duties under the law.[285] Thus, the extent to which the ATCA is applied to corporate actors may be left to the discretion of judges.

In ascertaining the appropriateness of applying the ATCA to corporations, the relationship between the human rights violations at issue and the corporation's operation is a primary factor that should be assessed.[286] Thus, a corporation's potential liability increases as the alleged human rights violations are more closely linked to the corporation's goals. With respect to Unocal, the actual work done by forced laborers on the pipeline should be assessed. Evidence that forced laborers performed most of the labor on the pipeline would indicate that Unocal's financial goals were inextricably tied to the violation of human rights.

In addition, other considerations should be evaluated by the Court, including the corporation's involvement with the government, the particular human rights that have been violated, and the corporate representatives who sanctioned the violation of human rights.[287] A balancing test that takes these factors into consideration will achieve a means of evaluating and circumscribing the range of activities for which a corporate actor could be subject to an ATCA claim. This will clarify the extent to which the statute can impose responsibility upon corporate actors, quieting arguments that the ATCA provides an unbounded means of subjecting corporations to unforeseen liability.

B. SOURCES OF CORPORATE CONTROL

Although the ATCA incorporates current international law into its application, no international forum exists for establishing the bounds of corporate liability.[288] Since the ATCA cannot allocate corporate responsibility throughout the international community and only applies to corporations that the United States can exercise its jurisdiction over, the statute does not meet the needs of the international community.[289]

Nonetheless, other states have been subjecting private corporations to greater scrutiny through their own domestic forums and laws. Recently, the

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[284] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *11 (9th Cir. Dec. 3, 2001).

[285] Paust, *supra* note 53, at 820.
[286] *See* Wood & Scharffs, *supra* note 43, at 555.
[287] *Id.*
[288] *Id.* at 450.
[289] *Id.*

British House of Lords asserted that corporate actors must recognize the importance of protecting human rights.[290] Meanwhile, the Israeli Supreme Court highlighted the value of holding private actors liable for human rights violations.[291]

Despite the international trend toward examining the acts of multinational corporations within domestic courts, little movement has been made toward universalizing a concept of corporate liability for human rights offenses. The current meting out of corporate liability involves gross inequities. For instance, while Unocal is defending itself against an ATCA claim, Total, Unocal's partner in the pipeline project, is not being held accountable for its role in the alleged human rights violations that occurred in Myanmar. Thus, increasing the legal responsibility of all corporations will require the development of international legal standards and forums.[292]

1. Developing and Enforcing Standards of Corporate Accountability

Currently, most international laws are directed at the actions of states, not corporations.[293] Thus, corporations are not required by international law to observe human rights standards, and there are limited means through which corporations can be monitored and regulated.[294] While the International Criminal Court asserts its jurisdiction over natural persons, it does not enforce human rights standards with respect to corporations.[295]

a. Treaties

Attempts to regulate corporations such as Unocal on an international level could be handled through treaties[296] that states would be required to enforce. Thus, through international agreements, standards of human rights could be formally delineated, outlining appropriate corporate behavior and stating the consequences of violating the terms of a treaty.[297] Although this method would provide a means of establishing international human rights standards, it would not provide an unbiased form for adjudication. Thus, states would be able to choose to protect their own economic interests rather than implement international treaties. For instance, governments such as the SPDC, which allegedly perpetuates the violation of human rights, are unlikely to give great importance to a treaty delineating human rights standards. Furthermore, states may be unable to require corporations to comply with the terms of a treaty, as the power and wealth of corporations is now greater than that of many small nations.

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[290] Paust, *supra* note 53, at 809.
[291] *Id.* at 810.
[292] Stephens, *supra* note 54, at 401.
[293] *See Corporate Liability*, *supra* note 157, at 2036.
[294] *Id.*
[295] *Id.* at 2032.
[296] Stephens, *supra* note 54, at 401.
[297] *See Corporate Liability*, *supra* note 266.

b. Enforcing Corporate Codes Through Legal Action

Requiring corporations to adhere to voluntary codes of conduct could serve as an alternative means of regulating corporations.[298] Although such codes are useful because they can specify specific standards of corporate behavior regarding human rights, legal consequences generally do not ensue when corporate codes are breached.[299] Thus, corporate codes would only be useful to the extent that they provide an impetus for legal action. The imposition of a uniform code on multinational corporations may allow for the establishment of international norms of corporate liability that ultimately provide a basis for legal sanctions.

Courts could use established codes to determine the standards to which corporate actors should be held. By crafting mandatory corporate codes, multinational corporations could clearly delineate guidelines for the observance of human rights standards in their business practices. Furthermore, judges could use such codes to assess the extent to which corporations have deviated from recognized human rights standards.[300] In this sense, greater certainty and predictability would advance the adjudication of corporate matters, as multinational corporations would have a clear awareness of their duties.

Currently, since corporations create different codes and follow them to differing degrees, corporate codes lack usefulness and uniformity. For instance, IKEA has agents monitor overseas labor conditions, ensuring that children are not forced to engage in labor.[301] Meanwhile, Nike has been continually criticized for its lax regulation of the working conditions in its Indonesian, Chinese, and Vietnamese plants.[302] Although both companies have corporate codes, they are not equally effective as a means of protecting human rights. While a corporation could choose to adhere to its code, commitments to its own financial growth, public relations, and local country laws could prevent it from following self-imposed regulations.[303] Thus, legal accountability may be needed to provide corporations with the incentive to follow their codes.

The United Nations Human Rights Commission's draft of basic norms regarding corporate human rights standards provides an existing set of regulations that the international community can draw from.[304] The United Nations' voluntary code has been followed by some corporations. However, it has been criticized due to the lack of a practical enforcement mechanism.[305] Such codes could prove to be very valuable if the courts of various states apply them. Their standards provide domestic courts with

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[298] Cleveland, *supra* note 194, at 1550.

[299] *See* Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer?*, 42 WM. & MARY L. REV. 619, 642 (2000).

[300] *See id.*

[301] *See* Cleveland, *supra* note 194, at 1552.

[302] *Id.* at 1551.

[303] *Id.*

[304] Stephens, *supra* note 54, at 402.

[305] *Id.*

international norms regarding a company's human rights obligations. Over time, these norms may gradually become accepted as international law, formalizing the obligation of corporations to observe human rights standards.

An international corporate code could provide a sound basis for determining the scope of the ATCA with respect to corporate liability for human rights offenses. Thus, the establishment of formal human rights norms for multinational corporations would allow American courts to impose legal liability on corporations based on predictable standards.

c. Enforcing Corporate Codes Through Non-Governmental Organizations (NGOs)

While the threat of legal accountability may not deter corporate actors from engaging in lucrative projects that violate human rights, the global presence of NGOs imposes a growing level of accountability on corporations. Today, NGOs act as the watchdogs of national and corporate activity.[306] International NGOs place great emphasis on furthering human rights worldwide, and they require that corporations heed international standards.[307] As non-profit, non-governmental organizations, NGOs generally act apolitically, and often provide the fairest means of enforcing human rights standards internationally.[308] As active participants in the establishment of corporate codes, NGOs pressure corporations to comport with international human rights norms, and publicly shame corporate human rights offenders.

Recently, advocacy NGOs have been encouraging corporations to establish and refine codes of conduct regarding the conditions of laborers.[309] As a result, multinational corporations are increasingly crafting and following codes that prohibit forced labor.[310] Such codes often include monitoring schemes that enable independent committees to scrutinize the activities of corporations.[311] Additionally, corporations that violate their corporate codes are subjected to the public humiliation and international pressure that NGOs use to encourage the observance of human rights standards.[312] Although corporate codes are technically voluntary, the involvement of NGOs in the enforcement of such codes has greatly advanced their effectiveness.[313] Thus, corporate codes "are beginning to look like law."[314]

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[306] Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 509-10 (2002).
[307] *Id.*
[308] *Id.*
[309] Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161, 168 (2002).
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161, 168 (2002).

Compliance with corporate codes is becoming an economic necessity, as corporations fear the consequences of being targeted, shamed, and deemed a violator of human rights. Consumers today are often influenced by the characterization of corporations and choose not to purchase products that have been made in a socially irresponsible manner.[315] Thus, reports from NGOs on the inappropriate activities of a corporation have a significant effect on profits.[316] Therefore, in order to protect their economic interests, corporations are being forced to assume a role in protecting and promoting international human rights standards.

In 2000, Amnesty International and the United Kingdom's Prince of Wales Business Leaders Forum jointly crafted a human rights guide for senior corporate policymakers entitled, "Human Rights: Is It Any of Your Business."[317] The guide warns that, although a corporation may not be legally obligated to comply with human rights standards, corporations "who have violated them have found, to their cost, that society at large will condemn them."[318]

Conversely, a corporation that graciously espouses its corporate code of conduct may gain a competitive advantage.[319] Various mechanisms enable corporations to use compliance with international human rights standards as a selling point. Social labeling is one such mechanism, and it has been incorporated into the codes of some corporations.[320] Labeling can provide a means of verifying that products have not been made through the use of forced labor. For instance, carpet labels certifying the absence of child laborers, indicate to the public that a corporation has adhered to certain norms of international human rights. Such labels express a corporation's commitment to respecting human rights, and can be used in an economically beneficial manner. Corporations can market labels by emphasizing that consumers should give preferential treatment to products that are made in accordance with international standards of human rights.

By publicly holding corporations accountable to corporate codes and mobilizing public opinion in support of corporations that promote human rights standards, NGOs have a significant impact on the economic success of a corporation. They call upon individuals within the global marketplace to uphold human rights standards, advocating boycotts on products that are made by corporate human rights violators, and encouraging the purchase of items produced by corporations that promote human rights.

For instance, Unocal's alleged endorsement of human rights violations in Myanmar has been documented by several NGOs.[321] The corporation

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[315] Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 COLUM. J. TRANSNAT'L L. 619, 668 (2002).

[316] *Id.*

[317] Ratner, *supra* note 256, at 463.

[318] *Id.* at 463-64.

[319] Pridan-Frank, *supra* note 315.

[320] Ratner, *supra* note 256, at 531-32.

[321] Amnesty International, *Public Statement: Myanmar and Premier Oil*, Apr. 12, 2003, AI INDEX: ASA 16/02/00, *available at*

has been branded a "rogue oil company" and consumers have been encouraged to avoid purchasing Unocal gas.[322] In contrast, Levi-Strauss, Eddie Bauer, Liz Claiborne, Amoco, Reebok, Petro-Canada, and Smith & Hawken have been applauded for their unwillingness to invest in Myanmar.[323] Moreover, pressure from NGOs has also forced Heineken, Motorola, ARCO, and several other corporations to abandon their investments in Myanmar.[324]

Thus, NGOs diminish the perpetration of corporate human rights violations by bringing such violations to the public eye. Often, codes of conduct fill a void in international law and aid in the evolution of human rights standards. They require corporations to weigh their financial objectives against the economic consequences of being labeled a corporate human rights offender. NGOs effectively encourage corporations to police their own actions, subjecting them to the benefits of public praise and the constant threat of public shame.

C. THE MORAL RESPONSIBILITY OF CORPORATIONS

Although Unocal possesses the political power and monetary influence to encourage the SPDC to better conditions in Myanmar, there is no evidence that it has done so. Instead, it has invested in an allegedly abusive environment and provided an opportunity for the SPDC to experience financial gain while furthering its regime of purportedly systematic violence.[325] Terry Collingsworth, attorney for citizens of Myanmar, has described the plight of individuals in Myanmar, stating, "Villagers were forced at gunpoint to work on the pipeline for days on end without food and water. Those who failed to work enough were often beaten or killed."[326] Despite the U.S. State Department's recognition that the government of Myanmar engages in human rights violations,[327] Unocal has not espoused a sense of moral responsibility for acts committed in furtherance of its financial investments.

Judge Pregerson's opinion implied the importance of a corporation's moral responsibility.[328] He stated, "given that there is . . . sufficient evidence in the present case that Unocal gave assistance and encouragement to the Myanmar Military, we do not need to decide whether it would have been enough if Unocal had only given moral support to the

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http://web.amnesty.org/802568F7005C4453/0/92BC1FFA9445D819802568C10056A12E?Open&Highlight=2,Mymar (last visited Mar. 15, 2003).

[322] *See Burma and the Investors in Terror: Companies STILL Doing Business in Burma, available at* http://www.geocities.com/CapitolHill/3108/#South%20Africa (last visited Mar. 26, 2003).

[323] *Burma: The South Africa of the Nineties, available at* http://www.*geocities.com/CapitolHill/3108/#South%20Africa* (last visited Mar. 27, 2003).

[324] *Id.*

[325] *See* Terry Collingsworth, *Holding Businesses and Burma's Government Responsible for Human Rights Abuses*, OPEN SOCIETY NEWS, Fall/Winter 2002-2003.

[326] *Id.*

[327] Doe v. Unocal, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976, at *36 n.6 (9th Cir. Dec. 3, 2001).

[328] *Id.* at *13.

Myanmar Military."[329] This statement highlights the potential for corporations to be held liable for providing moral support for human rights violations. It suggests that ATCA claims can be used to impose a level of moral responsibility upon corporations.

However, Judge Reinhardt's concurrence observed that references to moral support could be problematic.[330] He asserted that it would be difficult to construct a legal standard defining and holding corporations accountable for moral support.[331] Nonetheless, Justice Reinhardt's argument seems to forget that although human rights norms possess an inherently moral tenor, they are binding upon states and private individuals.

The legislature has expressed support for the position that corporations have a moral responsibility to discourage human rights abuses.[332] Senator Helms has stated that "[w]e know there is forced labor in Burma,"[333] and the legislature has encouraged American companies to exert pressure on Myanmar's government by investing in Myanmar and working toward the advancement of human rights.[334] Thus, the legislature conceives of corporations as ambassadors of moral norms, entities that are able to further the observance of human rights standards internationally.

This perception is not unique to the United States. It is embodied in U.N. Secretary-General Kofi Annan's assertion that "companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects."[335] Such responsibility involves a moral commitment to observe human rights. Certain corporations have been successful in bettering human rights conditions. For instance, Levi-Strauss has forced reforms in the employment practices of its suppliers, and the Gap has encouraged human rights organizations to oversee and monitor the practices in a San Salvador contractor plant.[336]

In contrast, Unocal's lack of involvement in the improvement of working conditions in Myanmar, and the corporation's seeming acceptance of forced labor practices, brings to light the disturbing fact that the economic interests of corporations sometimes override their sense of moral duty. It also highlights the importance of using the ATCA to impose a moral standard on corporations.

1. Reconciling Economic Interest and Moral Responsibility

Although corporations can be viewed as moral agents that are capable of encouraging inhumane governments to respect human rights standards, they are more commonly perceived as economic entities that are subject to

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[329] *Id.*
[330] *Id.* at *30.
[331] *See id.*
[332] *See* Doe v. Unocal, 963 F. Supp. 880, 895 n.17 (1997).
[333] *Id.* (citing 142 CONG. REC. § 8753 (daily ed. July 25, 1996) (statement of Senator Helms)).
[334] *See id.* (citing 142 CONG. REC. § 8755 (daily ed. July 25, 1996)(statement of Senator Helms)).
[335] Kofi Annan, *Help the Third World Help Itself*, WALL ST. J., Nov. 29, 1999, at A28.
[336] Cleveland, *supra* note 194, at 1552.

market influences.[337] Thus, using the ATCA to impose moral responsibility on corporations may run counter to certain academic theories of corporate law.[338] Furthermore, expanding the scope of the ATCA in this manner may be viewed as a threat to the interests of the national economy.[339]

The exponential growth of corporations[340] and the recent rise in allegations of international human rights violations against large American corporations[341] indicates that legal scholarship needs to reevaluate the role of corporations in the international realm. Currently, plaintiffs from South Africa, Sudan, Nigeria, Peru, Indonesia, India, Columbia, Egypt, Saudi Arabia, Ecuador, Guatemala, and Myanmar have asserted that their human rights have been transgressed because of the investment of American corporations in their countries.[342] Thus, the perception that corporations are solely economic entities who bear no responsibility for violating international norms is being questioned.

Despite the numerous allegations of human rights violations against American corporations, protection of the United States' economic interests may discourage the use of the ATCA as means of holding corporations accountable. Those who criticize the expansion of the ATCA assert that the furtherance of economic growth should not be compromised in order to promote indefinite human rights standards.[343]

First, critics of the ATCA point to the flexibility that courts have in determining human rights norms. They argue that submitting American corporations to indeterminate standards will discourage corporate activity.[344] Furthermore, they claim that uncertainty regarding the legal liability involved in partnering with other corporations or governmental bodies will undermine the building of international corporate ties.[345]

Such arguments neglect the reality that courts have the authority to govern the conduct of corporations by imposing certain obligations on them, in exchange for the privileges and protections that they receive. In 1810, Chief Justice Marshall highlighted the role of the judiciary in establishing human rights standards, stating that the courts "are established . . . to decide on human rights."[346] Thus, it is entirely within the judiciary's authority and duty to establish human rights norms with respect to corporate actors. A reevaluation of corporate responsibility would resolve the legal uncertainty that opponents of expanding the ATCA fear.

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[337] *See* Wood & Scharffs, *supra* note 43, at 546.
[338] *Id.* at 547.
[339] *See* Thadhani, *supra* note 299, at 635.
[340] *See* Wood & Scharffs, *supra* note 43, at 539.
[341] Ken Dalecki, *U.S. Firms Battle Human Rights Lawsuits*, KIPLINGER BUS. FORECASTS, Sept. 5, 2002.
[342] *Id.*
[343] *See* Thadhani, *supra* note 299, at 634-36.
[344] *Id.*
[345] *Id.*
[346] Paust, *supra* note 53, at 821 (citing Chief Justice Marshall).

Second, critics assert that the imposition of liability upon multinational corporations will have damaging consequences on the American economy.[347] The ATCA's jurisdictional arm extends mainly to national corporations that have sufficient contacts with the United States.[348] Therefore, critics contend that the threat that the ATCA poses to foreign corporations will diminish their involvement with the United States.[349] Prospective corporate investors will be discouraged from bringing wealth into the United States, and this will undermine the nation's economic growth.[350] In an economy that is increasingly dependant upon global ties, this is viewed as a significant disadvantage.

This fear appears to be unjustified in light of the fact that jurisdictional limits prevent the courts from applying the ATCA to foreign corporations that lack sufficient contacts with the United States. For instance, in *Doe v. Unocal*,[351] the fact that Total had Californian operational subsidiaries defined as the company's "U.S. unit" was insufficient to establish jurisdiction over Total.[352] This indicates that mere investment or business ties within the United States do not constitute a basis for subjecting a foreign corporation to the ATCA. Rather, a foreign corporation would need to establish a substantial base within the United States for liability to ensue. Furthermore, because most foreign corporations that invest in the United States do so through subsidiaries, they do not have the minimum contacts that are required for personal jurisdiction to be established. Therefore, the ATCA will neither threaten nor hinder foreign investors.

Third, critics of the judiciary's expanded application of the ATCA have also expressed fear over the possibility that courts may unreasonably intrude into the realm of foreign relations.[353] The concern is that courts may use the ATCA to sanction corporations and thereby place indirect sanctions on the economic activity of sovereign states.[354]

This contention reasonably recognizes the importance of maintaining the separation of power between governmental branches, requiring the judiciary to avoid overtly political issues. However, it ignores the reality that in cases regarding the application of the ATCA, the U.S. Department of State has been quick to inform judges when a claim against a corporation conflicts with the nation's interests.[355] For instance, despite the State Department's criticism of Indonesia's human rights record, it has urged the judiciary to dismiss a case against ExxonMobil.[356] The claim has asserted that Indonesian villagers were subjected to human rights violations when

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[347] *See* Thadhani, *supra* note *299*, at 621.
[348] *Id.*
[349] *Id.*
[350] *Id.*
[351] 27 F. Supp. 2d 1174, 1181 (1998).
[352] *See* Zia-Zarifi, *supra* note 51, at 128.
[353] *Id.*
[354] *See* Thadhani, *supra* note 299, at 634.
[355] Ken Dalecki, *U.S. Firms Battle Human Rights Lawsuits*, KIPLINGER BUS. FORECASTS, Sept. 5, 2002.
[356] *Id.*

the government's security forces attempted to protect ExxonMobil's interests in the region.[357] Nonetheless, the Bush administration has been unwilling to allow this case to go forward,[358] and has used the system of checks and balances to prevent the judiciary from applying the ATCA to certain cases involving foreign relations.

2. The Intersection of National Interest and Moral Duty

Ultimately, the ATCA's scope will be determined by the nation's willingness to recognize its moral duty to further international human rights standards. The United States has been accused of hypocritically imposing human rights standards on other nations while refusing to apply such standards to itself.[359] The nation has been involved in crafting human rights laws; however, it has rarely adhered to them.[360] The United States' duplicitous support for human rights principles has undermined its international relations and irked the leaders of many countries, resulting in its dismissal from the U.N. Human Rights Commission. Thus, "for the first time since Eleanor Roosevelt helped launch the U.N. Human Rights Commission in 1947, the United States is not a member."[361]

Expanding the application of the ATCA to impose liability on corporate human rights violators could improve the moral and political standing of the United States,[362] demonstrating the nation's desire to participate in the establishment and enforcement of international human rights norms. The ATCA stemmed from the Founders' desire to establish the United States as an international presence that was committed to observing the duties imposed by the "law of nations."[363] Thus, the extension of the statute to corporate actors is in accordance with the rationale behind the construction of the ATCA. An expanded application of the ATCA will enhance the United States' reputation among international bodies and enable investors to feel secure in the knowledge that the United States respects and enforces international standards.

Nonetheless, the National Foreign Trade Council (NFTC), a trade group of the most influential multinational companies, has attacked the ATCA and lobbied Congress, requesting that the ATCA be weakened.[364] Ironically, the NFTC expresses a desire to "curb abuses" of the law.[365] Yet, it lacks concern for the international human rights abuses that corporations perpetuate, and is comfortable with a system that lacks a mechanism for

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[357] *See id.*

[358] *See id.*

[359] *See* Stephens, *supra* note 54, at 403.

[360] Derek Jinks, *The Legalization of World Politics and the Future of U.S. Humanitarian Rights Policy*, 46 ST. LOUIS U. L.J. 357, 358 (2002) (on file with author).

[361] Simon Barber, *Columnist Views Process of 'Voting Out' of U.S. from U.N. Rights Commission*, WORLD NEWS CONNECTION, May 9, 2001, *available at* 2001 WL 21335445 (on file with author).

[362] *See* Burley, *supra* note 188, at 493.

[363] *Id.* at 483.

[364] Earth Rights International, *In Defense of the Alien Tort Claims Act*, *available at* http://www.earthrights.org/burma.shtml (last visited Jan. 10, 2003).

[365] *Id.*

holding corporations accountable.[366] Asserting that economic interests trump international human rights concerns, the NFTC voices the very opinions that have led other nations to distrust the United States' policy toward human rights.

As a nation that is recovering from large-scale corporate scandals, the importance of regulating the acts of corporations is apparent. Plaintiffs from various nations have been bringing actions against American corporations, alleging violations of their human rights.[367] While the NFTC's stance may seem economically beneficial in the short run, if American corporations lose international accountability the nation will suffer long-term economic and political losses. International corporations will refrain from partnering with American corporations, as they will be perceived as unprincipled violators of international standards. Additionally, the United States' role in promoting and upholding human rights will deteriorate further.

In 1882, Justice Story noted 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."[368] Thus, applying the ATCA in the context of international human rights violations would allow the United States to assume its moral duty. The failure to regulate American corporations that engage in international human rights violations would undermine the United States' obligation to observe and enforce international norms.

Thus, expanding the application of the ATCA would be beneficial on multiple levels. First, it would enable the United States to gain a respected position as an advocate of enforcing international human rights law. Strides made in this arena could result in heightened involvement with the international community, bettering the likelihood that the United States will be reelected to U.N. Human Rights Commission. Second, it would align American corporations with the heightened level of morality and accountability that is being advocated by the U.N. and NGOs. American corporations could thereby reap economic benefits from marketing themselves as responsible actors, and encourage partnerships with foreign investors and corporations. Third, and perhaps most importantly, expanding the scope of the ATCA would enable the United States to assert itself as a champion of international norms, providing a potent example of the extent to which a nation can participate in furthering the objectives of the international community.

Intertwined in a network of countries and corporate actors, the United States faces an increasingly globalized world. As the millennium unfolds, the nation should espouse an active role in implementing and establishing the human rights standards of the international community. Expanding the

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[366] *Id.*

[367] Ken Dalecki, *U.S. Firms Battle Human Rights Lawsuits*, KIPLINGER BUS. FORECASTS, Sept. 5, 2002.

[368] United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822).

application of the ATCA to corporate human rights offenders will effectively emblazon the path of American involvement in international human rights law.