

In Our Court

ATCA, SOSA AND THE TRIUMPH OF HUMAN RIGHTS

“I came to this country in 1978 hoping simply to confront the killer of my brother. I got so much more. With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice?”

—Dolly Filartiga, plaintiff in ATCA case *Filartiga v. Peña-Irala*



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In Our Court: ATCA, Sosa and the Triumph of Human Rights
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\$10.00

A Report about the Alien Tort Claims Act
by EarthRights International, July 2004



ABOUT EARTHRIGHTS INTERNATIONAL (ERI)

ERI combines the power of law and the power of people in defense of human rights and the environment, which we define as earth rights. We use a variety of strategies including legal work, campaigning, fact-finding, advocacy, and capacity-building to hold earth rights abusers accountable.

ERI issues a regular e-newsletter with updates and action alerts about ATCA and other human rights issues. To subscribe, sign up at www.earthrights.org. For more specific information about ATCA, go to <http://earthrights.org/atca/index.shtml>, and for general information about work at the intersection of human rights and environmental abuses, visit www.earthrights.org.

ABOUT THIS REPORT

This report was written and/or edited by Betsy Apple, Kenny Bruno, Rick Herz, & Katie Redford. Additional copies, as well as a PDF version, may be obtained at www.earthrights.org/publications, or by contacting ERI at infousa@earthrights.org or at 202-466-5188. ERI is the copyright holder of this report; for permission to reprint, please contact ERI at infousa@earthrights.org. ©2004

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A Report about the
Alien Tort Claims Act

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Acknowledgements

Thanks are inadequate, but are nonetheless due, to all survivors and victims of human rights abuses who are plaintiffs in ATCA cases, for their courage and commitment to justice.

Special thanks go to Logan Hambrecht and Tarek Maassarani for their exceptional help with every aspect of this report. Thanks also to Kate Greene, Vanessa Bitterman, and Paul Breloff.

ERI is grateful to the following foundations, whose vision and support made this report, and ERI's legal and campaign work underlying it, possible: Courtney's Foundation, CS Fund/Warsh-Mott Legacy, Educational Foundation of America, Flora Family Foundation, I Do Foundation, Libra Foundation, Polis-Schutz Family Foundation, Richard & Rhoda Goldman Fund, Threshold Foundation. Thanks are due as well to the ERI Board of Directors and to our individual supporters for their commitment to all our work, and to our litigation in particular.

We would also like to thank the thousands of people who signed our petition to defend ATCA and took action to protect ATCA through our website and e-newsletter.

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The *Sosa* opinion sent a clear message

to the corporate lobby and the Bush Administration that human rights matter, and that U.S. courts have an important role to play in their promotion and protection.

PREFACE

Victory for Human Rights

On June 29, 2004, we at EarthRights International nervously awaited one of the last rulings of the Supreme Court's session, in the case of *Sosa v. Alvarez-Machain*. At stake in the case was more than two decades of careful legal work by human rights defenders.

We cared about *Sosa* because the claims were based, in part, on an important law, the Alien Tort Claims Act (ATCA). This law is critical for the protection of human rights in U.S. courts, and is especially important to EarthRights, as our first ATCA lawsuit, *Doe v. Unocal*, has been a centerpiece of our work for over seven years. Using ATCA on behalf of Burmese villagers who had suffered forced labor, rape and torture was and is, we believe, a well-justified use of the law to create accountability and to bring at least a modicum of justice to people who had no other recourse.

In a crucial victory for human rights, on June 29, 2004, the Supreme Court held that ATCA continues to allow victims to sue in U.S. courts for the most serious abuses. In *Sosa*, the Court addressed the question of whether ATCA allows federal courts to hear human rights claims without Congress passing new laws first, and the Court answered "yes."

The ruling was not only a victory for human rights, although by sustaining the "beacon of hope" that ATCA had become for victims of human rights abuses for the past 23 years, it accomplished much. It also sent a clear message to the corporate lobby and the Bush Administration that human rights matter, and that U.S. courts have an important role to play in their promotion and protection. For nearly two years, the corporate lobby had engaged in a crusade to eliminate ATCA. But the business campaign against ATCA was almost mild compared to the Bush Administration's position, as spelled out in June 2003 in their brief in the *Unocal* case. Where the business lobby had argued mainly that companies should not be held liable, the Justice Department took the position that the entire law should cease to function, even against state actors, and that the previous twenty-three years of cases had been wrongly decided.

The *Sosa* decision rejects both of these views, and means that ATCA cases against both corporations and government officials can proceed in federal courts. New cases can be brought as well, so long as the alleged

wrongdoing involves violations of an egregious nature, such as slavery, torture and genocide.

However, the ruling also ensures that there will neither be an explosion of ATCA cases, nor will ATCA become a general corporate accountability measure. Rather, it will serve as a tool for corporate liability—and justice for victims—in a limited set of circumstances. As such, ATCA will continue to deter corporate complicity in severe human rights crimes anywhere in the world.

The decision in *Sosa* squarely rejected the arguments advanced by the Bush Administration and the corporate lobby, that ATCA does nothing more than give courts jurisdiction to hear claims that Congress would have to specify in future legislation. The Court dismissed the idea that ATCA was passed by Congress “as a jurisdictional convenience to be placed on the shelf by use for a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.” Holding that ATCA is “jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject,” the Court said that claims alleging violations of definite, widely-accepted international norms are actionable.

The holding in *Sosa* is precisely what the Bush Administration argued against. The rationale for its hard-line position is difficult to fathom, but, if nothing else, it is consistent with two ideological planks of the Administration: deference to business interests and a disdain for international law.

On the other side, the aspirations for ATCA are sometimes also immodest. For a number of human rights victims and their advocates, ATCA provides hope for justice in specific cases of abuse. But for a somewhat wider group, ATCA is a symbol of the yearned-for primacy of human rights in the age of globalization. Some of these might wish for an even broader law, one that encompasses a larger class of human rights violations. For them, and for all human rights defenders, it should be clear post-*Sosa* that ATCA will not be the solution to every corporate accountability problem.

Rather, *Sosa* affirms the line of important ATCA cases discussed in this report, including *Filartiga v. Pena-Irala*, *Kadic v. Karadzic*, and *Estate of Hilao v. Marcos*, for the proposition that proper claims are those involving violations of “specific, universal, and obligatory” international norms. In



maintaining the right of victims to sue, the Court did not open the door to just any case. Rather, the Court struck down the claims of Dr. Humberto Alvarez-Machain, the plaintiff in the original case, for arbitrary arrest and detention, holding that his arrest did not rise to the level of a violation of international law. It also noted that some violations give rise to liability for private actors, including corporations. This important recognition enables cases against corporations for complicity in gross human rights abuses to go forward.

While the opinion clearly preserves the ability of some human rights victims to seek justice in what is, for many, the only available forum, it is not the end of the ATCA story. Mindful of the foreign relations impact of some cases, the Court invited Congress to provide guidance about which violations trigger jurisdiction under ATCA. Given that the Administration and multinational corporations want to eliminate ATCA as a tool for corporate accountability, we can expect the conflict to shift to Congress. Vigilance will be required to ensure that ATCA’s promise endures.

EXECUTIVE SUMMARY

Understanding ATCA

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.”¹

The dry language of the Alien Tort Claims Act (ATCA) has inspired passionate responses from disparate groups for over two decades, starting almost two hundred years after its adoption. To human rights victims and survivors, it is a chance for justice, in some cases the only chance. To big business, ATCA is an “awakening monster” that threatens foreign investment and should be killed before it “runs amok.”² To the Bush Administration, ATCA interferes with foreign policy and the War on Terror. To human rights advocates, ATCA represents a path to accountability.

This report seeks to summarize the history, jurisprudence and politics of ATCA in order to explain how this relatively obscure law became a lightning rod in the world of business and human rights, and the target of an attack by business and the Bush Administration, culminating in the Supreme Court’s decision in *Sosa v. Alvarez-Machain*. Recent ATCA histo-



ry culminated in the June 29 *Sosa* decision, which holds that ATCA confers the authority on federal courts to hear claims alleging violations of the most heinous human rights abuses. Given this decision, human rights survivors, lawyers, and activists will need to use the law strategically and judiciously to ensure that appropriate claims, involving violations of specific, universal, and obligatory international norms, receive a full hearing. In light of the new decision, this report also lays out some possible scenarios for the future of human rights litigation in the United States.

This report’s Introduction describes the current political context in which ATCA cases have been litigated. It explains why and how ATCA has emerged as both a tool for human rights advancement and a flashpoint for corporate accountability issues.

Chapter One details the history and jurisprudence of ATCA: from a law from 1789, to the basis for victims to sue former government officials in U.S. federal courts for gross human rights violations committed abroad, to the foundation for suits against corporations complicit in human rights abuses committed in connection with their foreign projects.

Chapter Two explains the need for ATCA, particularly in its contemporary usage as the basis for suits against corporate violators. Case studies from Burma, Nigeria and the Sudan reveal the faces behind the cases and make the link between the people who have suffered and the corporations that have profited from the abuse.

Chapter Three describes and analyzes the arguments against ATCA advanced by the Bush Administration and the corporate lobby. The Administration claims that ATCA suits interfere with the War on Terror (WOT) and impede the executive branch’s ability to make and implement foreign policy. Corporations argue that ATCA stifles foreign investment, inundates U.S. courts with meritless cases, and unfairly subjects corporations to liability. This chapter exposes the fallacy of each argument and explains how ATCA is not only a useful tool in the WOT, but is also a fair, reasonable, and restrained device for corporate accountability.

Chapter Four scrutinizes the recent Supreme Court decision in *Sosa v. Alvarez-Machain*. In addition to providing a legal perspective on the case, the chapter also explores the political implications of the case for victims, activists lawyers, the Administration, and corporations. In light of the *Sosa* opinion, the chapter recommends next steps to preserve the ability of human rights victims and survivors to sue for redress in U.S. courts.

INTRODUCTION

The War on ATCA and the Fight for Human Rights

John Doe IX lived in a rural village in Burma's Tenasserim region, where he was a jewelry-maker and farmer.³ His village was close to the route where Unocal, Total, and the Burmese junta were building the Yadana natural gas pipeline. Starting in 1994, John was forced to work for the Burmese army to help build the pipeline infrastructure. Specifically, he had to help build a helipad that Unocal and Total officials used when they revisited the area.⁴ He was forced to work on building roads leading to the pipeline, and he had to serve as a "pipeline porter," to carry supplies and undertake menial tasks for soldiers along the pipeline route.⁵ As a forced laborer, he would have been killed if he refused to work or if he grew too weak to be useful.⁶

John Doe IX was a victim of the Burmese army's campaign to "clear and secure" ⁷the pipeline route, a campaign the military undertook at California oil company Unocal's request. He is one of numerous survivors who have suffered serious human rights abuses—including forced labor, torture, murder, and rape—as a result of corporations' foreign investment projects. The Alien Tort Claims Act (ATCA) gives him recourse in U.S. courts against a U.S. corporate perpetrator. Although enacted in 1789, ATCA was largely ignored until 1979, when the *Filartiga* family, whose son had been tortured and murdered in Paraguay, used it to sue the offending Inspector General of police who had since relocated to Brooklyn.⁸ Since the U.S. Court of Appeals for the Second Circuit's landmark 1980 decision in *Filartiga v. Pena-Irala*⁹ allowing the family's case to proceed, ATCA has served as the basis for non-citizens to sue in U.S. federal courts for gross human rights abuses.¹⁰ From the *Filartiga* decision to the present, ATCA has served to hold both individual and corporate perpetrators accountable in a credible court of law.

The elements of an ATCA claim at first glance appear simple: the plaintiff must be an alien alleging a tort, and the alleged tort must be a violation of the law of nations or a treaty of the United States.¹¹ A tort is in violation of the "law of nations" when it violates a norm of customary international law.¹² Customary international law, "results from a general and consistent practice of states followed by them from a sense of legal

obligation."¹³ While determining when a practice has become general and consistent is not simple, it is clear that only the most egregious abuses, such as war crimes,¹⁴ crimes against humanity,¹⁵ genocide,¹⁶ summary execution,¹⁷ torture,¹⁸ forced labor,¹⁹ and cruel, inhuman and degrading treatment,²⁰ meet the standard. The Supreme Court's recent *Sosa* decision confirms that only the most heinous violations are actionable.²¹

The first ATCA cases²² focused on bringing "state actors" to justice for their human rights abuses. In these cases, in which victims sued former governmental officials and military officers, it was clear that international law applied to hold government officials accountable.²³ In subsequent cases, courts were forced to ask questions about which abuses qualified as violations of the law of nations, and who could be held accountable. The case law that emerged permits ATCA suits against private parties, as opposed to government officials: where a private party committed an act regardless of whether a state is involved, such as genocide,²⁴ slave trading,²⁵ or war crimes,²⁶ that violates the law of nations, or where the private party could be characterized as a state actor due to its relationship with a state.²⁷

Once courts recognized that international law, and therefore ATCA, could apply to private parties as well as governments, the next big question they were presented with was inevitable: What if the perpetrator was neither a government nor private citizen but a corporation? Given that corporations are often treated as legal persons, shouldn't they, too, be held accountable if involved in human rights abuses amounting to violations of international law?

The next set of ATCA cases, against private corporations for abuses of human or environmental rights, sought to answer this question. From *Texaco* in Ecuador²⁸ to *Unocal* in Burma²⁹ to *Freeport-McMoRan* in Indonesia³⁰ to *Shell*³¹ and *Chevron*³² in Nigeria, these cases analyzed the relationship between transnational corporations and abuses. And while many of them have been dismissed and none of them has yet resulted in a judgment against a corporation,³³ these lawsuits have raised the ire of both the Bush Administration and the corporate community.

From the *Filartiga* decision in 1980 until the present Administration, Republican and Democratic presidents alike supported ATCA as a way to hold abusers accountable. The Bush Administration has sought for the past two years to reverse the tide by challenging victims' right to use ATCA as the basis for these claims. In July 2002, in response to the D.C.

federal court's request, the State Department wrote a letter urging dismissal of an ATCA case against ExxonMobil for violations in Aceh, Indonesia.³⁴ The chief rationale for their position was that the lawsuit could strain relations with Indonesia at a time when the U.S. was attempting to enlist the government of Indonesia in the War on Terror. Next, the Justice Department, joined by the State Department, submitted a brief in May 2003 in the case against Unocal, urging the court to read ATCA as a purely jurisdictional statute that did not, itself, provide a cause of action.³⁵ Subsequently, the State Department submitted a similar brief in the ExxonMobil case.³⁶ Their efforts have culminated in *Sosa v. Alvarez-Machain*, an ATCA case that the Supreme Court finally agreed to hear at the Justice Department's urging.

In these briefs, including the Justice and State Departments' brief in *Sosa*,³⁷ the Administration argued for nothing less than the total eradication of twenty-three years of case law. In arguing that human rights claims cannot proceed under ATCA, they took a position that had been rejected by every court that has heard an ATCA case.³⁸ The June 29 Supreme Court decision affirmed the view of those lower courts, by holding that claims resting on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized"³⁹ continue to be actionable under ATCA.⁴⁰ In other words, while not every violation of a human right gives rise to an ATCA claim, the worst abuses, such as genocide, torture, slavery, and murder, do.

The government's position also bolsters the corporate lobby's interpretation of ATCA.⁴¹ Among supporters of the law, there is a suspicion that the real provocation for this stance from a business-friendly Administration is not a principled legal objection to ATCA, but a desire to end the cases against corporations.

"No President has ever done more for human rights than I have," said George W. Bush earlier this year.⁴² Yet his attack on ATCA demonstrates the limits of his commitment to hold corporations legally accountable for their complicity in human rights abuses. For human rights victims and plaintiffs like John Doe IX, Bush did nothing but stall their ability to enforce their rights in a court of law. The Supreme Court's ruling in *Sosa* renews their hope that justice delayed will not mean justice denied.

CHAPTER ONE

From Obscurity to Controversy

In the more than two centuries that have elapsed since ATCA was passed, hundreds of millions of human rights abuses have been perpetrated.⁴³ In much of the world, impunity for perpetrators of human rights abuses is assured. Though limited in scope, ATCA is critical to human rights promotion, because it means that the U.S. will not serve as a safe haven for individual or corporate abusers. It serves as a model for other nations, as well as provides access to justice for the victims, punishment for the perpetrators, and a deterrent to future abuse.

In the twenty-three years between the landmark *Filartiga* decision and the Supreme Court's consideration of ATCA in the *Sosa* case, courts have held consistently that ATCA provides the basis for lawsuits brought by non-citizens in U.S. federal courts for serious human rights abuses.⁴⁴ Notwithstanding this long chain of cases, potential ATCA defendants and their allies—corporations and the U.S. government in particular—have recently sought to eviscerate ATCA. Unable to convince Congress to repeal the law, they argued to the courts that it does not provide a cause of action (essentially, a right to sue), but only grants jurisdiction to courts if Congress passes another law providing the cause of action.⁴⁵ Until *Sosa*, the Supreme Court had repeatedly refused to consider the scope of ATCA. Why the Supreme Court agreed to consider an ATCA case now is a matter of speculation. What is known, however, is that the current Administration's position on ATCA undermines human rights.

THE BIRTH OF ATCA: FILARTIGA AND ITS PROGENY

ATCA was barely used for nearly two centuries. Then, in 1979, came a breakthrough: *Filartiga v. Pena-Irala*.⁴⁶ In 1976, Joelito Filartiga, a seven-



teen-year old Paraguayan, was tortured to death by Americo Pena-Irala, then Inspector General of Police in Asuncion, Paraguay, in retaliation for his father's political activities. In 1979, Joelito's father and sister, living in Brooklyn, New York, discovered to their horror that Pena-Irala was also living in Brooklyn. Working with lawyers from the Center for Constitutional Rights, they sued Pena-Irala under ATCA.

Although ATCA had never been used as the basis for a human rights case before, the U.S. Court of Appeals for the Second Circuit found that the *Filartiga*'s claim met all of its requirements. The plaintiffs were aliens, they were alleging a "tort" or civil wrong, and the torture and murder of Joelito *Filartiga* was a "violation of the law of nations." A lower court subsequently found Pena-Irala liable in the amount of \$10 million. Although Pena-Irala fled without paying, Joelito's sister Dolly *Filartiga* feels, as much as possible, that justice was served: "I came to this country in 1978 hoping simply to confront the killer of my brother. I got so much more. With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice?"⁴⁷

In addition to the emotional satisfaction for the *Filartiga* family of having the truth heard and acknowledged in a court of law, the decision of the Second Circuit Court of Appeals in *Filartiga* had at least two significant aspects. In a reversal of the district court decision, the appeals court ruled that torture was in fact a violation of the law of nations.⁴⁸ Perhaps even more significantly, the Second Circuit held that "...courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."⁴⁹ In other words, even if torture was not recognized as a violation of international law at the time of the passing of ATCA, it was still a violation under ATCA in the 20th century. In 1991, Congress passed the Torture Victim Protection Act,⁵⁰ which made it even clearer that torture and summary execution, specifically, are cognizable claims in U.S. courts, and that torturers will not find a safe haven in the U.S.

In the recent *Sosa* decision, the Supreme Court affirmed and clarified this *Filartiga* doctrine, holding that claims resting on "a norm of international character accepted by the civilized world and defined with a specificity comparable to [emphasis added] the features of the 18th century paradigms we have recognized,"⁵¹ which included piracy, infringements of the rights of ambassadors, and violation of safe conduct,⁵² are action-

able. In other words, modern federal courts are not restricted to hear cases for the same crimes contemplated in 1789, but can exercise jurisdiction when the contemporary abuses are as "specific, universal, and obligatory"⁵³ today as the parallel examples from the 18th century.

Since *Filartiga*, a sequence of human rights cases has found that other abuses constitute violations of international law. In *Forti v. Suarez-Mason*, a court found that disappearance (essentially, an abduction in which the victim is never found) qualified, and limited the law by holding that only violations of "universal, definable and obligatory" international law norms were actionable under ATCA.⁵⁴ Subsequent courts interpreted ATCA to allow suits for, among other violations, genocide,⁵⁵ war crimes and crimes against humanity,⁵⁶ summary execution,⁵⁷ and cruel, inhuman and degrading treatment.⁵⁸ By the same token, courts have not exercised jurisdiction for every alleged violation, rejecting claims against state actors for violations that fail to meet the standard, including suits for deprivation of property,⁵⁹ and failure to inform a foreign prisoner about the right to consular assistance.⁶⁰

Another important development emerging from the post-*Filartiga* cases was the understanding of **who** can be held accountable under ATCA. *Filartiga* established that the actual torturer who was a "state actor" or governmental official could be sued. Other cases have applied ATCA to a commander—not the actual perpetrator—but one with command responsibility.⁶¹ The federal district court in New Jersey also found that officials of the U.S. government could be sued (although not the government itself).⁶² However, the U.S. Supreme Court also limited victims' abilities to sue foreign governments in U.S. courts, holding that another law, the Foreign Sovereign Immunities Act (FSIA), creates generalized immunity for foreign states.⁶³

The cases against Radovan Karadzic in 1995 presented the court with the novel question of whether a non-state actor could be sued under ATCA. Karadzic, the leader of the Bosnian Serb army, was not an official of a recognized state, but was President (and directed the military forces) of the self-proclaimed Republic of Srpska, within Bosnia-Herzegovina. Karadzic and his army carried out a campaign of genocide, rape, torture, and summary execution, among other abuses, and did so "not acting under the authority of a state."⁶⁴ In particular, the court had to determine if the most grievous crimes—genocide, war crimes, and crimes against humanity—were only actionable under ATCA if perpetrated by a

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as well as *who* could be sued under ATCA, the courts were fulfilling *Filartiga's* most important legacy: to understand violations of international law in a modern context.



state actor, or if private individuals could be held liable for such gross abuses. After a thorough review of the law, the court concluded that state action is not necessary for genocide, war crimes, or crimes against humanity, and that the law of nations controls the conduct of private as well as state actors who commit these abuses.⁶⁵ The court also decided that, while ATCA does not allow claims against private individuals for some international law violations (such as torture), a private person can nonetheless be held liable for these violations when acting in concert with a state actor.⁶⁶

The *Karadzic* case made clear that international law norms apply to private individuals and states alike. By articulating **which** human rights abuses qualified as well as **who** could be sued under ATCA, the courts were fulfilling *Filartiga's* most important legacy: to understand violations of international law in a modern context. *Karadzic* confirmed what many victims already knew: that heinous human rights abuses are not only perpetrated by governmental officials, but by private parties as well.

DOE V. UNOCAL AND CORPORATE COMPLICITY

Corporations have long operated with impunity in foreign countries, from the Dutch and British East India companies, which exploited humans and the natural environments on multiple continents in the eighteenth and nineteenth centuries,⁶⁷ to the corporations providing goods and services to Nazi Germany, to the present day. The *Karadzic* case set the stage for victims to end this impunity by suing corporations in U.S. courts for certain abuses.

In an early corporate ATCA case, indigenous peoples of the Ecuadoran Oriente tried to hold corporate giant Texaco accountable for massive environmental contamination leading to illness, death, and loss of livelihood, among other harms.⁶⁸ While a U.S. court ultimately ruled the case against Texaco should be tried in Ecuador rather than the United States,⁶⁹ a series of subsequent cases have helped to build on a body of law beginning to affirm the principle of corporate accountability. In a case filed by an Indonesian plaintiff against mining giant Freeport-McMoran for abuses at the hands of security forces for their mining operation in Indonesia, as well as for serious environmental damage, the court found that a corporation could be held liable for genocide, which is prohibited by international law whether perpetrated by a state or non-state actor.⁷⁰ (The case was dismissed due to procedural problems). Nigerian plaintiffs,



suing Royal Dutch/Shell for complicity in human rights abuses associated with the Ogoni peoples' peaceful protests of Shell's environmental and human rights violations, have been permitted to proceed with their suit for crimes against humanity, torture, cruel, inhuman, or degrading treatment, violation of the rights to life, liberty and security of person, and violation of the right to peaceful assembly and association against both the corporation and the former head of Shell's Nigerian subsidiary.⁷¹

The case against California energy company Unocal, brought by villagers from Burma who were enslaved, tortured, and raped by Burmese military forces providing security for Unocal's pipeline in that country, has gone farther than any other corporate case. In 1997, a U.S. federal district court agreed to allow the case against Unocal to proceed, concluding that corporations and their executive officers can be held legally responsible under ATCA for violations of international human rights norms.⁷² After the district court later dismissed the case, the Ninth Circuit reversed, holding that Unocal could be held liable for gross human rights

abuses by acting in complicity with Burma's military.⁷³ The federal case, stayed pending the resolution of the *Sosa* decision in the Supreme Court, spawned a California state court case as well, alleging violations of California tort law for the same abuses.⁷⁴

At the heart of the Unocal case is the issue of complicity. Can a corporation be held accountable for acts committed by its partner in a joint venture, which it knew about, benefited from, abetted and tacitly if not explicitly approved even if they were not directly committed by its employees? A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit answered "yes." The plaintiffs claimed that Unocal aided and abetted Burma's military regime, the State Law and Order Restoration Council (SLORC), in the human rights abuses committed to further the joint venture, a natural gas pipeline built through indigenous territory in southern Burma. After the district court dismissed the case, the Ninth Circuit on appeal determined that "we may impose aiding and abetting liability for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime" and that "Unocal's weak protestations notwithstanding, there is little doubt that the record contains substantial evidence creating a material question of fact as to whether forced labor was used in connection with the construction of the pipeline....The evidence also supports the conclusion that Unocal gave practical assistance to the Myanmar [Burmese] Military in subjecting Plaintiffs to forced labor."⁷⁵

By addressing the question of corporate complicity in human rights abuses, the courts have taken on one of globalization's biggest problems: multinational corporations have achieved unprecedented international power without corresponding global accountability. Some of ATCA's critics have argued that victims should be suing in their home countries, and that granting U.S. courts authority to hear such cases undermines the sovereignty of those countries.⁷⁶ This critique ignores the reality of such corporate abuses: they often occur in countries ruled by the brutal regimes committing the violations, or where the national governments lack the ability to regulate, much less punish, massive corporate enterprises. The *Unocal* court, in acknowledging the corporation's true role as a culpable partner in human rights crimes, took an important step in filling this accountability vacuum. The *Sosa* Court affirmed this step by indicating that corporations can, indeed, be held liable for their complicity in the most egregious abuses.⁷⁷

CHAPTER TWO

The Faces Behind the Cases

Many perpetrators of human rights abuses are more mobile than victims and survivors. A high-level individual such as a former military commander or chief of police often has the money and power to insulate himself from legal action or even flee the country of his abuses.⁷⁸ A multinational corporation has the legal, political, and economic wherewithal to shield itself from local liability and then depart. This combination of inhospitable local climates and transient populations of perpetrators means that justice, if at all attainable, must often be sought elsewhere.

The Alien Tort Claims Act allows victims the hope of justice while reducing the likelihood that perpetrators will find a safe haven in the U.S. With globalization, individual and corporate abusers alike are not restricted—either in their acts or in their ability to flee—by national borders. If human rights abuses and abusers are transnational, so, too must be the ability of victims to access mechanisms that punish those abuses. ATCA makes enforceable legal remedies available to victims and deters future abuses by ending impunity for perpetrators who are present in the U.S. It also forces powerful multinational corporations, many from the U.S., to submit to the judgment of U.S. courts. Given that voluntary initiatives for corporations are of dubious effectiveness,⁷⁹ ATCA provides a critical channel for foreign victims to demand corporate compliance with international human rights obligations.

CORPORATE POWER: “VOLUNTARY” RESPONSIBILITY V. ACCOUNTABILITY

The ever-growing concentration of wealth and power in the hands of fundamentally undemocratic global corporations, with little accountability to governments or peoples (but for their shareholders), creates a quandary. Corporations have long been able to use their economic supremacy, and the political power that goes along with it, to aid and abet repressive governments, quash political participation, and violate economic and social rights.⁸⁰ However, corporate accountability issues have recently come to the fore, due to the clear recognition that corporations can and do profit from and are complicit in the grossest human rights abuses (such as the

murder of millions during the Nazi Holocaust), and the development of a system of international law understood to address such abuses.⁸¹ ATCA cases against corporations require much more than corporate presence in countries where human rights abuses occur. Corporations are accused of **direct complicity** in human rights abuses, such as hiring the armed forces that commit the rape, murder, and forced labor in order to further the corporation’s project.⁸² In these cases, even if the corporate employees don’t actually pull the trigger, they are giving money, equipment, substantial support, and motive to those who do.⁸³

While new opportunities for private companies to participate in the worst violations, unfortunately, have yet to be exhausted,⁸⁴ the ongoing problem of corporate abuse will exist so long as natural resource companies are willing to partner with abusive regimes, or nations with natural resources lack the bargaining power to control their multinational corporate partners.⁸⁵ Democracy, the rule of law, and human rights do not always coexist when natural resources are at issue. As Vice President Dick Cheney said, while the CEO of Halliburton, “The problem is that the good Lord didn’t see fit to always put oil and gas resources where there are democratic governments.”⁸⁶

To convince investors that their overseas investments are safe, host governments may offer government troops to provide “security” for these projects. Transnational corporations generally accept this offer believing in the “controversial but necessary relationships with the state security forces.”⁸⁷ Because these investment projects are often opposed by the local people—or would be, if the local people were consulted—the projects may become the focus of protest, creating a vicious cycle: local people oppose the project, which leads to increased armed security ordered by governments that do not tolerate even peaceful dissent, which leads to violence. As former Unocal President John Imle stated about the military build-up around Unocal’s Yadana pipeline, “What I’m saying is that if you threaten the pipeline there’s gonna [sic] be more military. If forced labor goes hand and glove with the military yes there will be more forced labor. For every threat to the pipeline there will be a reaction.”⁸⁸

WHO SUFFERS

The plaintiffs in many of the ATCA cases filed against multinational corporations represent examples of the otherwise unexceptional individuals whose lives, cultures, rights, and environments have been destroyed by

irresponsible companies. The Burmese military, working in partnership with Unocal to protect and construct the Yadana gas pipeline, committed numerous abuses against the villagers from Burma who were able to sue Unocal: the soldiers forced them to leave their homes, took their property, forced them to clear trees, build barracks, and haul heavy equipment, prohibited them from farming and took their livestock, and, in some cases, raped and killed local villagers.⁸⁹ The court in that case noted, “The deposition testimony recounted numerous acts of violence perpetrated by Burmese soldiers in connection with the forced labor and forced relocations”⁹⁰ which occurred in conjunction with Unocal’s pipeline construction. Hundreds of villagers have been injured, and dozens slaughtered, in Nigeria’s oil-producing Delta region. Thousands if not more African non-Muslims in the Sudan have suffered as a result of Talisman’s support of the Sudanese government.⁹¹ The particular stories of ATCA plaintiffs and victims of corporate abuse reveal the human faces behind the law. Without ATCA, these and many other stories, each unique but all sharing abuse and tragedy in common, would remain untold, unheard, and without legal remedy.

CORPORATE-SPONSORED RAPE, FORCED LABOR AND KILLING IN BURMA

Since the military regime seized power in Burma in 1988, it has been internationally condemned for committing egregious human rights abuses, including forced labor, torture, rape, summary and arbitrary executions and forced relocation.⁹² To build and secure a gas pipeline for oil transport through the Yadana region of Burma, Total (a French company), and Unocal (a California corporation), hired the Burmese military,⁹³ even though they knew about its appalling human rights record.⁹⁴ Contemporaneous Unocal internal memos question how to define and identify forced labor, a clear indication that Unocal officials knew of human rights abuses occurring because of their investment in the pipeline.⁹⁵ A U.S. State Department official stated, “Forced labor is currently being channeled...to service roads for the pipeline...When foreigners come on daily helicopter trips to inspect work sites, involuntary laborers are forced into the bush outside camera range.”⁹⁶

Before Unocal’s pipeline was constructed across Burma’s southern Tenasserim region, fisherfolk and farmers in the region made their livelihoods relatively free from restrictions; they were able to provide for them-

selves and occasionally earn extra money.⁹⁷ After Unocal and Total began negotiating with the Burmese junta regarding the project in 1990-91, everything changed, especially the remarkable increase of military presence in the region.⁹⁸ The human rights abuses that ensued were predictable, as the Burmese military was notorious for systematically using forced labor, murder, and torture.

As a federal court hearing the Unocal case described, the “evidence demonstrate[ed] that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and the Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.”⁹⁹

Among the “numerous acts of violence” were the rapes of the Jane Does II and III. Nearly a decade ago, Jane Doe II and her great niece, teenager Jane Doe III, went to get two pigs to celebrate Christmas. On their return home, they were seized by soldiers from Burma’s army who were providing security for the Unocal gas pipeline project. After telling the women they were going to keep the pigs, one officer ordered the older woman to leave the girl alone with him; when she protested, he threatened her. Although Jane Doe II heard her niece crying for help, she was afraid to go to her aid. After both women were sexually assaulted, they were allowed to leave the next day.¹⁰⁰

In the same way that the Burmese military’s brutal tactics accompanied their security operations for the pipeline, so too did their hallmark forced labor abuses. Villagers like John Doe IX and John Doe VII were forced to build helipads near and along the pipeline that were—and are still today—used by Unocal officials and employees. Other villagers, including John Does I, VII and IX were forced to build roads and other pipeline infrastructure. Still others were forced to serve as “pipeline porters” carrying heavy loads of arms, ammunition, food and clothing for soldiers patrolling Unocal’s Yadana Pipeline.¹⁰¹

The particular stories of ATCA plaintiffs and victims reveal the human faces behind the law. Without ATCA, these stories would remain untold, unheard, and without legal remedy.

Unocal claims that it is “improving lives in Myanmar”¹⁰² through a program of socio-economic initiatives directed at thirteen villages in the pipeline region.¹⁰³ Regardless, the people of the pipeline region do not want the pipeline,¹⁰⁴ and they believe their lives were better—even without Unocal’s socio-economic programs—before the pipeline arrived.¹⁰⁵ And even if Unocal’s assertions about improving some lives were true, it does not excuse complicity in the most serious kinds of crimes.

INDIGENOUS PEOPLE IN NIGERIA

The case of Unocal using the Burmese army for security is but one example of the indefensible human rights violations that result from the collaboration of transnational corporations with local military forces to protect corporate projects. Unfortunately, Burma is far from being the only country with a history of violent corporate involvement. Nigeria’s indigenous people have been victimized by both Chevron and Shell, acting in complicity with the Nigerian military forces.

Shell’s oil extraction activities in Ogoniland have led to torture, murder, and environmental devastation.¹⁰⁶ Consider the case of Ken Saro-Wiwa, a writer, television producer, activist, and president of the Movement for the Survival of Ogoni people (MOSOP). Along with Ogoni community members, he peacefully protested the massive oil spills and related cultural and environmental destruction wreaked by Shell over its 46 years of extracting almost thirty billion dollars worth of oil from the Niger Delta.¹⁰⁷ Shell has built pipelines through Ogoni farmlands and in front of Ogoni homes. Oil leaks from the pipelines and gas flaring have created persistent chemical fumes and a permanent crust of oil on the soil.¹⁰⁸ Cancer, bronchial asthma, and other respiratory illnesses previously unknown to the region have skyrocketed while indigenous plants and wildlife have disappeared.¹⁰⁹

On November 10, 1995, Saro-Wiwa and eight others were hanged following months of detention—including torture and the denial of both medical care and legal representation—and a sham trial by a Nigerian special tribunal.¹¹⁰ His son, Ken Wiwa, describes that day, “On the morning of his execution, he was taken from his prison cell in a military camp in Port Harcourt, on the southern coast of Nigeria, and driven under armed escort to a nearby prison. It took five attempts to hang him. His corpse was dumped in an unmarked grave; acid was poured on his remains and soldiers posted outside the cemetery.”¹¹¹ According to the allegations in

The case of Unocal using the Burmese army for security

is but one example of the indefensible human rights violations that result from the collaboration of transnational corporations with local military forces to protect corporate projects.



the Federal District Court for the Southern District of New York, Ken Saro-Wiwa was hanged after “[d]efendants [Shell] bribed witnesses to testify falsely at the trial, conspired with Nigerian authorities in meetings in Nigeria and the Netherlands to orchestrate the trial, and offered to free Ken Saro-Wiwa in return for an end to MOSOP’s international protests against defendants. During the trial, members of Ken Saro-Wiwa’s family, including his elderly mother, were beaten.”¹¹²

Furthermore, plaintiffs allege that Shell sought protection for its oil activities from Nigeria’s military and notorious “kill-and-go” mobile forces in order to ensure that business could proceed “as usual.”¹¹³ The company provided helicopters and boats used by the military for reconnaissance to launch attacks on civilians, which included the rape and beatings of Ogoni residents; made cash payments to military police; and on numerous occasions, called in government troops to fire on peaceful protesters, resulting in more injuries and deaths.¹¹⁴

Shell is not the only multinational company operating in Nigeria to partner with violent military forces in the pursuit of profit. Chevron does as well. On May 25, 1998, Larry Bowoto, a member of the indigenous Ilaje community in Ondo State, and about 100 other unarmed community members went to the Chevron Parabe offshore platform to request a meeting with company officials regarding Chevron’s environmental practices, which have destroyed the fisheries, fresh water supplies, homes, and very livelihoods of local residents.¹¹⁵ The protesters remained peacefully on the platform for three days awaiting a promised meeting, during which time they did not interfere with oil operations or the free movement of Chevron workers. After a meeting with Chevron officials, the protesters agreed to vacate the platform on May 28 in anticipation of another meeting in the village on May 29.¹¹⁶ However, before they could do so, Chevron called in the Nigerian military and flew them to the platform in Chevron helicopters. When the soldiers reached the platform, they opened fire, killing two protesters and injuring many others.¹¹⁷ After Larry Bowoto was shot, he was stabbed with a bayonet by soldiers.¹¹⁸ He sustained serious injuries and had to undergo surgery to remove the bullets. After an extended hospitalization, he finally returned to his hometown.¹¹⁹

Larry Bowoto, one of the plaintiffs in the case brought against ChevronTexaco for these abuses, was lucky to survive Chevron’s attempts to quell local protest of its activities.¹²⁰ Indeed, during the Parabe inci-

dent, soldiers seized and subsequently tortured another protest leader when he refused to confess to piracy.¹²¹ Only seven months later, the Nigerian military, along with Chevron staff, flew over fishing villages once again opening fire on civilians.¹²² Soldiers then used Company leased boats to launch attacks on the villages. As a result of these two assaults, at least seven people died.¹²³

BLACK AFRICAN NON-MUSLIMS IN THE SUDAN

Currently, a “Taliban-style Islamic fundamentalist movement”, known as the National Islamic Front, controls northern Sudan and is conducting a war of genocide on black African non-Muslims in the southern part of the country.¹²⁴ Partnering with the Arab Janjaweed militias that it arms, the Sudanese government commits serious human rights abuses, including rape, murder, and torture during its campaign of ethnic cleansing.¹²⁵ The conflict has evolved into an “oil war” in which Talisman, a Canadian oil company, has used brutal military action to secure the valuable petroleum resources in the south for exploration and extraction.¹²⁶

Peter Gaduel lived in the village of Panhial in southern Sudan, located near Talisman’s oil exploration activities. He, along with two other named plaintiffs, represents a class of victims suing Talisman for the “unholy alliance” it entered into with the National Islamic Front Government of Sudan.¹²⁷ In April, 2000, Peter Gaduel’s village was attacked at dawn by government forces as part of the collaborative campaign between Talisman and the Sudanese armed forces to clear and “protect” areas where Talisman had undertaken oil exploration and extraction. The soldiers burned down his village and abducted his wife and four children. During the attack, soldiers shot Peter in the leg.¹²⁸ The National Islamic Front received money in exchange for Talisman’s investment in infrastructure (roads, airfields, and communications facilities) that the military could then use to launch attacks on civilians, an estimated two million of whom have died during the conflict.¹²⁹ Specifically, Talisman had regular meetings with Sudan’s army intelligence to discuss “how to dispose of civilians” in areas in which Talisman intended to operate.¹³⁰ The revenues earned from the oil not only profited Talisman; they gave the Sudanese government a war chest to fund its jihad.

Around the town of Bentiu, also in the non-Muslim south, government troops reportedly cleared the area using helicopter gunships, some allegedly piloted by Iraqi soldiers, and aerial cluster bombardment by high-alti-

tude Antonov planes. In addition, government troops on the ground reportedly drove people out of their homes by committing gross human rights violations: male villagers were killed in mass executions, women and children were nailed to trees with iron spikes. Reports from other villages claim that soldiers slit the throats of children and killed male civilians who had been interrogated by hammering nails into their foreheads.¹³¹

In March 2003, Talisman pulled out of the Sudan, stating that the “perceived political risk in-country” was harming its stock price. Despite the pull-out, Talisman claimed its presence in the Sudan was a positive one, citing its social projects such as wells and hospitals, while conveniently forgetting its direct contribution to committing human rights abuses.¹³²

Unocal, Shell, Chevron Texaco, and Talisman exemplify the attitude of corporate defendants in ATCA cases; they whitewash the dark side of their foreign projects—the gross human rights abuses, the irrevocable environmental damage—with a focus on socio-economic initiatives.¹³³

Furthermore, these and other corporations, aided by both governments, intergovernmental organizations, and the United Nations, argue that voluntary initiatives are much more effective than enforceable legal instruments in achieving corporate responsibility.¹³⁴ These voluntary codes of conduct, including the U.N. Global Compact, contain weak language, relying on “public accountability, transparency and the enlightened self-interest of companies, labor and civil society” to protect human rights at risk from corporate practices.¹³⁵

Even though accountability for corporations’ abuses of human rights should operate at both the national and international level, an enforceable international regime for corporate accountability has yet to be established. The U.N.’s Global Compact, despite its charge “to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalization”¹³⁶ is suspect; it has no enforcement mechanisms, and this institution has partnered with, and thereby validated, many corporations well-known for their indifference to human rights.¹³⁷ International courts are either limited to hearing cases brought by one country on behalf of its citizens against another¹³⁸ or lack the ability to deliver enforceable legal decisions against U.S. corporations.¹³⁹ The current U.S. Administration has been severely criticized for its inability to safeguard human rights.¹⁴⁰ This leaves the enforcement of certain human rights norms against corporations, at least in the U.S., squarely in the hands of the judiciary. ATCA is essential to that task.

CHAPTER THREE

Debunking the Myths

In the zeal to eliminate ATCA as the basis for human rights lawsuits, both the Department of Justice and big business are spreading myths about the statute that invoke various political and economic doomsday scenarios. The Administration claims that ATCA interferes with the government’s ability to prosecute the War on Terror (WOT). The corporate lobby has claimed that ATCA causes irreparable economic harm to U.S. corporations, and results in a financial windfall for tort lawyers. This coordinated attack on ATCA is both legally unsound and inaccurate.¹⁴¹ The majority of Supreme Court Justices did not fall for these myths. In *Sosa v. Alvarez-Machain*, the Supreme Court recognized that a core group of human rights violations, abuses of international norms with “definite content and acceptance among civilized nations”¹⁴² are as actionable



today under ATCA as piracy, violations against safe passage, and abuses against ambassadors were in 1789, when ATCA was enacted.¹⁴³ And while the Court urged caution in exercising jurisdiction, it recommended a “policy of *case-specific* [emphasis added] deference to the political branches” rather than a wholesale rejection of all cases with potential impact on foreign policy.¹⁴⁴

Since the *Filartiga* decision, commentators periodically have criticized ATCA for its alleged expansion of the judiciary’s proper role and for its application of international law in domestic courts. Notwithstanding, every district and circuit court that has considered the question of whether ATCA provides a legitimate basis for human rights suits has determined that, indeed, it does.¹⁴⁵ The corporate offensive has moved beyond the Constitutional arguments to posit a “nightmare scenario” in which “American trial lawyers and anti-globalization forces” join hands, resulting in the destruction of the global economy.¹⁴⁶ The Department of Justice, first in the *Unocal* case and then again in the *Sosa* case, filed briefs arguing that all human rights litigation under ATCA is flawed and should be eliminated.

The U.S. Supreme Court agreed last year to consider *Sosa*¹⁴⁷ after declining to hear ATCA cases on at least six previous occasions. Briefs filed by the Department of Justice as well as several business associations including the National Foreign Trade Council (NFTC)¹⁴⁸ in the *Sosa* case make different arguments, but advocate for the same conclusion: the elimination of ATCA as the basis for human rights suits. The Justice Department argued that ATCA is problematic primarily because it interferes with foreign relations and impedes the War on Terror. The NFTC, viewing the *Sosa* case as an opportunity to achieve tort reform, argued that ATCA chills much-needed foreign investment, applies the misguided principle of vicarious liability to corporations that simply engage in legitimate business activity, and holds the wrong actors—corporations instead of states—accountable for human rights abuses in contradiction to international law.

ATCA IS A TOOL AGAINST TERRORISM

By painting ATCA as a barrier to a comprehensive counter-terrorism strategy, the Administration seeks to capitalize on widespread public opinion that defending against terrorism is a leading priority.¹⁴⁹ The Justice Department argues that ATCA impedes the government’s ability to

prosecute this “war” in a robust fashion. In so doing, they cloak the Administration’s labors to immunize corporations in the mantle of efforts to protect the public.

In an August 7, 2003 New York Times Op-Ed, Senator Arlen Specter defended ATCA against its critics in the Administration and cogently explained the value of ATCA in promoting the WOT. He wrote: “American credibility in the war on terrorism depends on a strong stand against all terrorist acts, whether committed by foe or friend. Our credibility in the war on terrorism is only advanced when our government enforces laws that protect innocent victims. We then send the right message to the world: the United States is serious about human rights.” This message is all the more critical in the wake of the revelations of abuses at Abu Ghraib.¹⁵⁰

According to the current Administration’s argument, ATCA is problematic because it potentially exposes U.S. allies in the War on Terror, such as Indonesia and Pakistan, to lawsuits in U.S. courts.¹⁵¹ They further argue that ATCA subjects the U.S. government to such suits.¹⁵² Both of these contentions are specious. First, foreign governments typically cannot be sued. The U.S. government claims that ATCA is problematic, nonetheless, because it “may be asserted against foreign governments or officials who assist the United States military in its ongoing operations around the world.”¹⁵³ This argument is unconvincing as well. Foreign governments are generally entitled to protection from lawsuits, and cannot be sued in U.S. courts unless the Foreign Sovereign Immunities Act (FSIA) waives that immunity.¹⁵⁴ The FSIA waives immunity where foreign governments engage in commercial activity that serves as the basis for the lawsuit, or in cases where the government has been designated a “state sponsor of terrorism.”¹⁵⁵ It is highly unlikely that the actions of a foreign government assisting the U.S. in legitimate counter-terrorist activities would qualify as commercial activity. ATCA does not pierce the immunity of foreign governments, and the only statute that does—the FSIA—does not apply to counter-terrorism. The body of ATCA cases dismissed against foreign governments confirms

By arguing that ATCA impedes the government’s ability to prosecute

the War on Terror in a robust fashion, the Administration cloaks its labors to immunize corporations in the mantle of efforts to protect the public.

that this argument is unfounded.¹⁵⁶

Second, ATCA litigation is like any other tort litigation in U.S. courts, in that courts are equipped with a variety of legal tools to screen and dismiss cases that either lack merit or exceed the bounds of judicial authority. The acts of state and political question doctrines are two such devices that enable courts to dismiss particular cases dealing with international issues that should not be adjudicated in a courtroom. The *Sosa* Court recognized this, urging that “federal courts [should not] avert their gaze entirely”¹⁵⁷ from violations of international norms, while exercising caution in crafting remedies for claims that might have adverse foreign policy implications.¹⁵⁸ If, for example, an ATCA case were instituted against a U.S. ally that involved a legal official act perpetrated by that government, it could be dismissed at an early stage. Cases that have survived the political question objection are those that *should* be adjudicated in a U.S. court, because they address claims arising out of gross abuses such as genocide, rape, murder, and torture.¹⁵⁹

With respect to suits arising out of legal counter-terrorism activities, the Justice Department’s concerns are similarly suspect. The U.S. government is immune from suit unless Congress has waived this immunity by a specific statute.¹⁶⁰ ATCA does not provide a waiver of the government’s immunity.¹⁶¹ While the Federal Tort Claims Act (FTCA)¹⁶² provides a limited waiver, there are a number of exceptions to that liability, one or more of which should protect the government for lawful counter-terrorist activities.¹⁶³ In any event, FTCA is a different statute from ATCA. While the FTCA’s waiver provision may subject the U.S. government to suit for certain counter-terrorist activities, ATCA does not, and the assault on ATCA on this basis is misplaced.

Just as importantly, the Administration’s claim that ATCA hinders the WOT obscures the fact that ATCA has the potential to do the opposite. ATCA suits by foreign victims of terrorism offer the chance to gain information, through private investigation and litigation discovery, about the funding and activities of terrorist organizations. Monetary judgments against terrorists and their supporters (as well as the expenses incurred in defending against such suits) would also help to impair their financial ability to commit future attacks. Terrorism, by U.S. law, is defined in part as “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State.”¹⁶⁴ Many terrorist acts are human rights violations that qualify under ATCA as violations of the

law of nations. U.S. law allows U.S. citizens to bring civil suits for injuries from terrorist acts.¹⁶⁵ ATCA does the same for foreign victims.¹⁶⁶ It is not only unfair to create two classes of victims—U.S. and foreign—but it is also self-defeating, as foreign victims utilizing ATCA suits could actually be assisting the U.S. government in tracking down terrorists and holding them accountable.

ATCA DOES NOT FORCE COURTS TO INTERFERE WITH U.S. FOREIGN POLICY

The Administration also argues that ATCA human rights cases are inappropriate because they infringe upon the executive branch’s ability to make and implement foreign policy. By promoting respect for human rights, ATCA **implements** U.S. foreign policy. Congress has mandated that “a principal goal” of U.S. foreign policy “shall be to promote the increased observance of internationally recognized human rights by all countries.”¹⁶⁷ Specifically, Congress has consistently favored candid, public scrutiny of other nations’ compliance with fundamental rights as an integral part of U.S. foreign policy. For example, Congress has directed the State Department to comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world,¹⁶⁸ and on the status of religious freedom in individual countries.¹⁶⁹ It is difficult to see how adjudication of individual human rights claims under ATCA can impinge upon U.S. foreign policy, when Congress has expressly ordered the State Department to publicly criticize these very kinds of abuses wherever they occur.¹⁷⁰ Indeed, the Executive branch took exactly the opposite view of the current Administration in an *amicus* brief in *Filartiga*. There, the government told the court that where there is consensus in the international community that the right at issue is protected, “there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation’s commitment to the protection of human rights.”¹⁷¹

While the Supreme Court in *Sosa* seems to affirm the legitimacy of the political question doctrine, which permits dismissal of cases with an adverse foreign policy impact on a case-by-case basis, it does not extend the doctrine beyond its current incarnation.¹⁷² This doctrine addresses both the Court’s and the Administration’s concern; courts have long been willing to use the doctrine as the basis for dismissing problematic cases.

Simply because a case involves sensitive political questions, or touches on foreign relations, however, does not require a court to decline jurisdiction.¹⁷³ The court has the discretion to apply the doctrine in dismissing a case if it is called upon to address a political question that should be addressed elsewhere. By arguing that **all** ATCA cases are suspect because they deal with international human rights—and therefore political—issues, the Administration exaggerates the foreign policy significance of some of these cases. With this argument, the government also seems to indicate it lacks confidence in courts’ abilities to determine when they should decline jurisdiction for political reasons. Since courts have dismissed ATCA cases on political question grounds, this insecurity seems unfounded.¹⁷⁴

Another legal theory, the act of state doctrine, provides even more protection against judicial overstepping. This theory, which dictates that courts of one country ordinarily cannot judge the official acts of another government within its own territory, is often invoked by defendants in ATCA cases. One example would be a case where plaintiffs directly challenge the official acts (especially acts that do not violate international law) of a foreign government within that government’s territory. As with the political question doctrine, just because a case relates to the acts of a foreign government does not require its dismissal under the act of state theory. Even though courts have found that “it would be a rare case in which the act of state doctrine precluded suit” under ATCA,¹⁷⁵ the doctrine is available—and has been used—where dismissal is appropriate.¹⁷⁶

THE CORPORATE CRITIQUE

The U.S. government’s critique that ATCA is problematic from a political perspective has been bolstered by the corporate attack. Transnational corporations have taken an economic approach claiming that ATCA will result in myriad, expensive lawsuits that will clog the nation’s courts, burden corporations unfairly, and damage international trade. The history of ATCA cases proves these extravagant claims to be untrue.

• ATCA does not open the floodgates to litigation

The corporate voice against ATCA (a united voice of the National Foreign Trade Council, the United States Council for International Business, and other business associations) expresses concern about the sheer number of existing and potential ATCA cases. The corporate lobby posits a “night-



mare scenario” in which the number of ATCA cases, already excessive, will multiply to the extent that, for example, trade with China is all but destroyed.¹⁷⁷ There is no basis to let companies that have been complicit in abuses off the hook based on the corporate lobby’s unfounded “predictions” about the volume of future cases. To date, only thirty-two (32) ATCA cases have been filed against corporations, and fewer than sixty (60) have been filed overall.¹⁷⁸ According to U.S. government statistics, a total of 252,962 civil cases were filed in federal district courts in 2003.¹⁷⁹ ATCA cases against corporations represent .01304% of all cases in the U.S. federal district courts. Of these, almost half of the corporate cases were dismissed, eight on substantive and six on procedural grounds.¹⁸⁰

No ATCA case against a corporation has yet to succeed at trial, and no damages have been awarded in a corporate case. In nearly twenty-five years of human rights cases under ATCA, these figures hardly seem like a “nightmare scenario.”

As a solution to this non-problem, corporations contend that ATCA cases should be heard in the country where the abuses take place. This argument fails to recognize the reality of human rights violations. In many cases, plaintiffs only sue in U.S. courts because they are unable to do so in their home countries. Some cases of serious abuse occur in countries that do not have an adequate independent judiciary, or are unwilling or unable to exercise control over the multinational corporations with whom they have entered into investment relationships.

Furthermore, this corporate argument is rebutted by another legal device, *forum non conveniens* (*FNC*), which permits courts to dismiss ATCA cases on the grounds that they are more appropriately heard in another country. The court engages in an analysis to determine whether dismissal on the basis of *FNC* is correct, looking at factors including the location of the witnesses and evidence, the available of an alternative legal forum, relative costs of a suit in the U.S. and elsewhere, and fairness considerations.¹⁸¹ When cases should be heard in the location of the abuses, courts have proven themselves willing to dismiss on *FNC* grounds.¹⁸²



• Corporations that behave well have nothing to fear

As part of their argument that ATCA has unleashed the floodgates, corporations claim ATCA subjects any company doing business in a country with human rights abuses—which would be virtually any country, since no country has a perfect human rights record—to liability. The case law should assuage this fear, as mere presence in a country where human rights violations occur has never been found to be sufficient to impose liability. The cases that have proceeded against corporations under ATCA are based on allegations of direct complicity in the abuses. For example, the court in the *Unocal* case found that liability could only be imposed where the corporation offered “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime,”¹⁸³ a standard that requires substantial action rather than mere presence.

• ATCA does not curtail foreign investment and cause economic damage abroad

The corporate lobby claims that ATCA cases will have a chilling effect, making companies unwilling to invest in countries with known human rights abuses. There is no evidence to support this claim; in fact, the “nightmare scenario” posited under ATCA by the Institute for International Economics is actually a hypothetical scenario. As the IIE itself states, “To be sure, no decided [ATCA] cases can be cited to confirm that the nightmare scenario we have just sketched will come to pass.”¹⁸⁴ And in contrast to their dire predictions, a number of corporations, including ATCA defendants, continue to expand their investments in such countries.¹⁸⁵ Corporations also claim that ATCA diminishes their ability to compete with foreign corporations not subject to such restrictions. The corporate lobby has not presented any basis for this claim; however, even if true, it is for a good reason: U.S. law is not designed to enable citizens and corporations to legally commit crimes. Corporations are already restricted from bribing foreign officials.¹⁸⁶ ATCA, while not a criminal statute, may act to similarly control illegal activity—participation in human rights abuses—by corporations abroad. The contention that ATCA prevents corporations from complicity in human rights abuses is, in fact, an argument in its favor.

CHAPTER FOUR

ATCA After *Sosa*: The Door Ajar

The June 29 Supreme Court opinion in *Sosa v. Alvarez-Machain* ensures that ATCA will remain a tool for human rights accountability, though, as before, a limited one. ATCA will neither become the “awakening monster” that big business has feared, nor a general corporate accountability measure that some global justice campaigners would like to see. The *Sosa* opinion, which holds that foreign victims may seek relief in U.S. courts under ATCA for the most serious human rights, affirms ATCA as a tool that provides a remedy for a narrow range of heinous abuses, those that have sufficiently “definite content and acceptance among civilized nations.”¹⁸⁷ Thus, while *Sosa* protects the rights of the most egregiously abused to sue in U.S. courts, it does not open the door wide and invite anyone in who has suffered harm.

In order to rule on the viability of Alvarez’s specific claim under ATCA, the Court had to examine more broadly ATCA’s intent, purpose and scope. In doing so, the Court addressed and rejected the primary objections put forth by ATCA’s strongest critics, the Administration and multinational corporations: ATCA is jurisdictional only, thereby prohibiting claims without additional enabling legislation; ATCA opens the floodgates to claims arising out of any violation of human rights whatsoever; and ATCA interferes with the conduct of foreign affairs. The Court responded to each concern so as to leave “the door [to human rights suits] still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today,”¹⁸⁸ while emphasizing that courts should exercise restraint in hearing new claims. *Sosa* didn’t slam the door in the face of human rights victims, as ATCA’s critics urged, but the opinion’s cautionary tone makes it clear that federal courts should not become an ATCA free-for-all.

THE FACTS IN *SOSA*

While the *Sosa* case keeps U.S. courts open to foreign victims of serious abuses, it was not a victory for Dr. Humberto Alvarez-Machain, who sought damages for arbitrary arrest. The Supreme Court held that his detention, even if illegal, lasting “less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no

norm of customary international law”¹⁸⁹ to the degree that it would allow a suit under ATCA. The legal aspect of the saga began in 1990, when a federal grand jury indicted Alvarez, a Mexican physician, for his supposed role in the 1985 torture and murder of Enrique Camarena-Salazar, an agent of the Drug Enforcement Administration (DEA).¹⁹⁰ Alvarez allegedly had acted to prolong the agent’s life in order to extend his interrogation and torture.¹⁹¹ The U.S. District Court of the Central District of California issued a warrant for Alvarez’s arrest, but the Mexican Government would not turn him over or negotiate with the DEA.¹⁹²

Taking matters into their own hands, the DEA approved a plan to hire Mexican nationals, including Jose Francisco Sosa, to seize Alvarez and bring him to the U.S. for trial, which they subsequently implemented.¹⁹³ They abducted Alvarez from his house and flew him to El Paso, Texas, where federal officers arrested him.¹⁹⁴ Once in the U.S., Alvarez tried to obtain a dismissal of the indictment, claiming that his seizure violated an extradition treaty and constituted “outrageous governmental conduct.”¹⁹⁵ At trial in 1992, the district court granted Alvarez’s motion for acquittal and he returned to Mexico.¹⁹⁶

From Mexico, Alvarez brought a civil action¹⁹⁷ alleging false arrest and seeking damages from the U.S. under the Federal Tort Claims Act (FTCA), and alleging a violation of the law of nations against Sosa under ATCA.¹⁹⁸ Before the case reached the Supreme Court, the district court dismissed the FTCA claim, but awarded summary judgment and \$25,000 in damages to Alvarez for the ATCA claim.¹⁹⁹ However, a three-judge Ninth Circuit panel reversed the dismissal of the FTCA claim while affirming the monetary ATCA judgment,²⁰⁰ a decision affirmed by a divided *en banc* court.²⁰¹ It was this judgment that the Supreme Court reversed in *Sosa*, denying Alvarez relief under both the FTCA and ATCA.²⁰²

THE JURISDICTION ISSUE

In deciding whether Alvarez’s arrest qualified as a violation of the law of nations, the Court first had to answer the jurisdiction question. Is ATCA purely jurisdictional, as the U.S. government and the corporate lobby had argued,²⁰³ and therefore does not allow a plaintiff to bring a case, or does the statute itself authorize federal courts to hear human rights claims? The Court held that although the statute is only jurisdictional, jurisdiction in 1789 empowered courts to hear a certain narrow class of claims.²⁰⁴ Today’s federal courts, therefore, are authorized to hear the

claims that are as universally recognized today as those that were actionable in 1789.²⁰⁵

In concluding that ATCA was (and is) jurisdictional “in the sense of addressing the power of the courts to entertain cases concerned with” violations of the law of nations,²⁰⁶ the Court determined that ATCA was intended for immediate use when it was drafted. The Court considered not only the legal, but also the practical, effect of the Administration’s interpretation, and found that “it would have been passing strange” for the Congress to have enacted a law that couldn’t be used until Congress passed yet another law.²⁰⁷

THE DOOR AJAR, NOT WIDE OPEN

The corporate lobby argued that if ATCA were allowed to continue as the basis for human rights claims, the “awakening monster” would be unleashed and thousands of claims would result in untold damage to the world economy as well as to the U.S. judicial system.²⁰⁸ Though it is far from clear that there was ever a danger of proliferating, unwarranted ATCA cases, the Court in *Sosa* squarely addresses this concern by reaffirming that only a “very limited category” of cases are actionable under ATCA.²⁰⁹ Throughout the *Sosa* opinion, the Court emphasizes the restricted nature of the class of the possible claims: “cases concerned with a certain subject,” “a relatively modest set of actions,” “only a very limited set of claims,” “a narrow set of common law actions derived from the law of nations,” and “the modest number of international law violations with a potential for personal liability.”²¹⁰

The *Sosa* Court looked backward to 1789 in order to discern what should be actionable today. When ATCA was enacted in 1789, the contemporaneous common law provided the cause of action for a limited set of international law violations, which at that time included only piracy, the right to safe conduct, and the rights of ambassadors.²¹¹ These three crimes serve as the models for which violations are actionable today.²¹² In trying to define the scope of this “very limited category” of cases, the *Sosa* Court examined ATCA jurisprudence since *Filartiga*²¹³ to ascertain which claims have the same “definite content and acceptance among civilized nations [as] the historical paradigms familiar when [ATCA] was enacted.”²¹⁴

Since *Filartiga*, courts have addressed the question of what constitutes a violation of international law, or the law of nations. The *Filartiga* court,



in deciding whether torture was a violation of the law of nations, looked at whether countries *felt* legally obligated to refrain from torture, as well as the opinions of judges and legal experts, and concluded that “[F]or purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind.”²¹⁵

The *Sosa* Court affirmed the line of cases commencing with *Filartiga* holding that, in order for an international norm to be actionable, it must be specific or definable, universal and obligatory.²¹⁶ While the Court acknowledged that the determination of whether a norm is specific or definite enough for ATCA jurisdiction “involves an element of judgment”

on the part of federal courts, there is already some case law to give guidance. ATCA case law to date suggests that a norm is specific or definable if either 1) there is concrete criteria for a court to identify whether a norm is violated;²¹⁷ or 2) there is universal consensus that the *alleged conduct* violates international law, even if every aspect of the norm is not entirely clear.²¹⁸ In finding that Alvarez’s arbitrary arrest claim did not qualify, the Court found Alvarez’s “general prohibition” against arbitrary detention to be too broad to rise to the level of an international law violation.²¹⁹ Critically, however, in affirming the careful methodology courts have already used to determine whether a violation exists, the Supreme Court has preserved the existing body of ATCA case law.

OTHER LIMITS

Although the *Sosa* Court never explicitly mentions the War on Terror, it squarely addresses ATCA’s potential impact on foreign affairs. In a lengthy and detailed analysis of why courts should exercise caution in hearing new claims under ATCA, the Court talks about the dangers of judicial interference with the foreign policy branches of the government, namely, the Legislative and Executive branches.

In analyzing how a court should go about deciding whether a cause of action falls under ATCA, the Court recommends that it consider “the practical consequences of making that cause available to litigants.”²²⁰ And (in a very long footnote), the Court suggests that where the Executive branch views a case as having negative foreign policy impact, as in the South Africa Apartheid cases, courts should “give serious weight” to that opinion.²²¹ This should assuage the Administration’s concerns about judicial interference with Executive functions. At the same time, the Court in *Sosa* makes clear that deference to the political branches should occur on a case-by-case basis, and not in the wholesale fashion that the Administration had desired.²²²

Finally, the *Sosa* Court suggests that there may be other limitations on the availability of relief in future cases. For example, in certain cases, a court may require that victims exhaust their available remedies in their domestic locales before seeking redress in U.S. courts.²²³ The combination of actual limitations the Court describes—i.e. its reaffirmation of the lower courts’ recognition of the need for the claim to be specific, universal, and obligatory, deference to the political branches on thorny foreign policy matters—as well as the potential for additional, future restrictions,

demonstrates the hyperbole of both the Administration’s and the corporate lobby’s attacks. ATCA does not grant an unfettered license to sue, as its critics would claim; it never did, and with the *Sosa* decision, its restrictive nature is apparent.

ATCA’S FUTURE

As described in this report, ATCA’s use as a tool to hold private actors, including corporations, as well as states accountable for human rights violations has subjected the statute to serious and critical scrutiny. Governmental and corporate detractors alike, as well as ATCA supporters, have long awaited the Supreme Court’s ruling in *Sosa* to aid in forecasting the future course of ATCA cases. While predicting the future is, necessarily, an inexact art, the *Sosa* opinion gives some insight into what state and private actors might anticipate from future ATCA litigation.

It seems that private actors are still subject to suit under ATCA, since the majority opinion praised a sphere where “[international law] rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”²²⁴ In discussing standards for assessing claims, the Court stated that one consideration would be “whether international law extends the scope of liability [] to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual,” which suggests that individuals and corporations are, indeed, subject to suit when sued appropriately.²²⁵ Expressing the disappointment of the business community, a lawyer with the U.S. Chamber of Commerce admitted, “We didn’t succeed at cutting these cases off at the pass. We’re back to square one.”²²⁶ With *Sosa* decided, ATCA cases against corporations for complicity in gross abuses, such as *Doe v. Unocal*, can proceed.

For John Doe IX, Jane Does II and III and the other plaintiffs in cases against Unocal and others, their chance at justice has not been eliminated. Claims such as theirs for rape, torture and widespread forced labor would seem to fall into the category of those well-defined and universally condemned abuses for which ATCA was designed and still stands. Of course, ATCA can never restore the security or freedom that they lost as a result of Unocal’s, of Shell’s, or Chevron’s pipeline, and they must still live in hiding, risking their lives to pursue their claims in U.S. courts. The struggle is still one of David and Goliath proportions. But the slingshot that ATCA represents to these people is still available to them.

ENDNOTES

- ¹ 28 U.S.C. § 1350 (2000).
- ² See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *THE AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (Institute for International Economics, Washington, DC 2003).
- ³ Third Amended Complaint, para. 120, *Doe v. Unocal*, CV 96-6959-RAP (BQRx), 963 F. Supp. 880 (C.D. Cal. 1997), available at <http://www.earthrights.org/unocal/fed-complaint.shtml> (last visited June 9, 2004).
- ⁴ *John Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002), vacated & rehearing en banc granted by *Doe v. Unocal Corp.*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003).
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ Third Amended Complaint, para. 33, *supra* note 3.
- ⁸ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).
- ⁹ *Id.*
- ¹⁰ See *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (Argentine plaintiffs sued Argentine general for abuses committed against their relatives by Argentine soldiers); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Guatemalan former Minister of Defense sued for abuses committed by soldiers under his command); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) (class of plaintiffs including everyone who suffered under the Marcos regime sued for abuses by soldiers and government authorities of the Philippines in the 1970's and 1980's); *Abebe- Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996) (local Ethiopian leader sued for torture).
- ¹¹ See *Filartiga*, 630 F.2d at 887.
- ¹² See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Filartiga*, 630 F.2d at 884; *Forti*, 694 F. Supp. at 709.
- ¹³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2), cmt. c (1987).
- ¹⁴ See *Kadic*, 70 F.3d at 242–43.
- ¹⁵ See *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986).
- ¹⁶ See *Kadic*, 70 F.3d at 241–42.
- ¹⁷ See *Marcos*, 25 F.3d at 1475.
- ¹⁸ See *Filartiga*, 630 F.2d at 884.
- ¹⁹ See *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).
- ²⁰ *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992).
- ²¹ *Sosa v. Alvarez-Machain*, 2004 U.S. LEXIS 4763 at *70 (U.S. June 29, 2004).
- ²² The first wave of ATCA cases includes those cases filed between 1979 and 1982.
- ²³ See *supra* note 12.
- ²⁴ See *Kadic*, 70 F.3d 232.
- ²⁵ See *id.* at 239.
- ²⁶ See *id.* at 236–240.
- ²⁷ See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).
- ²⁸ See *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), vacated and remanded *sub nomine*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

- ²⁹ See *Doe*, 963 F. Supp. 880 (holding that corporations and their executive officers can be liable under the Alien Tort Claims Act for violations of international human rights norms in foreign countries and that U.S. courts have the authority to adjudicate such claims).
- ³⁰ See *Beanal*, 969 F. Supp. at 362.
- ³¹ See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).
- ³² See *Bowoto v. Chevron*, No. C99-2506 CAL (N.D. Cal. July 2000).
- ³³ See Appendix A.
- ³⁴ See Letter from William H. Taft, IV, Legal Advisor, dated July 29, 2002, available at <http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf> (last visited June 24, 2004).
- ³⁵ Brief for the U.S. as amicus curiae, *Doe v. Unocal*, *supra* note 3, available at <http://earthrights.org/atca/dojbrief.pdf> (last visited June 24, 2004).
- ³⁶ See Supplemental Statement of Interest of the USA, *Doe v. ExxonMobil*, No. 1-01-CV-1357-LFO (D.D.C. July 14, 2003), available <http://www.laborrights.org/projects/corporate/exxon/Amicus%20State%20Dept%20Exxon.pdf> (last visited June 22, 2004).
- ³⁷ Brief for the U.S. supporting Petitioner, *Sosa v. Alvarez-Machain*, Case No. 03-339, available at http://www.nosafehaven.org/_legal/atca_con_USsupportingSosa.pdf (last visited June 24, 2004).
- ³⁸ Judge Bork, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798–823 (D.C. Cir. 1984) disagreed with *Filartiga*, but each of the three judges on the panel wrote a separate concurrence, only agreeing on the outcome (to dismiss the case). No court has subsequently adopted Judge Bork's approach.
- ³⁹ *Sosa*, 2004 U.S. LEXIS 4763 at *57–58.
- ⁴⁰ *Id.* at *42.
- ⁴¹ The National Foreign Trade Council and the U.S. Council on International Business are among the most vocal and active corporate members in the attack on ATCA. Some members of the NFTC include ExxonMobil, Occidental Petroleum Co., Halliburton, Caterpillar, Dow Chemical, and Unocal. While the NFTA website does not have a membership list, one of its projects, USA*Engage, does. It's available at http://www.usaengage.org/about_us/members/index.html (last visited June 24, 2004). For a list of USCIB members, see <http://www.uscib.org/index.asp?documentID=1846> (last visited June 24, 2004).
- ⁴² Ken Auletta, *Fortress Bush*, THE NEW YORKER, Jan. 19, 2004, at 64.
- ⁴³ Some examples of massive human rights abuses include the African slave trade, the Armenian genocide, the American “Indian problem,” the Chinese Cultural Revolution, the Soviet Gulag, the Holocaust, the Cambodian killing fields, apartheid, the Rwandan genocide, the Argentine disappeared, the abuses of Burma's military regime, ethnic cleansing in the Balkans, abuses against women by the Taliban, and the current genocide in the Sudan. This is an incomplete list.
- ⁴⁴ See, e.g., *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993) (summary execution); *Kadic*, 70 F.3d 232 (genocide, war crimes, summary execution, torture); *Abebe-Jira*, 72 F.3d 844 (torture); *Xuncax*, 886 F. Supp. 162 (summary execution, torture, disappearance, cruel, inhuman or degrading treatment).
- ⁴⁵ Department of Justice Brief for the Petitioner, *Sosa*, 2004 U.S. LEXIS 4763, available at <http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.html> (last visited June 24, 2004).

ed July 1, 2004).

⁴⁶ *Filartiga*, 630 F.2d 876.

⁴⁷ See *Statement of Dolly Filartiga – March 29, 2004*, No Safe Haven Website, available at http://www.nosafehaven.org/state_filartiga.html (last visited June 25, 2004).

⁴⁸ *Filartiga*, 630 F.2d. at 884.

⁴⁹ *Id.* at 881.

⁵⁰ *Torture Victim Protection Act*, 28 U.S.C. § 1350 (2004).

⁵¹ *Sosa*, 2004 U.S. LEXIS 4763 at *57-58.

⁵² *Id.* at *42.

⁵³ *Id.* at *71, citing with approval *Marcos*, 25 F.3d at 1475 (“actionable violations of international law must be of a norm that is specific universal, and obligatory”).

⁵⁴ *Forti*, 672 F. Supp. at 1540.

⁵⁵ See *Kadic*, 70 F.3d 232.

⁵⁶ *Id.*

⁵⁷ See *Trajano*, 978 F.2d 493.

⁵⁸ See *Xuncax*, 886 F. Supp. 162.

⁵⁹ See *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983).

⁶⁰ See *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342 (D.N.J. 2003).

⁶¹ See *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

⁶² See *Jama v. U.S. Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353 (D.N.J. 1998).

⁶³ See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

Some limited exceptions to this general immunity exist, such as cases in which the foreign state has waived its immunity, and those involving commercial activity occurring in or having a direct effect in the United States.

⁶⁴ *Kadic*, 70 F.3d. 232.

⁶⁵ “Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” *Id.* at 239.

⁶⁶ *Id.* at 245.

⁶⁷ See Beth Stephens, *STEFAN A. RIESENFELD SYMPOSIUM 2001: The Amoral of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 49 (2002).

⁶⁸ See *Jota*, 157 F.3d (Texaco/Ecuador). While ultimately dismissed in U.S. courts on *forum non conveniens* grounds that it should be heard in Ecuador, the Texaco case has mobilized indigenous communities in the Amazon and changed the landscape for oil companies operating in the region. Furthermore, the case has been refiled in Ecuadorian court, and the U.S. court held that Texaco (now ChevronTexaco) must comply with the Ecuadorian judgment.

⁶⁹ *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 536 (S.D.N.Y. 2001) (dismissing on *forum non conveniens* grounds because the record established that the case had “everything to do with Ecuador and nothing to do with the United States”).

⁷⁰ *Beanal*, 969 F. Supp. at 372-73, *dis’d* *Beanal v. Freeport-McMoran, Inc.*, 1998 WL 92246 (E.D. La. March 3, 1998) (amended complaint failed to state a claim for genocide) (unpublished opinion), *aff’d*, 197 F.3d 161 (5th Cir. 1999).

⁷¹ See *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, (S.D.N.Y. Feb. 28, 2002).

⁷² *Doe v. Unocal Corp.*, 963 F. Supp. 880.

⁷³ *John Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, *supra* note 4.

⁷⁴ See State Court Complaint, *Unocal Corp. v. Los Angeles County Superior Court*, 2003 Cal. LEXIS 3270 (Cal. May 14, 2003), available at <http://www.earthrights.org/unocal/statecomplaint2003.doc> (last viewed June 28, 2004) (alleging, for example, wrongful death, negligence, recklessness, conversion, false imprisonment, assault and battery, etc).

⁷⁵ *Doe v. Unocal Corp.*, 963 F. Supp. 880, *supra* note 3. The Ninth Circuit is reconsidering the case *en banc* (all the judges in the Circuit), at Unocal’s request.

Notwithstanding, the court in *Talisman* also held that a corporation could be liable for aiding and abetting in human rights abuses. *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

⁷⁶ See, e.g., *HUFBAUER & MITROKOSAS*, *supra* note 2.

⁷⁷ *Sosa*, 2004 U.S. LEXIS 4763 at *71 (fn 20).

⁷⁸ See, e.g., *Filartiga*, 630 F.2d 876 (former Inspector General of Police left Paraguay and relocated to New York); *Avril*, 812 F. Supp. 207 (former head of Haitian military left Haiti and moved to Florida); *Xuncax*, 886 F. Supp. 162 (D. Mass. 1995) (former Guatemalan Minister of Defense sued while in the U.S. attending Harvard’s Kennedy School of Government).

⁷⁹ See, e.g., 2003 *Lifeworth Annual Review of Corporate Responsibility*, New Academy of Business, available at <http://www.lifeworth.net/> (last visited June 25, 2004).

⁸⁰ For an overview of earlier corporate abuses, see Stephens, at 49-52, *supra* note 67.

⁸¹ Some examples of Holocaust cases include *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Frumkin v. JA Jones, Inc.* (*In re Nazi Era Cases Against German Defendants Litig.*), 129 F. Supp. 2d 370 (D.N.J. 2001); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

⁸² *John Doe I v. Unocal Corp.*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000) ,, (allegations in summary judgment).

⁸³ See, e.g., *Talisman*, 244 F. Supp. 2d 289 (company allegedly allowed military forces to use its facilities to stage operations directed against civilians); *ExxonMobil*, No.1-01-CV-1357-LFO, *supra* note 36 (company allegedly provided logistical assistance and equipment to military forces who tortured and killed civilians).

⁸⁴ For example, on June 8, 2004, the Center for Constitutional Rights filed a suit against the private security firms Titan Corporation, California and CACI International for committing torture at Abu Ghraib prison in Iraq. See *CCR Files Lawsuit Against Private Contractors for Torture Conspiracy*, CCR Website, at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=TutDBqRhAY&Content=387> (last visited June 22, 2004).

⁸⁵ See, e.g., *Saman Zia-Zarifi, Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOR. AFF. 81, 82 (1999) (“It is simply that these MNCs tend to be among the largest companies in the world, and their widespread activities in search of resources and markets bring them into contact with a variety of tragic human and environmental situations across the globe. Furthermore, resource extraction MNCs are particularly prone to associate with egregious violators of human rights because they have to dig for resources where they find them, typically in the developing world, and where the resource is one of the main sources of income for the government; all this in addition to the massive physical presence demanded for

resource extraction work, including construction of large-scale infrastructure and intensive use of labor.”) (internal footnotes omitted)

⁸⁶ *Halliburton's Cheney sees worldwide opportunities, blasts sanctions*, PETROLEUM FINANCE WEEK, Apr. 1, 1996.

⁸⁷ John Wade, *Violence, Crime Continues to Cast Shadow over Future Oil Investment in Colombia*, OIL & GAS J., Jan. 17, 2000, at 32.

⁸⁸ See *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d at 1300.

⁸⁹ *Id.* at 1298 (citing deposition testimony filed under seal).

⁹⁰ *Id.*

⁹¹ Amended Complaint, *Talisman*, 244 F. Supp. 2d 289, available at <http://www.iabolish.com/classaction/Final%20text%20of%20complaint%20ATCA.pdf> (last visited June 25, 2004).

⁹² *John Doe I v. Unocal Corp.*, 110 F. Supp.2d at 1296.

⁹³ See *id.* at 1301. A Unocal briefing document states that “[a]ccording to our contract, the government of Myanmar is responsible for protecting the pipeline. There is military protection for the pipeline and, when we have work to do along the pipeline that requires security, then military people will, as a matter of course, be nearby.” (Richardson Decl., Ex. 73 at 13940). Unocal CEO Roger Beach was asked about this briefing document in his deposition. He testified that “[i]t is my understanding that the Union of Myanmar was going to provide general security in the area of the pipeline, in its capacity as the sovereign government of Myanmar. I have no understanding with regard to whether or not Myanmar had a contractual obligation to provide such security, or whether the security provided by Myanmar was provided pursuant to any contract.” (Beach Dep. 129:21).

⁹⁴ *Id.* at 1301 (Hollingsworth Decl., Ex. A at 23).

⁹⁵ *Id.* (5/10/95 letter from Robinson to Total).

⁹⁶ *Id.* at 1302 (St. Department cable dated 5/20/96) (Collingsworth Decl., Ex. A at 51-52.)

⁹⁷ EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES 10 (2000).

⁹⁸ Since 1991, at least sixteen military battalions, with each battalion averaging 500 soldiers, have occupied the forty-one miles of pipeline across the Tenasserim.

⁹⁹ *John Doe I v. Unocal Corp.*, 110 F.Supp. 2d at 1306.

¹⁰⁰ Third Amended Complaint, *supra* note 3.

¹⁰¹ See *John Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, *supra* note 4.

¹⁰² “Myanmar” is the historical, Burmese-language name that the current military regime, the State Peace and Development Council, imposed upon the country when it took power. The name Myanmar has negative associations for most opposition groups, including the democratically elected National League for Democracy, headed by Nobel Peace Prize winner Aung San Suu Kyi, who refers to the country as Burma.

¹⁰³ See *The Story You Haven't Heard About . . . Improving Lives in Myanmar*, Unocal Website, at

<http://www.unocal.com/myanmar/soecon.htm> (last visited June 3, 2004).

¹⁰⁴ See TOTAL DENIAL CONTINUES, *supra* note 97.

¹⁰⁵ One pipeline villager said, “All in all, I want to say that if there was not a pipeline, there would not be foreigners. If there were no foreigners, there would not be soldiers, so we could have our own . . . life as we had it before.” *Id.* at 120.

¹⁰⁶ See generally Human Rights Watch, *The Price of Oil: Corporate Responsibility and*

Human Rights Violations in Nigeria's Oil Producing Communities (Washington 1999), available at <http://www.hrw.org/reports/1999/nigeria/index.htm#TopOfPage> (last visited June 24, 2004).

¹⁰⁷ Andrew Rowell, *Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria*, Greenpeace International (Andrea Goodall ed., 1994), available at <http://archive.greenpeace.org/comms/ken/hell.html> (last visited June 22, 2004).

¹⁰⁸ *Id.*

¹⁰⁹ ENERGY INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF ENERGY, COUNTRY ANALYSIS BRIEFS: NIGERIA: ENVIRONMENTAL ISSUES (2003), available at <http://www.eia.doe.gov/emeu/cabs/nigenv.html> (last visited June 24, 2004).

¹¹⁰ See U.S. DEPARTMENT OF STATE, 1996 HUMAN RIGHTS COUNTRY REPORTS: NIGERIA, available at http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Nigeria.html (last visited June 24, 2004).

¹¹¹ KEN WIWA, IN THE SHADOW OF A SAINT (Vintage Canada 2001).

¹¹² *Wiwa v. v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 at *5 (S.D.N.Y. Feb. 22, 2002).

¹¹³ *Id.*

¹¹⁴ See *id.*

¹¹⁵ Larry Bowoto and other plaintiffs in the case against Chevron-Texaco, through their nonviolent protests, sought to protect their people from further environmental devastation that has wreaked havoc on their community. Chevron's dredging has destroyed the fresh water supply. Several villages have eroded to the point they are in danger of simply disappearing. Local peoples can no longer fish, as the river water level is too low to enable boats to travel. Chevron's activities have destroyed the environment so that communities are unable to support their basic human needs for food, water, and livelihoods. See *The Price of Oil*, at 3-9, *supra* note 106. In the report, one expert describes a canal project by Chevron as “one of the most extreme cases of habitat destruction” in the Delta. See also Christine Bustany & Daphne Wysham, *Chevron's Alleged Human Rights Abuses in the Niger Delta and Involvement in Chad-Cameroon Pipeline Consortium Highlights Need for World Bank Human Rights Investment Screen*, (Institute for Policy Studies 2000), available at <http://www.seen.org/PDFs/chevronfinal.doc> (last visited June 24, 2004).

¹¹⁶ See Fourth Amended Complaint at paras 51-56; *Bowoto v. Chevron Texaco Corp.* No. C99-2506 SI, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (defendant's motion for summary judgment denied), available at <http://www.earthrights.org/chevron/4thamendedcomplaint.doc> (last visited July 1, 2004).

¹¹⁷ *Id.* at paras 49-56; See also Amy Goodman & Jeremy Scahill, *Drilling and Killing*, THE NATION MAG., Nov. 16, 1998.

¹¹⁸ Fourth Amended Complaint at para. 56, *supra* note 116.

¹¹⁹ See *Chevron's Oil Spill in Ilaje in Nigeria's Ondo State*, Environmental Rights Action Report, July 1998, available at <http://www.waado.org/Environment/OilSpills/NigerDelta/Ilaje.html> (last visited June 22, 2004).

¹²⁰ Defendant Chevron-Texaco's motion for summary judgment was denied, and as of June 2004, discovery in the case is ongoing. See *Bowoto*, 312 F. Supp. 2d 1229.

¹²¹ See Fourth Amended Complaint at paras 58-59, *supra* note 116.

122 *Id.* at paras 60-72.

123 *Id.* at paras 56, 62-64, 66-70.

124 See Amended Complaint at 12, 14, cited in *Talisman*, 244 F. Supp. 2d at 298, *supra* note 91.

125 See *Sudan: Darfur Destroyed*, Human Rights Watch Website, available at <http://www.hrw.org/reports/2004/sudan0504/> (last visited July 1, 2004).

126 See Amended Complaint at 11, 18, cited in *Talisman*, 244 F. Supp. 2d at 299, *supra* note 91.

127 *Id.* at 21.

128 *Id.* at 2.

129 *Talisman Suit to Proceed*, BBC On-Line News, March 20, 2003, at

<http://news.bbc.co.uk/1/hi/business/2868047.stm>, (last visited June 22, 2004).

130 Amended Complaint at 32, cited in *Talisman*, 244 F. Supp. 2d at 300, *supra* note 91.

131 *Sudan: The Human Price of Oil*, Amnesty International Website, available at <http://web.amnesty.org/library/Index/engAFR540012000> (last visited June 10, 2004).

132 *Talisman selling controversial Sudan oil stake*, CBC News, October 31, 2002, available at http://www.cbc.ca/stories/2002/10/30/talisman_021030 (last visited June 9, 2004).

133 See, e.g., *The Story You Haven't Heard About: Improving Lives in Myanmar*, *supra* note 105; *Chevron Nigeria Limited*, available at <http://www.petroinfonigeria.com/chevron.html> (last visited June 11, 2004); *Shell and the community*, available at

http://www.shell.com/home/Framework?siteId=nigeria&FC2=/nigeria/html/iwgen/our_community/zzz_lhn.html&FC3=/nigeria/html/iwgen/our_community/dir_shell-com_1505_1122.htm (last visited June 10, 2004).

134 According to the OECD, which has promulgated Guidelines for Multinational Enterprises, “Critics of these private initiatives view them as little more than public relations ploys and would favour replacing them with binding rules involving sanctions and government-directed enforcement mechanisms. Only these arrangements, they feel, will give norms for business conduct enough “teeth” to influence corporate behaviour in a meaningful way. This position is overly harsh and fails to account for the subtlety of the processes that underpin corporate conduct and misconduct. Recent thinking in this area...says that any kind of conduct or misconduct — by individuals or by businesses — is determined by factors that go beyond law statutes, that cannot be written down in contracts or international agreements or discerned by looking at particular enforcement apparatus....Generally, high compliance with a rule or norm reflects the broad consent of individuals and organisations. In effect, they are willing to comply with a given norm because of they believe that it appropriate and necessary (personal conviction) or because they are under pressure from family, friends and associates to comply (peer pressure). Without this agreement and implied consent (called “voluntary compliance” in enforcement circles), many rules or norms would be prohibitively costly to enforce using methods that are acceptable to democratic societies.” *Corporate Responsibility FAQ*, OECD Website, at http://www.oecd.org/document/33/0,2340,en_2649_33765_1933025_1_1_1_37439,00.html (last visited June 22, 2004).

135 See *The Global Compact: Overview*, Global Compact Website, at

<http://www.unglobalcompact.org/Portal/Default.asp> (last visited June 11, 2004).

136 *Id.*

137 See *What is the Global Compact*, at

<http://www.unglobalcompact.org/Portal/Default.asp> (last visited June 24, 2004). This initiative brings together large corporations, U.N. agencies, and selected large non-governmental organizations. The GC’s members include BP, Dupont, Nike, Newmont Mining, Royal Dutch/Shell, and Talisman, some of the worst corporate offenders.

138 See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 1059.

139 The International Criminal Court’s (ICC) jurisdiction depends on the cooperation of States. If a government (like the U.S.) does not recognize the ICC’s jurisdiction, it may challenge the Court’s authority to hear cases against its own citizens. The current U.S. Administration has not ratified the Rome Statute authorizing the creation of the ICC and, in fact, has sought to undermine the Court. The U.S. government undoubtedly would challenge any action in the ICC against a U.S. corporation. See Stephen Kabel, *Our Business Is People (Even If It Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of Congo*, 12 TUL. J. INT’L & COMP. L. 461 at 475-6 (Spring 2004).

140 America has led the most sustained attack on human rights since the UN’s creation, according to a recent report by Amnesty International. AMNESTY INTERNATIONAL REPORT 2004, available at <http://web.amnesty.org/report2004/index-eng> (last visited June 11, 2004).

141 It is also consistent with the Administration’s disdain for international law and cooperation, evidenced by numerous examples, including: the controversial move of pre-emptive war against Iraq and its failures to comply with international humanitarian law as an occupying force in the aftermath; its undermining of international treaties including the Rome Statute (International Criminal Court), the Kyoto Protocol (global warming), the Anti-Ballistic Missile, Non-Proliferation, and Land Mine Ban treaties; and its treatment of prisoners of war and detainees at prisons in Iraq and Guantanamo Bay, in violation of the Geneva Conventions and other international treaties and norms.

142 *Sosa*, 2004 U.S. LEXIS 4763 at *71.

143 *Id.*

144 *Id.* at *72 (fn 21).

145 In *Tel-Oren*, 726 F.2d 774, *supra* note 38 (D.C. Cir. 1984), the Court rejected the ATCA claim without agreeing on the meaning of ATCA itself. Of the three-judge panel, Bork disagreed with the Filartiga holding, *id.* at 798-823 (Bork, J., concurring), while another agreed with it, *id.* at 775-98 (Edwards, J., concurring), and the third would have dismissed the case on political question grounds, *id.* at 823-27 (Robb, J., concurring).

146 HUFBAUER, at 1-2, *supra* note 2.

147 *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003); *cert. granted*, *Sosa v. Alvarez-Machain*, 124 S. Ct. 807 (U.S. 2003).

148 The more than 650 members include Bechtel, the Business Roundtable, ChevronTexaco, ExxonMobil, and Unocal. See http://www.usaengage.org/about_us/members/index.html (last visited June 8, 2004).

149 *Economy and Anti-Terrorism Top Public’s Policy Agenda*, PEW RESEARCH CENTER FOR

THE PEOPLE AND THE PRESS, (Jan. 15, 2004), available at <http://people-press.org/reports/display.php3?ReportID=201> (last visited June 14, 2004) (78% of respondents place top priority on protecting the U.S. against future terrorist attacks).

¹⁵⁰ See, e.g., Dexter Filkins, *Testimony Ties Key Officer to Cover-Up of Iraqi Death*, N.Y. TIMES, June 25, 2004; Edward Wong, *Top Commanders Face Questioning on Prison Abuse*, N.Y. TIMES, June 22, 2004.

¹⁵¹ Brief Supporting Petitioner at 30, *Sosa*, 2004 U.S. LEXIS 4763. available at <http://sdshh.com/Alvarez/Humerto3%5B1%5D.03-485.pdf> (last viewed July 1, 2004).

¹⁵² *Id.*

¹⁵³ *Id.* at 53.

¹⁵⁴ *Argentine Republic*, 488 U.S. 428.

¹⁵⁵ 28 U.S.C. §§ 1330, 1605 (2004). The FSIA also exposes foreign governments to liability where they, or their agents, commit unreasonable acts that are not “discretionary.” 28 U.S.C. § 1605(5)(A). It is unlikely that acts in support of U.S. government counter-terrorist efforts would fall into this category.

¹⁵⁶ See, e.g., *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (Zimbabwean plaintiffs’ ATCA case against president and foreign minister for murder, torture, rape, etc. dismissed on foreign sovereign immunity grounds); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) (ATCA claims against two Saudi princes for support of terrorism dismissed on grounds they were acting in their official capacity); *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003) (FSIA does not apply to heads-of-state, so common law immunity principles apply, immunizing Nigerian head of state for acts he committed while serving in that capacity).

¹⁵⁷ *Sosa*, 2004 U.S. LEXIS 4763 at *66-67.

¹⁵⁸ *Id.* at *62-63.

¹⁵⁹ See, e.g., *Kadic*, 70 F.3d 232 (claims against Bosnian Serb leader were justiciable even though defendant might become head of Bosnian Serb state in the future); *Abebe-Jira*, 72 F.3d at 848 (a torture claim against a former Ethiopian official was justiciable); *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993) (damages suit arising out of the shooting down of a civilian Iranian airline by an American warship were justiciable).

¹⁶⁰ See *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

¹⁶¹ See *Goldstein v. United States*, 2003 U.S. Dist. LEXIS 19266 (D.D.C. Apr. 23, 2003), citing *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992).

¹⁶² 28 U.S.C. §§1346(b), 2671-2680 (2000).

¹⁶³ 28 U.S.C. §2680. For example, the “foreign activities exception” bars suits involving U.S. governmental activity abroad. In *Alvarez-Machain*, 331 F.3d at 638, the court addressed the question of whether activities planned and guided from the U.S. but executed abroad, are protected under the foreign activities exception. That court found that, where the foreign activities (in this case a transborder abduction) were planned, approved, and supervised from the U.S., the government was subject to suit under the “headquarters” doctrine. However, the scope of the FTCA and its exceptions are under review by the Supreme Court, per *United States v. Alvarez-Machain*, 2003 U.S. LEXIS 8573 (Dec. 1, 2003). The “discretionary function” exception protects governmental employees and agencies as they undertake discretionary decisions and actions as part of their jobs. See *Goldstein*, 2003 U.S. LEXIS 8573 (Dec. 1, 2003). The “combatant activities” exception protects the government for not only actual combat,

but also activities connected to that combat, during wartime. See *Koohi*, 976 F.2d at 1333.

¹⁶⁴ 18 U.S.C. § 2331 (2004).

¹⁶⁵ *Id.*; See *Estate of Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 100 (D.R.I. 2001) (upholding subject matter jurisdiction in case alleging defendants’ complicity in shooting death of U.S. citizen in Israel); *Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) (denying motion to dismiss claim by parents of man killed in Israel who alleged that defendants had engaged in international terrorism by supplying funding to groups responsible for the attack).

¹⁶⁶ See, e.g., *Burnett*, 292 F. Supp. 2d (dismissing suit against Saudi princes for alleged support to terrorists in 9/11 attack on lack of personal jurisdiction and sovereign immunity grounds).

¹⁶⁷ 22 U.S.C. § 2304(a)(1) (1994).

¹⁶⁸ 22 U.S.C. §§ 2151n (2004); 19 U.S.C. § 2464 (2004).

¹⁶⁹ 22 U.S.C. § 6412 (2004).

¹⁷⁰ *Accord*, *Doe v. Unocal Corp.*, 963 F. Supp. at 893 (where “the coordinate branches of government have already denounced the foreign state’s human rights abuses, it is hard to imagine how judicial consideration of the matter will [] substantially exacerbate relations...”).

¹⁷¹ Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, reprinted at 12 HASTINGS INT’L AND COMP. L.REV. 34, 46 (1988).

¹⁷² *Sosa*, 2004 U.S. LEXIS 4763 at *72 (fn 21).

¹⁷³ *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”).

¹⁷⁴ See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483 (D.N.J. 1999) (in case for damages for forced labor in WWII, court found executive branch had reserved authority for addressing reparations through peace treaties); *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (finding dismissal on political question grounds necessary as U.S. government declared lawsuit could negatively affect peace process).

¹⁷⁵ *Kadic*, 750 F.3d at 150; See also *John Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 ((citing *Kadic*), *supra* note 4).

¹⁷⁶ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (in a case against Cuban authorities for expropriation of property where the court found property expropriation not clearly in violation of international law).

¹⁷⁷ HUFBAUER at 1, *supra* note 2.

¹⁷⁸ See Appendix A.

¹⁷⁹ *Judicial facts and figures*, Administrative Office of U.S. Courts, available at <http://www.uscourts.gov/judicialfactsfigures/contents.html#tables> (last visited June 28, 2004). Over 16,000,000 civil cases were filed in state courts, according to the National Center for State Courts, *Civil: Examining the Work of the State Courts, 2003*, National Center for State Courts, available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Civil.pdf (last visited June 28, 2004).

¹⁸⁰ See Appendix A.

¹⁸¹ See, e.g., *Aguinda*, 303 F.3d (dismissing case on a FNC basis and finding that Ecuador provided a more appropriate legal forum).

182 See, e.g., *id.*; see also *United Bank for Afr. PLC v. Coker*, 2003 U.S. Dist. LEXIS 20880 (S.D.N.Y. 2003) (employee’s counterclaims in RICO action brought by Nigerian bank dismissed because Nigerian action was preferable and Nigeria offered an adequate forum).

183 *John Doe I v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 at *36, *supra* note 4.

184 HUFBAUER at 2, *supra* note 2.

185 See, e.g., *ExxonMobil Begins Development of Yoho Offshore Project in Nigeria*, ExxonMobil Website, available at http://www.exxonmobil.com/Corporate/Newsroom/Newsreleases/xom_nr_290802.asp (last visited June 16, 2004); ChevronTexaco, *Powering Performance: 2003 Annual Report*, available at <http://www.chevrontexaco.com/investor/annual/2003/download/> (last visited June 25, 2004).

186 Foreign Corrupt Practices Act, 22 C.F.R. § 709.1 (2004).

187 *Sosa*, 2004 U.S. LEXIS 4763 at *71.

188 *Id.* at *65.

189 *Id.* at *81-82.

190 Factual background taken from a summary in *Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003) (en banc).

191 *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

192 *Alvarez-Machain v. United States*, 331 F.3d at 609.

193 *Id.*

194 *Id.*

195 The Central District of California agreed, and the Ninth Circuit affirmed, but the Supreme Court reversed in *Alvarez-Machain*, 504 U.S. at 658, 670 (holding that the fact of Alvarez’s forcible seizure did not affect the jurisdiction of a federal court).

196 Described in *Sosa*, 2004 U.S. LEXIS 4763 at *12.

197 In addition to *Sosa* and the U.S., others sued in the lawsuit included: DEA operative Antonio Garate-Bustamante, five unnamed Mexican civilians, and four DEA agents. *Id.* at *12-13; *Alvarez-Machain v. United States* 331 F.3d at 610.

198 See *Alvarez-Machain v. United States*, 331 F.3d 604. The *Federal Tort Claims Act*, 28 U.S.C. § 1346 (2004), authorizes suit for “personal injury...caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” § 1346(b)(1).

199 *Alvarez-Machain v. United States*, 1999 U.S. Dist. LEXIS 23304 (C.D. Cal., Mar. 18, 1999).

200 *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001) (decided by a three-judge panel).

201 *Alvarez-Machain v. United States*, 331 F.3d at 641.

202 *Sosa*, 2004 U.S. LEXIS 4763 at *14.

203 See text, *supra* pp. , and accompany footnotes.

204 The types of claims available in 1789 were violations of the then-law of nations, which included piracy, violations of the right to safe conduct, and infringement on ambassadors’ rights *Sosa*, 2004 U.S. LEXIS 4763 at *42-43.

205 *Sosa*, 2004 U.S. LEXIS 4763 at *71-72.

206 *Id.* at *40,

207 *Id.* at *49.

208 See HUFBAUER, at 1-2, *supra* note 2.

209 *Sosa*, 2004 U.S. LEXIS 4763 at *37.

210 *Id.* at *40, 49, 52, 57.

211 *Id.* at *71.

212 *Id.* at *43.

213 See *Filartiga*, 630 F.2d 876.

214 *Sosa*, 2004 U.S. LEXIS 4763 at *72.

215 *Filartiga*, 630 F.2d at 885, 890.. See also *Forti v. Suarez-Mason*, 672 F. Supp. at 1540, *modified in part*, 694 F. Supp. 707 (N.D. Cal. 1988) (holding that the applicable norm must enjoy the consistent and near-universal practice of states flowing from *juris opinio*, a sense of legal obligation, so as to evince the international community’s willingness to be bound by it even in a foreign court); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 97 (June 27); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102(2) & cmt. c (1987).

216 See, e.g., *Marcos*, 25 F.3d at 1475; *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).

217 See *Xuncax*, 886 F.Supp. at 184.

218 See *id.* at 187; see also *Forti*, 694 F. Supp. at 709.

219 *Sosa*, 2004 U.S. LEXIS 4763 at *77.

220 *Id.* at *71.

221 *Id.* at *71(fn 21).

222 *Id.*

223 *Id.*

224 *Id.* at *42. Additionally, the Court wrote, “The law of nations included a[n]...element...that did fall within the judicial sphere, as a body of judge-made law *regulating the conduct of individuals situated outside domestic boundaries* [emphasis added] and consequently carrying an international savor.” *Id.*

225 *Id.* at *71(fn 20).

226 Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004 (quoting lawyer Robin Conrad).

APPENDIX A

[Op-ed page advertisement in the *New York Times*, 4/9/04]

The Business of Human Rights

Suppose a foreign country engages in human rights abuses against its own people. Should corporations that happen to do business there be held liable?

In 1990, a federal grand jury indicted a Mexican national, Humberto Alvarez-Machain, for participating in the torture of an agent with the Drug Enforcement Administration. As a result, the DEA devised a plan using Mexican nationals to apprehend him in his own country.

In court, the indicted Mexican proclaimed his innocence. Following his acquittal, he sued the United States and those who arrested him. Relying in part on a 200 year-old statutory provision, he argued that his human rights were violated because of his arrest.

The U.S. Supreme Court is currently considering his case and, in the process, may help define the limits of the provision upon which he relies.

The so-called Alien Tort Provision is a single sentence in the Judiciary Act of 1789. It says, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.”

Although this case does not involve any corporation, the decision will likely have broad implications, both for foreign policy and for the international business community. That’s because lawyers have begun to use the very provision at issue here to sue not only U.S. corporations but foreign corporations as well. In these suits, the lawyers seek monetary damages for alleged human rights abuses perpetrated—not by the companies, but by the foreign governments in whose countries the corporations operate.

The Court should use this case to reign in the use of this provision because...

• *It interferes with foreign affairs* - Suits relying on this provision often require U.S. courts to judge the conduct of foreign governments against their own citizens. Such cases thrust our courts into the position of establishing U.S. foreign policy - a task our Constitution assigns to the President and Congress.

• *It discourages foreign investment* - These suits discourage companies from investing in the very countries where such investment can be an important diplomatic tool. In fact, the U.S. companies sued are often better able to promote human rights through their economic and social contributions than by packing up and leaving.

• *It permits suits against bystander companies* - Many of these suits challenge conduct that U.S. corporations do not and cannot control. In fact, often the suits do not even allege that the company directly committed any human rights abuses. Instead, the companies often face legal action simply because they relied upon the foreign government’s security services to protect their workers in dangerous, war-torn regions.

• *It is being misapplied* - The provision was never intended to justify suits against U.S. companies. It was merely a “jurisdictional” provision that sought to steer suits involving piracy into federal courts. The First Congress, hoping to avoid legal rulings that might embroil our new nation in a foreign controversy, did not want violations of the “law of nations” to be heard in a state forum. The provision, however, did not define what constituted a violation of the “law of nations.” That task was left to the Congress and the Executive Branch as the Constitution mandated.

• *It permits U.S. courts to decide international law* - The provision permits courts to decide what constitutes the “law of nations,” and enables foreigners to sue companies for violations of “international agreements” to which the U.S. itself does not subscribe.

Most everyone agrees that governments engaging in human rights abuses should be ostracized and the abusers themselves prosecuted. But, distorting the Alien Tort Provision to permit suits against companies which did not partake in any abuses will not achieve that goal.

NATIONAL FOREIGN TRADE COUNCIL
1625 K Street NW, Suite 200, Washington
DC 20006

ERI’s Rebuttal

EarthRights International
April 12, 2004

Last Friday’s *New York Times* (April 9, 2004) ran an op-ed page advertisement (“op-ad”) paid for by the National Foreign Trade Council (NFTC), a big business lobby group, that summarizes their opposition to the Alien Tort Claims Act (ATCA), an important human rights law. The op-ad, called “The Business of Human Rights,” is filled with misleading, self-serving arguments.

The ad starts off: “Suppose a foreign country engages in human rights abuses against its own people. Should corporations that happen to do business there be held liable?” The answer to this rhetorical question is obviously supposed to be “no.” And in fact it is “no.” ATCA does not allow for liability of corporations “that happen to do business” in countries that violate human rights abuses. What it allows for is liability of corporations that are complicit in those abuses. For example, Unocal, which partnered with the Burmese military in building a natural gas pipeline, knew that the military would force local villagers to work on the project and commit other egregious abuses for the project’s benefit, yet nonetheless allowed the military to provide security and build project infrastructure. Similarly, when a group of Nigerian villagers staged a peaceful protest at a Chevron platform, Chevron flew the notorious “kill and go” mobile police out to the platform. When the soldiers reached the platform, they opened fire, killing two people and injuring many others.

A more appropriate rhetorical question would be this: Suppose a company knows of, provides assistance for and benefits from gross human rights violations committed by its own business partner. Should it be held liable? We believe most Americans would say “yes.”

The NFTC says the Supreme Court should “reign (sic) in the use” of ATCA because “It interferes with foreign affairs” and requires “US courts to judge the conduct

of foreign governments against their own citizens.”

FACT: ATCA can be a positive influence on foreign affairs by demonstrating our commitment to human rights. ATCA only applies to conduct that is universally recognized to violate international law, such as extrajudicial killing, genocide, forced labor and torture. No government claims the right to engage in these abuses, and Congress has directed the State Department to document and criticize them wherever they occur. The NFTC’s suggestion that a government is free to do anything it wants to its own citizens was rejected at Nuremberg.

The NFTC says that ATCA “discourages foreign investment.”

FACT: ATCA only discourages foreign investment in cases where a company would be complicit in gross human rights violations. Surely that kind of destructive and immoral investment should be discouraged.

The NFTC says ATCA “permits suits against bystander companies.”

FACT: ATCA does NOT allow suits against companies “simply because they relied on the foreign government’s security services.” Suits may be brought if the company allows security to commit abuses on the company’s behalf. The NFTC says that the suits “do not even allege that the company directly committed any human rights abuses.” Apparently they have never heard of aiding and abetting.

The NFTC says that ATCA “is being misapplied.” They claim that ATCA was “merely a ‘jurisdictional’ provision.”

FACT: As Justice Stevens said during Supreme Court oral arguments on March 30th, no judge has ever agreed with that view. Twenty-four years of jurisprudence supports the view that ATCA does allow these lawsuits.

The NFTC says ATCA “permits US courts to decide international law.”

FACT: U.S. courts have been deciding ques-



tions of international law since the founding of our nation. The abuses at issue under ATCA are well-established violations of international law, and furthermore the events at hand would certainly be illegal in the United States.

The NFTC concludes their ad by saying “most everyone agrees that governments engaging in human rights abuses should be ostracized....” But by seeking impunity for even the worst corporate outlaws, the NFTC seeks to remove any incentive for corporations to pressure foreign governments to change.

Behind the NFTC’s supposedly princi-

pled stand is this: Its member companies, including Unocal, ExxonMobil and ChevronTexaco, simply do not want to be sued for anything that happens overseas.

ATCA is a crucial tool for justice for the victims of gross human rights abuses, and a tool of accountability for the abusers. It has been applied carefully and judiciously. Businesses operating transnationally should not be granted immunity from the fundamental human rights norms governing all of humanity.

APPENDIX B

Summaries of ATCA Cases

All cases in U.S. courts as of June 28, 2004

A. CASES AGAINST CORPORATIONS

I. Dismissed Cases

a. Dismissed on substantive legal grounds (at least in part)

Carmichael v. United Technologies Corp., 835 F.2d 109 (5th Cir. 1988). A British national brought an ATCA claim against various businesses for his imprisonment and torture in Saudi Arabia, which was dismissed for lack of sufficient service and a failure to demonstrate a tort committed in violation of the law of nations.

Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995); *cert. denied in Hamid v. Price Waterhouse*, 516 U.S. 1047 (1996).

Appellant depositors filed a class action suit against appellees, bank owners, a foreign country, and related firms on fraud, breach of fiduciary duty, misappropriation of funds, and civil RICO claims. The district court dismissed the ATCA action because the wrongs alleged by appellants did not involve a violation of international law.

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

Indonesian citizens sued a US corporation that operated a mine in Indonesia, claiming environmental damage and various forms of physical abuse by security forces. Case dismissed due to procedural problems with plaintiff’s complaint. Also, mine pollution did not violate international environmental law and plaintiffs’ cultural genocide claim was too vague.

Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000).

Canadian citizens and their Egyptian corporation brought an ATCA claim against soda manufacturer for knowingly purchasing or leasing plaintiff’s property after it was expropriated by the Egyptian government on the basis of owners’ Jewish identity. The court found that expropriation of property was not a violation of the law of nations for purposes of the ATCA claim, but remanded because the court had subject-matter jurisdiction on diversity grounds.

Mendonca v. Tidewater, Inc., 159 F. Supp. 2d 299 (E.D. La. 2001); *rehearing and writ denied in*, Mendonca v. Tidewater Inc., 2003-1015 (La.App. 4 Cir. 15/1/04), 862 So. 2d 505; *and* Mendonca v. Tidewater, Inc., 2004-0426 (La. Apr. 8, 2004), 870 So. 2d 272, *respectively*.

The court dismissed an ATCA claim by a foreign employee alleging racial discrimination as discrimination doesn't constitute a violation of the law of nations.

Aldana Villeda, et. al. v. Fresh Del Monte Produce Inc., et al., 305 F. Supp. 2d 1285 (S.D. Fla. 2003).

Plaintiffs former Guatemalan trade union leaders allege human rights violations under ATCA, TVPA, and RICO including torture, kidnapping, unlawful detention, crimes against humanity, and the denial of the right to unionize as committed by security forces that were hired by and coordinating with defendant corporation. The court dismissed the claim finding only aggravated assault – as opposed to torture – and the denial of the right to collective bargaining, both of which were not deemed violations of the law of nations.

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

The court granted defendant mining company's motion to dismiss an ATCA claim by Peruvian residents because the alleged harm to health, environment, and development by pollution did not constitute a violation of the law of nations.

Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124 (D. Colo. 2004).

Court dismissed plaintiff French businessmen's ATCA and RICO claims against numerous foreign citizens and corporations because the alleged fraud, bribery, extortion, and corruption were not actionable under the law of nations.

b. Dismissed on procedural grounds

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

A foreign national sued a US automobile maker and its German subsidiary for employing forced labor in manufacturer's factory during World War II. While the court recognized slavery as a violation of the law of nations, the court found the claim preempted by postwar reparation treaties, the applicable statutes of limitations, the political question doc-

trine, and principles of comity.

Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001).

Thousands of residents of Bhopal, India sued a US corporation for degrading treatment, as well as violations of the right to life and health and international environmental law after a deadly gas leak from its nearby chemical plant. The court held that the settlement orders by the Supreme Court of India barred the ATCA claims.

Aquinda v. Texaco, Inc., 303 F. 3d 470 (2d Cir. 2002).

Court of Appeals ultimately dismissed the case due to forum non conveniens, where Ecuadorian and Peruvian plaintiffs sued a US corporation for dumping toxic chemicals in alleged violation of international environmental law. The case is currently being litigated in Ecuadorian court and the U.S. court declared it would enforce the Ecuadorian judgment.

In Re World War II Era Japanese Forced Labor Litigation (I),

164 F. Supp. 2d 1160, (N.D. Cal. 2001), *aff'd by* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).

Plaintiffs, Chinese and Korean nationals, alleged that, as prisoners of war, the Japanese corporations named in these consolidated lawsuits forced them to work during WWII without compensation. The plaintiffs alleged that the defendant corporations were liable under ATCA, but the court granted defendants' motion to dismiss holding that although forced labor constitutes a violation of the law of nations, the plaintiffs' claims were time barred by the TVPA's analogous 10 year statute of limitations.

In Re World War II Era Japanese Forced Labor Litigation (II), 164 F.

Supp. 2d 1153 (N.D. Cal. 2001), *aff'd by* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).

In a case against Japanese corporations for forced labor during World War II, the court held that a Treaty of Peace with the Philippines precluded an ATCA claim by the Filipino plaintiffs.

Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115 (D.D.C. 2003); *appeal dismissed by* Doe v. Islamic Salvation Front, 2003 U.S. App. LEXIS 13908 (D.C. Cir. 2003).

The court dismissed the ATCA claims of assisting in crimes against human-

ity and war crimes brought by Algerian citizens and NGO groups against defendant Algerian political group because there was no associational standing and the only claim violating the law of nations—hijacking—was not supported with sufficient evidence.

II. Ongoing Cases (at least in part)

Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1987); *summary judgment granted*, Doe v. Unocal, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *rev'd in part, remanded*, Doe v. Unocal, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002); *vacated, reh'g granted en banc*, Doe v. Unocal, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003).

Burmese plaintiffs sued Unocal, a US corporation, for allegedly working with the Burmese military to conscript forced labor, kill, abuse, and rape citizens while working on a pipeline project. Similar suits against Total (French) and the Burmese state oil company were dismissed on grounds of lack of personal jurisdiction and sovereign immunity.

Arias v. DynCorp, Case No. 01-0190 (*filed* D.D.C. 2001).

Plaintiffs in Ecuador say DynCorp, a U.S. contractor, conducted unauthorized spraying of toxic herbicides over large area to kill supposed drug crops. The spraying caused congenital birth defects, irritations and blisters, and in some cases deaths. Plaintiffs allege that DynCorp knew they would cause harm and are liable for torture, crimes against humanity, and genocide under ATCA. Motion to dismiss is pending.

John Doe I v. ExxonMobil, Case No. 01CV01357 (*filed* D.D.C. 2001).

Plaintiffs in Indonesia allege that they suffered human rights violations at the hands of Indonesian military that was hired by ExxonMobil to provide security for its natural gas facilities. Plaintiffs allege that ExxonMobil hired these troops knowing they would likely engage in massive human rights violations against the local population, and that all of the claims date from 2001, well after ExxonMobil had specific knowledge of massive human rights violations and could have changed their practices. Motion to dismiss is pending.

Sinaltrainal v. Coca Cola, Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2001); *motion to dismiss for lack of personal jurisdiction and to quash service of process denied in* Sinaltrainal v. Coca-Cola Co., 16 Fla. L. Weekly Fed. D

388 (S.D. Fla 2003).

Defendants Columbian trade union and union's estate sued plaintiff Delaware corporation, subsidiary, bottler, and managers under ATCA, TVPA, and RICO for liability in the murder of union leader. The former two claims were upheld for the bottler and manager, but dismissed for the corporation and subsidiary due to a lack of subject matter jurisdiction resulting from the corporation's and subsidiary's lack of control over the bottling plant's operations.

[Ntzebesa v. Citigroup] Brown v. Amdahl Corp. (*In re* S. African Apartheid Litig.), 238 F. Supp. 2d 1379 (S.D.N.Y. 2002).

Plaintiffs are citizens of South Africa who allege damages as a result of human rights violations under the system of apartheid. Defendants are U.S.-based corporations that allegedly conducted business in South Africa under apartheid including: Citigroup, UBS AG, Credit Suisse, Barclays, Ford, IBM, GM, Royal Dutch/Shell and Westinghouse. Plaintiffs assert that by doing business in South Africa during the period of apartheid, defendants enabled the economic and political structure of apartheid to exist, develop and flourish.

Khulumani v. Barclays, Case No. 02-CV5952 (*filed* S.D.N.Y. 2002).

Plaintiffs seek to hold accountable those businesses that aided and abetted the apartheid regime and its extrajudicial killings, torture, forced labor and arbitrary detentions. The complaint, unlike the *Ntzebesa* case above, states with specificity the corporate activities in South Africa responsible for the violations suffered – designing and implementing apartheid policies, providing computers to enforce apartheid, supplying armored vehicles, violating embargoes, and providing funding that permitted expansion of apartheid apparatus. The case still is in its early stages.

Digwamaje v. Bank of America, Case No. 02-CV-6218 (*filed* S.D.N.Y. 2002).

Similar to *Khulumani*, this case alleges that practices by 85 named companies and about 1,000 corporate Does furthered apartheid. It tries to provide specific examples of corporate action in this respect. The case is still in its early stages.

Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

Plaintiff residents of Bougainville in Papua New Guinea filed a putative

class action under ATCA against British and Australian mining corporations alleging harm to environment and health, as well as incitement of a civil war. The court largely upheld the validity of the claim under ATCA but dismissed the case on the basis of the political question doctrine. Now on appeal.

Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. Lexis 3293 (S.D.N.Y. 2002).

Nigerian plaintiffs were arbitrarily detained, shot, beaten and hung by the Nigerian military government in conjunction with a multinational oil company. Though initially dismissed on forum non conveniens, the appeals court – noting a strong policy of hearing human rights cases in the US – reinstated the case for all ATCA claims but those asserting an alleged violation of his right to life, liberty, and security of person, as well as arbitrary arrest and detention.

Abdullah v. Pfizer Inc., 2003 U.S. App. Lexis 20704 (2d Cir. 2003).

The court rejected defendant pharmaceutical company’s motion to dismiss on forum non conveniens grounds and remanded to the lower court to proceed with Nigerian residents’ ATCA claim that defendant had used an epidemic situation in Nigeria to conduct biomedical experiments with untested drugs.

Bauman v. Daimler-Chrysler A.G. (*filed* C.D. Cal. 2003).

Plaintiffs survivors and families of victims filed a claim under ATCA and TVPA against defendant automobile manufacture for turning over list of trade unionists to the Argentinian government, subsequently resulting in their torture, murder, and/or disappearance. The case is still in its early stages.

Mujica v. Occidental Petroleum (*filed* C.D. Cal. 2003).

Plaintiff filed complaint on behalf of family members who were killed by bomb dropped by Colombian Air Force. The CAF was allegedly being paid by Occidental to protect the pipeline, and the bombing was allegedly jointly planned by CAF and defendants. Plaintiffs also claim that Occidental had knowledge of widespread human rights violations in Colombia by military. Plaintiffs allege war crimes and extrajudicial killings. Motion to dismiss is pending.

Estate of Rodriguez v. Drummond Co. 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

Plaintiffs (family members of victims) allege that Drummond’s management in Colombia retained and authorized paramilitaries, as well as regular military personnel, to target union leaders for murder, and provided these death squads with financial and material support in order to rid the Drummond plant of the union. Court held that plaintiffs’ claims of torture and extrajudicial killing are actionable under ATCA and TVPA, as well as (on first impression) the denial of the fundamental right to organize.

Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

Talisman Energy allegedly aided and abetted or facilitated and conspired in ethnic cleansing of Sudanese plaintiffs by Islamic Sudanese forces to “clear and protect” areas around Talisman oil concessions. The ongoing litigation (now in discovery) held that corporations are liable under international law and that ATCA claims are actionable (including genocide, war crimes, torture and enslavement).

Al Rawi v. Titan (*filed* S.D. Cal. 2004).

Plaintiff victims brought a claim under ATCA and RICO against defendant security corporations and their agents for conspiring with US officials to torture, humiliate, and abuse Abu Ghraib prisoners. The case is still in its early stages.

Bowoto v. Chevron, 2004 U.S. Dist. LEXIS 4603 (N.D. Cal. 2004).

Plaintiffs in Nigeria allege that Chevron, acting in concert with government, committed systematic violations of human rights, including summary execution, torture, as well as cruel, inhuman, and degrading treatment, to suppress peaceful protests about Chevron’s environmental practices. There have been many amended complaints and the court has denied motions to dismiss for failure to state a claim and forum non conveniens. The case is still in its early stages.

III. Successful Cases

Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997).

In a claim by a U.S. corporation and its foreign agents against a Bolivian

distributor, the court denied the defendant's motion to dismiss holding that the alleged conspiracy between private defendant and state actors, which caused plaintiff's arbitrary and inhuman detention, was justiciable under ATCA. The case has settled.

Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *defendants motion for protective order denied in Bodner v. Banque Paribas*, 202 F.R.D. 370 (E.D.N.Y. 2000).

The court denied defendant foreign banks' motion to dismiss, and held that claims against banks for aiding and abetting Vichy and Nazi regimes by converting, looting, and plundering assets belonging to plaintiff Jewish victims constituted violations of the law of nations. Case settled.

B. CASES AGAINST STATE ACTORS

I. Dismissed Cases

a. Dismissed on substantive grounds

Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983).

Lottery-winner plaintiff failed to state an actionable claim related to the ATCA in her suit regarding her alleged deprivation of property because of how the state paid her. Dismissed on summary judgment.

Brancaccio v. Reno, 964 F. Supp. 1 (D.D.C. 1997).

Canadian serving time in US prison was denied injunctive relief under the ATCA after requesting transfer to Canada.

Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998).

On international law claims, the court held that although arbitrary arrest and detention are actionable, the arrest of Martinez (a Mexican) by the LA Police Dept and the City of LA was not arbitrary. Only domestic claims of false imprisonment and negligence continue.

Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.C. 2000).

Plaintiffs brought suit against Chinese government, bank, and manufacturer for wrongful imprisonment and forced labor. Action dismissed because plaintiffs failed to show corporation acted as *de facto* state actor. *Jogi v. Piland*, 131 F. Supp. 2d 1024 (C.D. Ill. 2001).

Plaintiff, charged with aggravated battery with a firearm, claimed that defendant law enforcement officers violated the Vienna Convention

because they failed to advise him of his right to a consulate. The court dismissed the case for failure to state a tort in violation of the law of nations.

Bieregu v. Ashcroft, 259 F. Supp. 2d 342 (D.N.J. 2003).

A foreign, *pro se* prison inmate claimed he did not have notice of his right to consult a consular official, but the court held that he did not allege the commission of a tort, as required under the ATCA.

Alvarez-Machain v. U.S., 331 F.3d 604 (9th Cir. 2003) *reversed by Sosa v. Alvarez-Machain*, 542 U.S. ____ (2004).

Mexican citizens, helping the Drug Enforcement Administration, kidnapped another Mexican citizen and brought him to the US where he was tried and acquitted for alleged involvement in the death of a DEA agent. On appeal, the Supreme Court in *Sosa* reversed the lower court holding that the abduction was justiciable under ATCA.

b. Dismissed on procedural grounds

Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996).

The court did not decide on whether the Marcos' estate is liable under the ATCA for cruel, inhuman or degrading treatment, since plaintiffs' claims of torture and arbitrary detention had already been successful.

Rosner v. U.S., 231 F. Supp. 2d 1360 (S.D. Fla. 2002).

Plaintiffs seeking reparation (from private corporations) as the descendants of African slaves were denied recovery for prudential and standing reasons.

II. Ongoing Cases

Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989).

Abused Filipino citizens filed a class action against soldiers and authorities of the Philippine government, including Ferdinand and Imelda Marcos, for torture, extrajudicial killing, and arbitrary detention. Parts of the cases are still pending, but a monetary recovery is possible.

Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996).

Cabiri sued the Ghanaian Deputy Chief of National Security for torture and detainment when sent back to Ghana on government business. Defendant's motion to dismiss based on jurisdiction and immunity denied.

Jama v. U.S. INS, 22 F. Supp. 2d 353 (D.N.J. 1998).

As a government agency, the INS could not be sued by immigrants seeking asylum in the U.S. on claims of cruel, inhuman, and degrading treatment. However, INS officials could be sued and employees of the private corporation that ran the facility could be sued as state actors. Still pending.

Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S. Fla. 2001); 291 F. Supp. 2d 1360 (S.D. Fla. 2002).

Plaintiffs suing on behalf of the Chilean decedent had standing to sue a member of the Chilean military under the ATCA due to the extrajudicial killing of the decedent in violation of the Torture Victims Protection Act. Judgment still pending, but three motions to dismiss by the defendant have been denied.

Abrams v. Societe Nationale Des Chemins De Fer Francais, 332 F.3d 173 (2d Cir. 2003).

Survivors of deportations during WWII sued the French railroad company for transporting civilians to Nazi death and slave labor camps. Originally, jurisdiction was not found under the ATCA, but recently (6/14/04), the entire case was remanded for reconsideration in light of *Republic of Austria v. Altmann*.

III. Successful Cases

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

In the first transnational human rights case successfully brought under international law in U.S. courts, plaintiffs sued a Paraguayan police official who had tortured and killed their relative in Paraguay. Plaintiffs won \$10 million and the case was the first to recognize torture under ATCA.

Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1987).

This case successfully recognized disappearance under the ATCA, but not claims for cruel, inhuman or degrading treatment, where plaintiffs were detained by military authorities in Argentina. They had sued for torture, arbitrary detention, disappearance, and degrading treatment.

Paul v. Avril, 812 F. Supp. 207; 901 F. Supp. 330 (S.D. Fla. 1994).

Haitian citizens sued the military government of Haiti for abuses ranging from beatings to starvation perpetrated by soldiers and military government

authorities. This was the first case to recognize cruel, inhuman and degrading treatment under the ATCA. Plaintiffs won a \$41 million judgment.

Kadic v. Karadzic, 70 F.3d 140 (2d Cir. 1995).

Holding that state action is not necessary to commit war crimes or genocide; the court found the leader of the Bosnian Serb army liable for killings, torture, rape, forced impregnation and detention committed by the army because of plaintiff's ethnicity and religion.

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

The former Guatemalan Minister of Defense was sued by Guatemalan citizens and an American nun for charges of torture, assault, and false imprisonment – sufficient violations of international law. Compensatory and punitive damages awarded.

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

Court of Appeals affirmed judgment for compensatory and punitive damages against military dictatorship on behalf of Ethiopians for torture and cruel, inhuman and degrading treatment.

Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).

Zimbabwean citizens alleged violations of the ATCA because government denied them political freedoms and the right of participation. The court found that the ruling party had systematically hounded its political opponents through terror and violence; court awarded compensatory and punitive damages.

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N. Ga. 2002).

Four refugees sued a former Bosnian-Serb commander under ATCA for torture, degrading treatment, and war crimes committed during the ethnic cleansing campaign. Plaintiffs recovered compensatory and punitive damages.

Manzanarez-Tercero v. C&Y Sportswear, Inc. (Chentex)

ATCA case withdrawn and settled in 2001 after Nicaraguan plaintiffs won their case in Nicaraguan courts against factory owners who fired and assaulted them for attempting to organize a union.

APPENDIX C

	SUCCESSFUL! (OR SETTLED)	ONGOING (AT LEAST IN PART)	DISMISSED				
			SUBSTANTIVE LEGAL GROUNDS (AT LEAST IN PART)	PROCEDURAL GROUNDS			
CASES AGAINST NON-STATE ACTORS	<ul style="list-style-type: none"> • Eastman Kodak v. Kavlin • Bodner v. Banque Paribas 	<ul style="list-style-type: none"> • Doe v. Unocal • Arias v. DynCorp • John Doe I v. Exxon Mobil • Sinaltrainal v. Coca Cola • <i>In re</i> S. African Apartheid Litig. • Khulumani v. Barclays • Digwamaje v. Bank of America • Sarei v. Rio Tinto PLC • Wiwa v. Royal Dutch Petroleum • Abdullah v. Pfizer Inc • Bauman vs. Daimler-Chrysler • Mujica v. Occidental Petroleum • Estate of Rodriguez v. Drummond • Presbyterian Church of Sudan v. Talisman Energy • Al Rawi v. Titan • Bowoto v. Chevron 	<ul style="list-style-type: none"> • Carmichael v. United Technologies • Hamid v. Price Waterhouse • Beanal v. Freeport-McMoRan • Bigio v. Coca-Cola • Mendonca v. Tidewater • Villeda Aldana v. Del Monte • Flores v. Southern Peru Copper • Maugein v. Newmont Mining 	PROCEDURAL GROUNDS			
				INSUFFICIENT EVIDENCE	CLAIM PRE-EMPTION	STANDING, STATUTE OF LIMITATIONS, PERSONAL JURISDICTION, PROCEDURAL DEFECTS, PRUDENTIAL CONCERNS	FORUM NON CONVENIENS
				<ul style="list-style-type: none"> • Doe v. Islamic Salvation Front 	<ul style="list-style-type: none"> • Iwanowa v. Ford Motor • Bano v. Union Carbide • <i>In re</i> World War II Era Japanese Forced Labor Litigation (II) 	<ul style="list-style-type: none"> • <i>In re</i> World War II Era Japanese Forced Labor Litigation (I) • Doe v. Islamic Salvation Front 	<ul style="list-style-type: none"> • Aquinda v. Texaco
CASES AGAINST STATE ACTORS	<ul style="list-style-type: none"> • Filartiga v. Pena-Irala • Forti v. Suarez-Mason • Paul v. Avril • Kadic v. Karadzic • Xuncax v. Gramajo • Abebe-Jira v. Negewo • Tachiona v. Mugabe • Mehinovic v. Vuckovic • Chentex 	<ul style="list-style-type: none"> • Trajano v. Marcos • Cabiri v. Assasie-Gyimah • Jama v. U.S. INS • Estate of Cabello v. Fernandez-Larios • Abrams v. Societe Nationale Des Chemins De Fer Francais 	<ul style="list-style-type: none"> • Zapata v. Quinn • Brancaccio v. Reno • Martinez v. City of Los Angeles • Bao Ge v. Li Peng • Jogi v. Piland • Bieregu v. Ashcroft • Alvarez-Machain v. U.S. 		<ul style="list-style-type: none"> • Hilao v. Estate of Marcos 	<ul style="list-style-type: none"> • Rosner v. U.S. 	



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