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Corporate Social Responsibility, Unmasked

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"CORPORATE SOCIAL RESPONSIBILITY," UNMASKED.

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I. INTRODUCTION

The scope and future of the Alien Tort Claims Act ("ATCA")[1] may well be decided this term by the Supreme Court in *Alvarez-Machain v. United States*.[2] However that case is decided, the review process has exposed an extremely critical issue that has great significance to the future of the global economy. The major international business organizations in the United States, including the National Foreign Trade Council ("NFTC"), the U.S. Chamber of Commerce, the U.S. Council for International Business and the U.S. Business Roundtable, collectively filed an *amicus curiae* brief in *Alvarez-Machain* ("NFTC Brief") that explicitly states what those of us working in the area of "corporate social responsibility" have long suspected.[3] Rather than embracing the binding norms of the ATCA as the foundation for meaningful corporate responsibility, the brand names of the global economy collectively asserted that the ATCA should be nullified by the Supreme Court because its application to U.S.-based multinational corporations placed them at a competitive disadvantage in the global economy.[4] The *Alvarez-Machain* case itself posed no issue directly related

* Executive Director, International Labor Rights Fund. This article is based on an *amicus curiae* brief filed by the author in Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003). Special thanks to Natacha Thys and Jeff Vogt, attorneys at the International Labor Rights Fund ("ILRF"), and to Meg Heaton, a student at Louis and Clark Law School, who worked as a legal intern at the ILRF during the Spring 2004 semester, for their help on the brief. The issues for this article were further refined at a symposium held at the St. Thomas University School of Law on March 12, 2004, sponsored by the International Law Society ("ILS"). The author wishes to express appreciation to the ILS for organizing the program.

1. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2004).

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

3. *See generally,* Brief of Amicus Curiae The National Foreign Trade Counsel, Sosa v. Alvarez-Machain, 124 S. Ct. 807 (2003) (No. 03-339), *available at* http://www.laborrights.org/publications/NFTC_Amicus_Brief.pdf (last visited Apr. 4, 2004) [hereinafter NFTC Brief]. The ILRF's brief filed in response, is also available on the site.

4. *See, e.g.*, GARY HUFBAUER & NICHOLAS MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 1-2 (2003) (advancing the position by various surrogates for the U.S. business community, both in public and in lobbying before Congress). Mr. Hufbauer also appeared at the St. Thomas School of Law program at which an early version of this paper was presented. *See* Gary Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607 (2004).

to any multinational company. Rather, it simply presents the first opportunity for Supreme Court review of the interpretation of the ATCA, beginning with *Filartiga v. Pena-Irala*, and then consistently applied by every court that has considered the issue since then, that the ATCA creates a right to sue for violations of the "law of nations."[5] Unhappy with the fact that several multinationals had themselves been sued under the ATCA for human rights violations, the business community simply could not resist going after the ATCA at full bore at the first opportunity to nip in the bud any prospect that U.S. companies could possibly be held accountable for human rights violations committed in the course of their international operations.[6]

The implications for this position extend far beyond the specific result of *Alvarez-Machain*. The essential assumptions of the architecture of the global economy are necessarily called into question if the collective U.S. business community claims the need to be freed from the constraints of the ATCA to gain competitive advantage. Since World War II, U.S. foreign policy has included as a major component the promotion of U.S. business interests abroad. This was perhaps tolerable as a major subsidy for U.S. business at taxpayer expense if legitimate societal interests were directly advanced. The myth was that U.S. business promoted American values, such as democracy, freedom and respect for the rule of law.[7] However, this myth is absolutely shattered when U.S. companies now claim the need to be free of the ATCA's prohibition of slavery, torture, extra-judicial killing, genocide, war crimes, crimes against humanity and arbitrary detention in order to increase profits.[8] A second major implication is that this "profits first" position reveals the lack of good faith in the much-touted voluntary codes of conduct movement. The already questionable idea of trusting corporations to self-police compliance with their broad codes of conduct is rendered ridiculous, given the aggressive refusal of these same companies to accept being bound to the minimal constraints of the ATCA. Virtually

5. Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

6. *See generally* Terry Collingsworth, *Separating Fact From Fiction in the Debate Over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights By Corporations*, 37 U.S.F. L. REV. 563 (2003).

7. Letter from William H. Taft, IV, Legal Advisor, U.S. State Dep't, to Louis F. Oberdorfer, Judge, D.D.C., 3, 5 (July 29, 2002), *available at* http://www.laborrights.org/projects /corporate/exxon/stateexxonmobil.pdf (urging dismissal of Doe v. Exxon Mobil, based on foreign relations concerns, but explicitly asserting that U.S. foreign policy includes advancing U.S. business interests, and that U.S. businesses advance core U.S. values in their overseas operations) (last visited Apr. 15, 2004).

8. *See infra* Section III for a discussion of cases that demonstrate this narrow scope of the federal courts' interpretation of the "law of nations" for purposes of ATCA.

all of the firms represented in the NFTC Brief participate in some form of a corporate social responsibility initiative and pledge to comply with social standards that far exceed the minimum standards of fundamental human rights under the ATCA. Unless these companies are misrepresenting their compliance with their own standards, their assertion that the ATCA is a hindrance to their economic competitiveness is simply incredible.

The focus of the remainder of this article will be on examining just how radical, and legally unsupportable, the position is that the ATCA should be judicially repealed in order to free U.S. companies from the competitive disadvantage of the ATCA's minimal constraints.[9] The ATCA, as interpreted today, is simply one source in a body of law that includes the Nuremberg Tribunals and various other federal laws that place clear, universally recognized limits on the conduct of corporations and individuals. Indeed, if the ATCA does not survive the Supreme Court's review, the position of the business community in the case exposes the clear need to develop some other mechanism to constrain corporate profit-seeking behavior. In collectively seeking the repeal of the ATCA, the U.S. multinational business community has repudiated the public trust.

II. THE U.S. IS A LEADER IN PROMOTING THE RULE OF LAW AND, SINCE NUREMBERG, HAS REJECTED THAT COMPETITIVE ADVANTAGE CAN JUSTIFY VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

Virtually every society that respects the rule of law has developed laws that restrain the profit motive. Under U.S. law, for example, companies (and individuals), no matter how profitable they might be, are prohibited from using slaves or engaging in slavery-like practices.[10] Likewise, no company may torture its workers.[11] To assert otherwise would seem absurd and barbaric. Even free market economists, who otherwise abhor the regulation of business activities, accept that legal restraints on harmful conduct are required to deter such conduct. Indeed, the rule of law is a necessary component of any free market economy geared towards profit.[12] The ATCA has played a unique role in

9. *See infra* notes 45-66, and accompanying text for a discussion on the very narrow scope of human rights norms accessible by the ATCA's "law of nations" language.

10. *See, e.g.*, U.S. CONST. amend. XIII; 18 U.S.C. § 1584 (2004); Manliguez v. Joseph, 226 F. Supp. 2d 377, 383 (E.D.N.Y. 2002) (holding that the thirteenth amendment and its enabling statute, 18 U.S.C. § 1584, apply to private conduct).

11. *See* Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350, *note* (2004).

12. *See, e.g.*, Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFFAIRS, Mar. 1998, at 95 (noting that the "[b]asic elements of a modern market economy, such as property rights and

maintaining U.S. leadership in developing respect for the rule of law and protecting universally recognized human rights.[13]

Undeterred by the legal or moral implications of their argument, the united business community asserts that "[ATCA] lawsuits harm the economy by putting companies with a U.S. presence at a unique and unfair competitive disadvantage."[14] As there is no question that law within the U.S. proscribes the conduct of these companies, the essence of the business opposition to the ATCA is that U.S. companies might face liability for their *international* operations. This, they assert, would place U.S. companies at a "competitive disadvantage" with non-U.S. companies, not reachable by the ATCA, which would then presumably remain free to engage in violations of fundamental human rights.[15]

It is difficult to respond on the merits to an "others do it too" argument that would not even get a serious hearing in a playground dispute. As an initial matter, however, it simply is not true that the other nations of the world do not have legal procedures for addressing human rights violations. The courts of many European countries have asserted jurisdiction over cases alleging violations of human rights occurring internationally. For example, the courts of Spain, Belgium and Switzerland issued requests for extradition for General Augusto Pinochet, based on his involvement in gross violations of human rights in Chile.[16] In the corporate context, cases concerning the use of forced labor in Burma were filed against TotalFinaElf and some of its senior executives in 2002. The first, filed in Belgium, cited "complicity in crimes against humanity," and the second, filed in France, cited "complicity in unlawful confinement."[17]

More fundamentally, the U.S. business community fails to

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contracts, are founded on the law"); O. Lee Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441 (2001).

13. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1798: A Badge of Honor*, 83 AM. J. INT'L L. 461, 492-93 (1989); *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991) (noting that the very existence of ATCA jurisdiction has a deterrent effect on potential violations of human rights) [hereinafter Koh].

14. NFTC Brief, *supra* note 3, at 10.

15. *See id.* at 12.

16. *See* Chandra Lekha Sriram, *Revolutions In Accountability: New Approaches To Past Abuses*, 19 AM U. INT'L. L. REV. 301, 318-23 (2003).

17. *See, e.g.*, *TotalFinaElf Accused of Forced Labour*, FINANCIAL TIMES-LE MONDE, Oct. 23, 2002, at 25; *Total Faces Burmese Forced-Labour Charges*, FINANCIAL TIMES- LES ECHOS, Aug. 30, 2002, at 1; *see also* Schalk Willem Burger Lubbe and Cape PLC, House of Lords, Judgment 20 July 2000, *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm (authorizing South African asbestos victims to proceed in U.K. courts against British asbestos maker, Cape PLC).

acknowledge (let alone assert with pride) that the U.S. has been a leader since the Nuremberg Tribunals in treating fundamental human rights norms as binding and enforceable through the rule of law, regardless of whether other nations permit barbaric behavior. Following Nuremberg, in addition to recent interpretations of the ATCA, there have been numerous laws passed by Congress that act to restrain conduct of corporations and individuals that, while profitable, were in violation of fundamental societal norms. Key examples are the Foreign Corrupt Practices Act ("FCPA")[18] and the Torture Victim Protection Act ("TVPA").[19] Arguably, these laws may place U.S. companies at a competitive disadvantage, vis-à-vis non-U.S. companies, but Congress has determined that certain egregious conduct simply cannot be the basis for profitability. Turning back the clock on these historic events based on an unproven allegation of "competitive disadvantage" would do more than nullify the ATCA.

THE NUREMBERG TRIBUNALS ESTABLISHED THAT NO CIVILIZED SOCIETY PERMITS A COMPANY TO PROFIT FROM SLAVERY AND OTHER FUNDAMENTAL HUMAN RIGHTS VIOLATIONS

At Nuremberg, the Allies, led by Justice Robert H. Jackson, inspired the world by bringing Nazi war criminals, including the companies that aided and abetted the Nazis, to justice in a court of law.[20] Justice Jackson "had a passionate conviction of the need to transform international law from a mere collection of hopes into an effective binding set of rules to govern the behavior of nations. He believed that international law was the only means for realizing man's wish for peace."[21]

In one of the key Nuremberg cases, *United States v. Friedrich Flick*, the Tribunal found Flick, the owner of a freight car business, guilty of slavery and crimes against humanity, based on his knowledge and approval of his company's decision to increase its production quota—knowing that forced labor would be required to meet the increase.[22] The Tribunal held Flick legally responsible for profiting from the Nazi slave labor program although he did not "exert any influence or [take] any part in the formation,

18. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78, *et. seq.* (2004).

19. *See* 28 U.S.C. § 1350.

20. *See* ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 68 (Cooper Square Press 2003).

21. *Id.*

22. Appellant's Opening Brief at 17-18, Roe III v. Unocal Corporation and Union Oil Company of California, (No. 00-56628), *available at* http://www.laborrights.org/projects/corporate/unocal/openingbrief.doc (citing United States v. Friedrich Flick, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. IV, Washington D.C.: U.S. Government Printing Office (1952) [hereinafter "6 TWC"]).

administration or furtherance of the slave-labor program."[23] Thus, the critical basis for liability was Flick's approval of the decision to increase company quotas and revenues, knowing that such a decision would in fact result in the use of forced labor.[24]

Similarly, in *United States v. Karl Krauch*, the Tribunal found Krauch guilty, although, as in the *Flick* case, he did not create the slave labor program or control the allotment process.[25] Krauch simply made an affirmative decision to conduct business knowing that it would in fact result in the use of forced labor. For this the Tribunal found him guilty, stating:

> Krauch was neither a moving party or an important participant in the initial enslavement of workers . . . [but] in view of what he clearly must have known about the procurement of forced labor and the part he voluntarily played in its distribution and allocation, his activities . . . impel us to hold that he was a willing participant in the crime of enslavement.[26]

Demonstrating the extreme de-evolution in law sought by the participants in the NFTC Brief, these companies argue that U.S. businesses operating in the global economy should not even have to answer in court to charges that a company knowingly aided and abetted a government that uses slave labor.[27] Obviously sensitive to the image of U.S. business groups rallying to repudiate the Nuremberg Tribunals, the companies instead attack as improper the Ninth Circuit's citation in the *Unocal* case to the *ad hoc* international criminal tribunals established for Rwanda and the former Yugoslavia.[28] However, these subsequent tribunals explicitly relied upon the historic rulings at Nuremberg in making their findings of liability. For example, in *Prosecutor v. Dusko Tadic*,[29] the Yugoslav Tribunal noted that

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23. *Id.* at 18 (citing 6 TWC, *supra* note 22, at 1198).

24. *Id.* (citing 6 TWC, *supra* note 22, at 831).

25. *Id.* (citing United States v. Karl Krauch, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. IV, Washington D.C., U.S. Government Printing Office (1952) [hereinafter "8 TWC"]).

26. *Id.* at 19.

27. *See* NFTC Brief, *supra* note 3, at 11.

28. John Roe Doe I v. Unocal Corp., 2002 WL 31063976, at *9-10 (9th Cir. 2002) (emphasis added), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. 2003), *submission withdrawn pending decision in this case.* Subsequent federal cases have relied upon these tribunals in ATCA cases. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003).

29. Appellant's Opening Brief at 17-18, Roe III et. al. v. Unocal Corporation and Union Oil Company of California, (No. 00-56628), *available at* http://www.laborrights.org/projects/corporate/unocal/openingbrief.doc (last visited Apr. 17, 2004) (citing Prosecutor v. Dusko Tadic, ICTY-94-1 (May 7, 1999)) *available at* http://www.un.org/icty/tadic/trialc2/judgment/index.htm (last visited Apr. 17, 2004).

"[t]he most relevant sources . . . are the [Nuremberg] war crimes trials, which resulted in several convictions for complicitous conduct."[30]

Nuremberg was not an aberration—it was a demonstration to the world of the rule of law as an alternative to violence—a lesson especially applicable at the present time. The United Nations specifically ratified the Nuremberg Tribunals as a major step forward in a world that elevates universal human rights norms to the status of law.[31] Accepting the pleas of U.S. companies to free them from the ATCA's constraints prohibiting slavery, torture and other fundamental human rights violations, would open the door to an alarming return to barbaric behavior. As the next two sections demonstrate, Congress has acted in recent times to reinforce that concerns by the business community about "competitive disadvantage" cannot outweigh the fundamental values of our society as expressed in law.

THE FOREIGN CORRUPT PRACTICES ACT WAS PASSED DESPITE EXPRESS CONCERNS BY U.S. BUSINESS THAT THEY WOULD BE PLACED AT A COMPETITIVE DISADVANTAGE.

The idea that corporations should be free to conduct business to obtain the greatest competitive advantage in the marketplace, without regard to the social or moral costs of their conduct, was rejected by Congress in the context of addressing corruption. In 1977, Congress passed the FCPA to criminalize, *inter alia*, the bribery of any "foreign official" by any "domestic concern" in order to "obtain or retain business."[32] Additionally, the FCPA introduced new reporting and disclosure requirements to increase the transparency of international business transactions.[33] The legislation was necessary to repair America's tarnished image and increase confidence in the integrity of U.S. corporations at the end of the 1970's. Indeed, as the legislative history of the FCPA reveals, the law was introduced after Securities and Exchange Commission investigations revealed "corrupt foreign payments by over three hundred U.S. companies involving hundreds of millions of dollars."[34] The rationale for passing the anti-corruption legislation was that:

[c]orporate bribery is bad business. In our free market system it is

30. *Id.* at 20.

31. *See, e.g., Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95(1), U.N. GAOR, 1st Sess., Part II at 188, U.N. Doc. A/64/Add.1 (1946) *available at* http://www.icrc.org/ihl.nst/0/648ff02b73cde729c125641e004064ac?opendocument (last visited Apr. 19, 2004).

32. *See* 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-2, 78ff (2004).

33. *See id.*

34. S. REP. NO. 95-114, at 3-4 (1977).

> basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive to this basic tenet .... Thus foreign corporate bribery affects the very stability of overseas business.[35]

The law was passed despite an outcry from U.S. businesses claiming that the FCPA put them at a competitive disadvantage with respect to their European counterparts. These concerns were cited time and again in the House and Senate debates leading up to the ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention"), which would hold the Organization for Economic Cooperation and Development ("OECD") member countries to anti-corruption standards roughly equal to the FCPA.[36]

In the face of this alleged competitive disadvantage, the U.S. Congress chose to aggressively promote anti-corruption measures internationally, rather than relax such standards at home. Indeed, Congress explicitly encouraged the negotiation of an anti-corruption agreement within the OECD during the Reagan administration in the Omnibus Trade and Competitiveness Act of 1988. As of 2003, thirty-four nations ratified the Convention, which requires the signatories to enact domestic legislation to combat foreign bribery.[37] Later, the U.S. Senate ratified the Inter-American Convention Against Corruption on July 27, 2000, which binds the governments of the Western Hemisphere to combat corrupt practices in international business.[38]

The experience with the FCPA amply demonstrates that the solution to perceived or actual disadvantage in business relations is not to find the lowest common denominator, but to promote respect for those principles among other nations internationally. The combined power of the NFTC, the U.S. Chamber of Commerce, the U.S. Council for International Business, the Business Roundtable, and the other participants in the NFTC Brief, along with the U.S. government, which also has sought a judicial repeal of the ATCA,[39] would no doubt have been better spent drafting a

35. *Id.* at 4.

36. *See, e.g.* 144 CONG. REC. S4220-01 (1998) (noting "United States corporations have contended that this [the FCPA] has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws").

37. *See* Organization for Economic Co-operation and Development, *available at* http://www.oecd.org/dataoecd/59/13/1898632.pdf (last visited Apr. 17, 2004).

38. *See* Inter-American Convention Against Corruption (Mar. 29, 1996) *available at* http://www.oas.org/juridico/english/Treaties/b-58.html (last visited Apr. 14, 2004).

39. *See generally* Brief for the United States as Respondent Supporting Petitioner, Sosa v. Alvarez-Machain *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.html (last visited Apr. 14, 2004).

multilateral mechanism to ensure global compliance with fundamental human rights standards and/or developing a process for biding codes of conduct, rather than seeking to eradicate the ATCA.

THE TORTURE VICTIMS PROTECTION ACT LIKEWISE APPLIES TO PROHIBIT TORTURE AND EXTRA-JUDICIAL KILLING REGARDLESS OF ECONOMIC IMPACT.

Congress passed the TVPA to prohibit torture and extra-judicial killing.[40] The passage of the TVPA also resoundingly confirms that extreme human rights violations such as torture and extra-judicial killing are universally condemned and prohibited by U.S. law, even if there is an impact on the way that U.S. companies do business.[41]

It is significant to note that in attacking the ATCA, the NFTC Brief cites the TVPA as an example of a clear, if not model, statutory scheme to regulate international violations of human rights.[42] However, the business participants fail to disclose that individual companies, when sued under the TVPA, have argued specifically that the TVPA does not apply to corporations.[43] Likewise, in its pending motion to dismiss, Exxon Mobil Corporation argued that it is not subject to the TVPA as a corporate entity.[44] While this reinforces that the business community has an underlying agenda to be free from all binding human rights regulation, the reality is that the TVPA does apply to individuals and corporations, and it prohibits torture and extra-judicial killing regardless of whether there is an economic impact.

III. THE ATCA, AS INTERPRETED AND APPLIED BY THE FEDERAL COURTS, ESTABLISHES A CLEAR STANDARD OF PROHIBITED CONDUCT

The U.S. business community argues that their competitive disadvantage from being bound to fundamental human rights standards under the ATCA is magnified by "enormous uncertainty regarding the

40. *See* S. REP. NO. 102-249, at 3 (1991).

41. *See generally* 28 U.S.C. § 1350.

42. *See, e.g.*, NFTC Brief, *supra* note 3, at 27-28.

43. *See, e.g.*, Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) (rejecting defendants' argument that the TVPA by its plain language applies only to "individual" defendants, not corporate entities); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003) (also rejecting defendants' argument that it as a corporation should not be liable to suit under the TVPA).

44. *See* Defendants' Motion to Dismiss at 22, Doe I v. Exxon Mobil Corp., (D.D.C.) (No. 01-1357).

scope of potential claims under the statute."[45] This argument is disingenuous on two fundamental levels. First, the post-*Filartiga* case law has been remarkably consistent in defining the scope and source of the "law of nations" for purposes of the ATCA. There is no uncertainty. Second, knowing that the law is clear, the business community resorts to using allegations made in various ATCA cases as the basis for demonstrating the lack of certainty. They fail to disclose that the parade of allegations they use comes from cases in which the claims were dismissed precisely because they were not within the scope of the ATCA's "law of nations." This simply reinforces that their objective is not clarity in ATCA law, but immunity from the law.

The issue of the scope and source of the "law of nations" for purposes of defining actionable torts under the ATCA is easily answered by examining the cases. Based on actual decisions made by courts, as opposed to allegations that have been or could be made, the list of actionable torts under the ATCA is short and precise: genocide,[46] war crimes,[47] extra-judicial killing,[48] slavery,[49] torture,[50] arbitrary detention[51] and

45. NFTC Brief, *supra* note 3, at 10-11.

46. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995) (stating that violent acts with the intent to destroy religious and ethnic groups would constitute genocide); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 326-27 (maintaining that the campaign of ethnic cleansing directed against non-Muslim population of southern Sudan constituted genocide within the react of ATCA).

47. *See, e.g.*, Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998) (recognizing systematic rape as a tool of war).

48. *See, e.g.*, *Kadic*, 70 F.3d at 240-41, 243-44 (noting that when Congress passed the TVPA, it codified ATCA's application to extra-judicial killing and torture); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1353-54 (S.D. Fla. 2001) (finding subject matter jurisdiction under ATCA and TVPA for the extra-judicial killing of plaintiff in Chile by a member of the Chilean military).

49. *See* Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1307–08 (C.D. Cal. 2000) (citing *Kadic*, 70 F.3d at 234); *see also* Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring); Nat'l Coalition Gov't of the Union of Burma v. Unocal Corp., 176 F.R.D. 329, 348 (C.D. Cal. 1997); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443 (D.C. N.J. 1999).

50. Torture is universally acknowledged to be a violation of "the law of nations." *See, e.g.*, *Abebe-Jira*, 72 F.3d at 847-48; Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995). The TVPA specifically defines "torture" to include "mental pain or suffering" resulting from "the threat of imminent death." Torture Victim Protection Act of 1991 § 3(b)(1)–(2)(C). The definition of "torture" under the TVPA is the same as under the Torture Convention. *See* S. REP. NO. 102–249, at 6 (1992). When the Senate ratified the Torture Convention in 1990, the Senate Report made clear that "torture" was consistent with the definition of cruel and unusual punishment of the Eighth Amendment to the U.S. Constitution. *Id*; *see also* 136 CONG. REC. S17486-01 (1990). The related concept of "cruel, inhuman, or degrading treatment" has also been recognized. *See Caballo*, 157 F. Supp. at 1361.

51. *See generally Abebe-Jira*, 72 F.3d at 844; Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998). A related concept is "disappearance," which has been defined as

crimes against humanity.[52] Indeed, the restatement on foreign relations adopts this list of the "international law of human rights," adding only "systematic racial discrimination" to the finite list consistently cited by federal courts in ATCA cases.[53] This very limited scope of the ATCA is due largely to the rigorous standard adopted by the Second Circuit in *Filartiga*. The court held that an ATCA claimant must demonstrate a violation of "a settled rule of international law" recognized by "the general assent of civilized nations."[54]

Anticipating the exact argument now made by the business community, the Second Circuit stated that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one."[55] The court rejected the notion that it or any other court had the ability to simply pick and choose laws from an international menu. The court interpreted the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[56]

Post-*Filartiga,* courts applying the ATCA have continued the tradition of a very rigorous and restrained approach, and they limit the ATCA's reach to "well-established, universally recognized norms of international law."[57]

"abduction by state officials or their agents . . . followed by . . . official refusals to acknowledge the abduction or to disclose the detainee's fate." *Forti,* 694 F. Supp. at 711 (finding the "existence of a universal and obligatory international proscription of the tort of 'causing disappearance.'").

52. *See generally Kadic*, 70 F.3d at 240–44; *Xuncax*, 886 F. Supp. at 187 (holding that defendant's act of bombing plaintiffs through aerial attacks constituted cruel, inhuman or degrading treatment in violation of international law under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887, at *9-10 (S.D.N.Y. 2002) (defining crimes against humanity as, inter alia, "torture . . . [and] inhumane acts . . . intentionally causing great suffering or serious injury to body or mental or physical health.").

53. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 702 (1987). In one case, three Colombian trade union leaders who were murdered in the course of negotiations with their employer over a dispute regarding their collective agreement were found to have stated claims for extra-judicial killing under the ATCA. *See* Estate of Rodriquez, 256 F. Supp. 2d at 1253-54. In addition, the court held that Plaintiffs had also stated a claim for violation of the right to associate. *Id.* at 1262-63. The ruling makes clear, however, that the violation was dependent upon the violent repression of the right to associate. *Id.* Another federal district court refused to recognize a fundamental right to associate under any circumstance. Aldana v. Fresh Del Monte Produce, Inc., 2003 WL 23205157, at *9-10 (S.D. Fla. 2003).

54. *Filartiga*, 630 F.2d at 881(quoting The Paquete Habana, 175 U.S. 677, 694 (1900)).

55. *Id.* at 886.

56. *Id.* at 887.

57. *Kadic*, 70 F.3d at 239 (quoting *Filartiga*, 630 F.2d at 888); *see also In re* Estate of Marcos Hum. Rgts. Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (stating that only violations of

The types of claims that have been dismissed convincingly demonstrate that courts across the country are respecting the very limited scope of the ATCA. In fact, most of the cases cited in the NFTC brief to show the types of claims that have been brought under the ATCA resulted in the claims being dismissed for being beyond the narrow confines of universally recognized norms. For example, the NFTC, *et al.* asserts with derision that "residents of Peru" sued for "violations of their 'right to life,' 'right to health,' and 'right to sustainable development.'"[58] Further, the plaintiffs alleged that significant health impacts on children living near the mining operations in Peru violated "the right of the child to the enjoyment of the highest attainable standard of health."[59] While these quotes are cited by the NFTC as a symptom of all that is wrong with the ATCA,[60] the undisclosed truth is that the claims at issue were dismissed by the district court and the Second Circuit affirmed the dismissal.[61] Likewise, the claims described in the NFTC Brief for environmental torts and cultural genocide in *Beanal v. Freeport-McMoran*[62] were dismissed by the district court, and the Fifth Circuit affirmed the dismissal.[63]

The business community presents a lengthy litany of various unratified treaties and conventions dealing with issues such as economic and cultural rights, and the rights of children, that have been asserted in ATCA cases, but buried in footnotes are the references to the only two reported cases in which these assertions were made—*Flores* and *Beanal*—both of which were dismissed with prejudice.[64] In short, the best case the collective business community could make with their abundant legal resources that the ATCA has run amuck was that some plaintiffs have made ATCA claims that were promptly dismissed by the courts. The system appears to be working fine.[65]

As demonstrated above, based on more than twenty years of recent applications, the ATCA applies to genocide, war crimes, extra-judicial

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"specific, universal, and obligatory" norms of international law give rise to valid ATCA claims).

58. NFTC Brief, *supra*, note 3 at 6.

59. *Id.*

60. *See id.* at 5-8.

61. *See generally* Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

62. NFTC Brief, *supra* note 3, at 7.

63. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167-68 (5th Cir. 1999).

64. *See* NFTC Brief, *supra* note 3, at 8-9, nn.8-11.

65. That it is possible to have baseless claims under the ATCA, which are then subject to dismissal, is not an argument for curtailing the use of the ATCA. This problem is common to all litigation in general and the federal courts have specific mechanisms available to curb such abuse. *See, e.g.*, FED. R. CIV. P. 11(b)(2) (requiring attorneys to certify that the claims filed are "warranted by existing law or by a nonfrivolous argument").

killing, slavery, torture, unlawful detention and crimes against humanity. To expand this list requires the heavy burden of showing new universal consensus. Responsible business leaders can be certain that if their companies are knowingly engaged in any of these prohibited torts they may be sued under the ATCA.[66] No party can be liable for an inadvertent violation, and in this era when companies are boasting comprehensive social responsibility programs, it is reasonable to assume that these companies are at least able to state with certainty that no part of their business is associated with these heinous crimes.[67] Remarkably, however, the business community did not request the Supreme Court or Congress to clarify the ATCA standard. They are seeking nullification of the ATCA and the corresponding immunity from liability for slavery, torture and other fundamental human rights norms.

IV. SPECIFIC U.S. COMPANIES THAT JOINED THE NFTC BRIEF CLAIM TO ACCEPT STANDARDS OF VARIOUS CORPORATE SOCIAL RESPONSIBILITY PROGRAMS THAT FAR EXCEED THE FUNDAMENTA HUMAN RIGHTS NORMS COVERED BY THE ATCA.

Most of the country's leading corporations claim in their own names to not only support human rights, but to be bound by various corporate social responsibility programs that set standards much higher than the extreme human rights violations covered by the ATCA. However, camouflaged by their membership in the various business associations that filed the NFTC Brief, these same companies attacked the ATCA arguing that they will suffer a competitive disadvantage if the Supreme Court affirms the ATCA's application to crimes such as slavery and torture.[68]

66. There is no question that in order to face ATCA liability, a party must either be the direct perpetrator of the actionable conduct or knowingly aid and abet the direct perpetrator. The sole appellate court to reach this issue in the corporate context was the Court of Appeals for the Ninth Circuit in *Unocal*. There, the court reinforced that even an aiding and abetting situation requires *knowing* practical assistance or encouragement that has a substantial effect on the perpetration of the crime." John Doe I v. Unocal Corporation, 2002 WL 31063976, at *9-10 (9th Cir. 2002) (emphasis added), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. 2003), *submission withdrawn pending decision in this case.*

67. *See infra* Section IV for a discussion of various corporate accountability programs that require companies to actively assess compliance with a wide range of human rights and labor standards.

68. These groups include: the National Foreign Trade Council (http://www.nftc.org); USA Engage (http://www.usaengage.org/about_us/members/index.html); the American Petroleum Institute (http://api-ec.api.org/links/); US Council for International Business (http://www.uscib .org/index.asp?documentID=1846); US-ASEAN Business Council (http://www.us-asean.org /Aboutus/board_of_directors.asp); and the Business Roundtable (http://www.Businessroundtable

There are many terms to describe this posturing, but for purposes of this discussion the key conclusion is that these companies have utterly failed to demonstrate that they cannot compete in the world constrained by the ATCA. If we take them at their public word, these companies are competing in the world while honoring the highest possible human rights and labor standards. A few examples will highlight what leading members of the business community say they are doing to comply with human rights standards far in excess of those covered by the ATCA.

EXXON MOBIL CORPORATION

Depending on how it is measured, Exxon Mobil is either the first- or second-largest company in the world, and is certainly the largest oil company in the world.[69] Exxon Mobil is a leading member of several of the business associations that filed the NFTC Brief, including the National Foreign Trade Council, USA Engage, the American Petroleum Institute, U.S. Council for International Business, US-ASEAN Business Council and the Business Roundtable.[70] Thus, Exxon Mobil is firmly behind the positions taken in the NFTC Brief, including the argument that the ATCA places U.S. companies at competitive disadvantage.

Nevertheless, to its shareholders and the public at large, Exxon Mobil asserts that compliance with human rights standards is a high priority for the company. Indeed, Exxon Mobil states that it plays an active role in using its influence to instill respect for the rule of law:

> In nations that lack well-developed legal and commercial systems,we seek ways to establish and strengthen appropriate institutions andnorms. We emphasize the necessity of honoring agreements and the primacy of the law in resolving disagreements. We believe this is an often-overlooked positive impact that business can have on the social fabric of a country.[71]

Further, on the specific issue of human rights, Exxon Mobil asserts:

> We strongly believe that corporations have an important role to play in promoting respect for human rights and that our business presence in developing countries and societies can have a positive influence on

.org/pdf/members.pdf). These websites provide the membership lists for these organizations, including memberships held by Exxon Mobil, Unocal Corporation, and Coca-Cola, who are specifically discussed, *infra* notes 68-87, and accompanying text.

69. *Exxon Profits Soar on Higher Prices,* BBC NEWS, July 31, 2003, *available at* http://news.bbc.co.uk/1/hi/business/3114153.stm (last visited Apr. 17, 2004).

70. *See* NFTC Brief, *supra* note 3.

71. *Our Commitment to Corporate Citizenship, available at* http://www.exxonmobil.com /corporate/files/corporate/CCR2002_commitment.pdf (last visited Apr. 17, 2004).

> issues related to the treatment of people. ExxonMobil condemns human rights abuses. We make it clear to all of our employees and contractors—as well as police and military forces that provide security to our operations—that human rights violations will not be tolerated. Our Standards of Business Conduct establish our approach and are consistent with the spirit and intent of the principles of the Universal Declaration of Human Rights insofar as they apply to private companies.[72]

Further, Exxon Mobil is a member of the *Voluntary Principles on Security and Human Rights*, a program initiated by the governments of the United States and the United Kingdom to work with companies in the mineral extractive sectors to develop principles to improve respect for human rights, particularly in addressing security issues.[73] The participants pledge "that we share the common goal of promoting respect for human rights, particularly those set forth in the Universal Declaration of Human Rights, and international humanitarian law."[74]

UNOCAL CORPORATION

Unocal is also a leading member of most of the business associations that filed the NFTC Brief, including the National Foreign Trade Council, USA Engage, the US Council for International Business, the American Petroleum Institute and the US-ASEAN Business Council.[75] Its shareholders and the public would no doubt be surprised that Unocal ascribes to the arguments made in the NFTC Brief given the company's effusive public commitment to company compliance with human rights norms:

> Unocal supports the principles and aspirations of the Universal Declaration of Human Rights. We also recognize certain universally relevant workplace principles: freedom from discrimination inemployment, elimination of child labor, freedom from forced labor andfreedom of association and collective bargaining. The International Labor Organization calls these "fundamental rights at work." These principles are reflected in the Global Compact and Global Sullivan Principles .... Unocal believes that we have a responsibility to society, especially in relation to the impact of our operations .... Managers are responsible for ensuring that any security arrangements

72. *Id.*

73. The U.S. government participates in this initiative through the U.S. Department of State. Details of the program are *available at* http://www.state.gov/g/drl/rls/2931.htm (last visited Apr. 17, 2004).

74. *Id.* at 1.

75. *See supra* note 51.

developed fora Unocal-operated location consider the US/UK Voluntary Principles on Security and Human Rights.[76]

As noted in the quote, Unocal, like Exxon Mobil, is a member of the U.S. government's *Voluntary Principles on Security and Human Rights* initiative.[77] Unocal also references one of the most significant and comprehensive corporate social responsibility programs, the U.N. Global Compact.[78] This program, initiated by the United Nations, establishes Nine Principles that participating companies must implement.[79] Principle One is that "[b]usinesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence."[80] The rationale for this commitment by participating companies is: "*A growing moral imperative to behave responsibly is allied to the recognition that a good human rights record can support improved business performance.*"[81]

Unocal not only accepts that compliance with human rights is good for business, it specifically disavows the competitive disadvantage argument of the NFTC Brief: "Basic human values and high standards of ethical conduct have always been a central part of Unocal's approach to business and *critical to our company's success.*"[82]

THE COCA-COLA COMPANY

Coca-Cola is also heavily represented in the NFTC Brief by its membership in USA Engage, U.S. Council for International Business, US-ASEAN Business Council, the Business Roundtable and it is on the Board of Directors of the U.S. Chamber of Commerce.[83] Coca-Cola, as is typical of many international companies, has a code of conduct that includes specific requirements for compliance with health and safety regulations, respect for the right of employees to form unions and bargain collectively,

76. *See Unocal Code of Conduct*, Unocal, *at* http://www.unocal.com/ucl_code_of_conduct/index/htm (last visited Apr. 17, 2004).

77. *See supra* note 67, and accompanying text.

78. *See generally The Global Compact & Human Rights,* THE GLOBAL COMPACT, *available at* http://www.unglobalcompact.org (last visited Apr. 17, 2004).

79. *Id.*

80. *What is the Global Compact?*, The Global Compact, *available at* http://www.unglobalcompact.org/content/AboutTheGC/Overview_About.htm?iViewId=253.

81. *Id.* (emphasis added).

82. *Human Rights—Our Position*, Unocal, *at* http://www.unocal.com/responsibility/humanrights/hr1.htm (emphasis added) (last visited Apr. 17, 2004).

83. For a list of the Board of Directors of the U.S. Chamber of Commerce, see http://www.uschamber.com/about/board/all.htm (last visited Apr. 17, 2004).

and that prohibits the use of forced labor or child labor.[84] These specific and detailed provisions far exceed the very limited scope of the ATCA's "law of nations," as applied by the federal courts. Coca-Cola requires its suppliers to comply with the code requirements because "good corporate citizenship is essential to our long-term business success and must be reflected in our relationships and actions in the marketplace, the workplace, the environment, and the community."[85]

This sampling of three major U.S. companies is representative of the individual corporations that are members of the various business organizations that collectively oppose the ATCA. Virtually all of the hundreds of companies that have joined this effort publicly extol their commitment to human rights in their global operations. The expansion and vitality of these programs is a thriving rebuttal to the notion that U.S. companies must be freed from the "burden" of observing the universal human rights standards enforceable through the ATCA. Through the work of legitimate corporate social responsibility organizations, companies in today's market understand that they are rewarded for being socially responsible.[86] That explains why the corporate participants in the NFTC Brief are not waging a public campaign in their own names against the ATCA. It does not explain how any company that makes a good faith public commitment to respect human rights can assert—even indirectly—that the ATCA's very limited application to extreme forms of human rights violations will subject them to any economic impact.[87] Whatever the explanation for that incongruity, it is clear that subjecting U.S. companies to potential ATCA liability could not, in itself, result in any competitive disadvantage.

It bears noting that some of these apparently conflicted corporations will undoubtedly take their public commitments to a broad range of human rights more seriously if the ATCA remains a viable check to ensure that

84. For the Coca-Cola Company's statement of workplace practices see *Supplier Guiding Principles*, Coca-Cola Company, *available at* http://www2.coca-cola.com/ourcompany/supplier_principles.html (last visited Apr. 17, 2004).

85. *Id.*

86. See the ILRF's Brief filed in *Alvarez-Machain* for a listing of these organizations that support the application of the ATCA to companies as a means of establishing a foundation for binding principles, *available at* http://laborrights.org (last visited Apr. 4, 2004).

87. *See generally*, PRAKASH SETHI, SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT FOR MULTINATIONAL CORPORATIONS (New York: John Wiley and Sons, Inc., 2003) (noting the economic incentive for companies to market themselves as socially responsible, but criticizing the general practice by multinationals of failing to take their public commitments seriously).

extreme violations of human rights are actionable in federal court.[88]

V. CONCLUSION

The collective attack on the ATCA by the U.S. business community clarifies that any progress made in "corporate social responsibility" is simply on paper. U.S. companies embrace social responsibility as a public relations exercise but have yet to make a commitment to any binding standards. That the ATCA applies only to slavery, torture, extra-judicial killing, genocide, war crimes, crimes against humanity and arbitrary detention, and the business community is threatened by its application, exposes the extreme hypocrisy—and lack of trustworthiness—of this business community. Any company that promises the public that it complies with a comprehensive code of conduct, but then acts to repeal the ATCA's prohibition on slavery and torture, has lost any credible claim to being socially responsible. After years of public claims of progress, we should be moving forward to a credible process of enforcing corporate responsibility, not seeking a surreptitious repeal of the principles set forth at the Nuremberg Tribunals. If the interpretation of the ATCA advanced since *Filartiga* is affirmed by the Supreme Court, then we will have a basic tool to apply limited—but binding—standards to corporations in their international operations. If, however, the Supreme Court acts to judicially repeal the ATCA, then there will be an urgent need to fill this void and work to pass new legislation. Either way, we are now clear that despite their public claims, the organized U.S. business community will not be a willing participant in the process of developing binding standards of corporate responsibility. Watch what they do—not what they say.

88. *See* Koh, *supra* note 13, at 2397-98 (noting that the possibility of ATCA suit serves as a significant deterrent to human rights violations).