St. Thomas Law Review

Volume 16
Issue 4 *Summer 2004*

Article 7

2004

The Alien Tort Claims Act: A Tool for Repairing Ethically Challenged U.S. Corporations

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THE ALIEN TORT CLAIMS ACT:[1] A TOOL FOR REPAIRING ETHICALLY CHALLENGED U.S. CORPORATIONS

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I. INTRODUCTION

Any good business person knows the best way to increase profit is to reduce overhead without compromising the quality of the product. With this in mind, many U.S. corporations have established business operations abroad, particularly in lesser developed countries. While lesser developed countries may not be attractive to tourists, they are attractive to industries and corporations for a number of reasons. Leaders of lesser developed countries can offer such corporations inexpensive materials, untapped natural resources, a cheap, yet highly productive, labor force, and there is virtually no regulation of business practices. Oftentimes, the leaders of such regions are just as concerned with maximizing their profits as the corporations, and in an effort to meet this end, they subject their citizens to various individual human rights violations.

In America, the Constitution, tort law, and criminal statutes protect against individual human rights violations and provide for civil damages and criminal punishment that deters corporations from engaging in such unethical practices. Internationally, the legal community has created several "soft law" instruments that seek to protect citizens of countries that do not have legal systems to prevent and deter human rights violations. Additionally, the nature of these instruments addresses relations among the states and does not consider the actions of private actors, such as corporations. However, U.S. corporations doing business in foreign countries may be held accountable under the scarcely used Alien Tort Claims Act ("ATCA") for contributing to human rights violations abroad.

The Alien Tort Claims Act has been in existence, in one form or

1. 28 U.S.C. § 1350 (2003).

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another, since the founding of America.[2] However, legislative intent is ambiguous, and the Act has never been fully interpreted by the judiciary. Some scholars believe that the framers' intent was to protect the integrity of the country against U.S. citizens who committed wrongs against foreigners abroad.[3] Further, the Supreme Court has only reviewed one case claiming a cause of action under the ATCA,[4] leaving the lower courts with virtually no binding precedent. In fact, the lower courts have applied several different legal theories resulting in inconsistent decisions and futile attempts to define the scope and extent of the Act.[5] Perhaps this can be explained best by citing dicta from a case out of the Eleventh Circuit in which Judge Hatchett stated, "Congress . . . may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute."[6] The courts do not have any uniform measure to adequately fashion such remedies. The ATCA, if given a clear definition with specific application, has tremendous potential to affect U.S. corporations' business dealings abroad.

For the first time, an ATCA claim against a U.S. corporation may survive summary judgment, giving the judiciary another opportunity to give the ATCA form and meaning. *Doe v. Unocal*, a groundbreaking case in the Ninth Circuit Court of Appeals, will soon determine whether or not Unocal,[7] a U.S. corporation, while doing business in Burma, may be held

2. Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claim Act: A Practical Assesssment*, 40 VA. J. INT'L L. 545, 551 (2000) (ATCA was enacted during the First Congress as part of the Judiciary Act of 1789).

3. Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claim Act*, 48 CATH. U. L. REV. 881, 890-91 (1999) [hereinafter Kieserman].

4. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 436-37 (1989) (holding respondent Liberian corporation's claim was improper because the ATCA does not provide for a cause of action for the unlawful taking of a prize during wartime). A Lexis search on March 30, 2004, for Supreme Court cases using the search string "'ATCA' or 'Alien Tort Claims Act' w/100 rape or torture or labor" produced only one result.

5. *See* Ge v. Peng, 201 F. Supp. 2d 14, 22 (D.D.C. 2000) (granting dismissal of the case and holding that plaintiffs, former and current prisoners of China, failed to establish a "substantial degree of cooperative action between the Chinese government defendants and Adidas such that jurisdiction would be proper under a state action theory" because the only evidence of Adidas' involvement was the logo placed on each ball. (internal quotes omitted)). It makes very little sense that Adidas had no information regarding the use of prison labor to produce their soccer balls. *Cf.* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 343 (S.D.N.Y. 2003) (denying oil company's motion to dismiss, rejecting the argument that state action did not exist because plaintiffs were challenging official government acts within Sudan's border).

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

7. Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-57195, 2002 U.S. App. LEXIS

liable under the Alien Tort Claims Act for numerous human rights violations. Unocal, a U.S. owned petroleum company, has contracted with the Burmese government to assist with the development of their oil pipeline project, which will connect Burma (Myanmar)[8] with Thailand. The country of Burma is known for its military state and is notorious for its human rights violations against its own citizens. Unocal initiated business dealings with the government of Burma before the United States took a formal stance against the Burmese government's treatment of their citizens. Therefore, the Unocal-Burmese business relationship is exempt from trade sanctions, which were subsequently implemented. As a result, several non-governmental organizations ("NGOs"), in conjunction with independent counsel, filed the lawsuit under the theory of tort provided by the ATCA on behalf of the villagers of Burma who have endured such human rights violations as forced labor, rape and murder.[9]

The various implications of a judicial decision in favor of the villagers (Doe) with regard to U.S. companies doing business abroad could have a profound effect, particularly on U.S. corporations' freedom to establish operations while at the same time acting responsibly to avoid unethical, illegal practices involving human rights violations. An additional implication involves the inherent environmental cost to undeveloped and underdeveloped countries, who often bow to U.S. business interests. In these lesser developed countries, there are no regulatory protections to ensure reduced exposure to pollutants and the maintenance of the eco-system, which are the most basic survival needs of a community.

In order to fully understand the impact that the *Doe v. Unocal* decision may have on U.S. corporations, it is vital to have a basic understanding of the evolution of international human rights, the history of the Burmese situation, and the actual lawsuit. Furthermore, it will be necessary to examine the legislative history of the ATCA, the various courts' interpretation of the act, and finally the potential effects of a Supreme Court ruling on an ATCA claim.

19263, at *1 (9th Cir. Sept. 18, 2002) [*Unocal III*]. To avoid confusion, each of the incarnations of the *Unocal* cases will carry a specific designation. Each designation corresponds to the time when the respective court decided the case. There are four *Doe v. Unocal* decisions cited altogether.

8. The United States does not recognize the renaming of Burma to Myanmar because of the documented disapproval of its government. *See infra* notes 23-37 and accompanying text.

9. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) [*Unocal I*].

II. INTERNATIONAL HUMAN RIGHTS HISTORY IN A NUTSHELL

The notion of human rights dates back to the beginning of time and has its origins in the major religious faiths (Christianity, Buddhism, Confucianism, Hinduism, Judaism, and Shinto) of the world.[10] These religious beliefs became so important that many legal scholars sought to create legal theories, such as Natural Law, that would prevent and deter human rights abuses, particularly when such abuses were committed by a sovereign state against its own citizens.[11] Natural law evolved into the concept of Natural Rights Theory, which advocates the importance of human independence and the governing body's charge to protect its citizens' rights to life, liberty, and property.[12] The classical evolution of human rights as a legal concept that endorses individual freedom was well intended but not universally accepted or ever formally established.

However, modern history provides that proceeding World War II and the Holocaust, international communities were forced to recognize that individual human rights needed to be protected and mechanisms needed to be put in place in order to address human rights concerns.[13] To promote international peace and security, the international community came together to form the United Nations, which has established international law prohibiting human rights abuses.[14] Today, there are over twenty universal treaties, more than twelve regional conventions and numerous other declarations, resolutions, and soft law instruments that prohibit human rights abuses and seek to protect individuals being persecuted by their government.[15]

These laws were and are created by committees with representatives from various nations around the world and are enforced by international administrative agencies. One such agency is the International Labour Organization ("ILO"). According to Geoffrey Palmer, New Zealand Ambassador to the United Nations, "[T]he International Labour Organisation is the most advanced supertreaty system in terms of providing legislative outcomes of any of the international agencies."[16] As early as

10. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1288-91 (Robert C. Clark et al. eds., 2d ed. 2002) [hereinafter HUNTER].

11. *Id.*

12. *Id.* John Locke is one of the most noted academics of the Natural Rights theory.

13. *Id.*

14. FRANK C. NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 1-3 (1990).

15. HUNTER, *supra* note 10, at 1318.

16. Gregory Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 280 (1992).

1930, the ILO, in Convention No. 29, Article 2, prohibited the use of forced labor, and more recently the ILO has created a Convention on Indigenous and Tribal Peoples, which states:

> Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity . . . . Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination . . . . No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned . . . .[17]

The ILO, in conjunction with non-government organizations, has been persistent in the fight for human rights and for adequate living environments for indigenous peoples.[18] The collaboration of these actors seeks to redress and remedy human rights violations and environmental destruction on behalf of suppressed populations throughout developing countries worldwide.[19]

III. THE PLIGHT OF BURMESE CITIZENS AND THE PIPELINE PROJECT

One specific example of their ability to initiate action is the case of *Doe v. Unocal*,[20] which alleged that Unocal engaged in human rights violations during the construction of a petroleum pipeline.[21] For the past three to four decades, the ILO's supervisory body has voiced its disapproval of the Burmese government's despicable behavior towards its citizens.[22] To understand the position of the ILO, a brief history of the plight of the Burmese people and a description of the pipeline project is in order.

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17. International Labour Organisation: Convention Concerning Indigenous and Tribal Peoples in Independent Countries, November 1989, 28 I.L.M. 1382, arts. 2(1), 3 (entered into force June 27, 1989).

18. *See* EarthRights International, *The Situation in Burma, at* http://www.earthrights.org /burma.shtml (last visited April 16, 2004).

19. *Id.*

20. *See generally* Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-57195, 2002 U.S. App. LEXIS 19263, at *1 (9th Cir. Sept. 18, 2002) [*Unocal III*].

21. *Id.*

22. International Labour Organization, *Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention*, 1930 (No. 29), (Geneva, July 2, 1998), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/ myanmar.htm (last visited May 13, 2004) [hereinafter *Report of the Commission of Inquiry*].

A. A BRIEF HISTORY OF BURMA

Burma has been under military rule for over forty years.[23] Sixteen years ago, in 1988, the citizens of Burma protested against the way the government was treating them.[24] The government responded by restricting the actions of their citizens, forming the State Law and Order Restoration Council ("SLORC") regime, and eventually renaming Burma, Myanmar.[25] The SLORC held elections in an effort to reform their international reputation of military rule;[26] the National League for Democracy, a pro-democracy party, won the multi-party elections in a landslide, capturing eighty two percent of the seats in parliament.[27] Unfortunately, the SLORC refused to legitimize the election results.[28]

Currently, Burma is still governed by the SLORC.[29] The SLORC has become notorious for its human rights violations, including but not limited to forced labor, displacement of communities, unjustified arrests, abuse of women, and unjustified killings of civilians.[30] The 1998 ILO's Commission of Inquiry found that forced labor in Burma was "widespread and systematic."[31] In a landmark decision, the ILO Conference by an overwhelming majority voted to call upon the Burmese government to "take concrete action" to amend and enforce existing laws and to ensure that "no more forced or compulsory labor be imposed by the authorities, in particular the military."[32]

Although this decision involves documented disapproval of such practices, the ILO conference does not have a mechanism in place to enforce its decision or require compliance, and to date there is no evidence that these human rights violations have come to an end.[33] To add insult to injury, it appears that foreign corporations are contracting with the

23. *Unocal III*, 2002 U.S. App. LEXIS 19263, at *3.

24. William J. Aceves, *Doe v. Unocal, 963 F. Supp. 880, U.S. District Court, C.D. Cal., March 25, 1997*, 92 AM. J. INT'L L. 309, 310 (1998) (note that the comment is titled identical to the case) [hereinafter Aceves].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Report of the Commission of Inquiry, supra* note 22.

30. *Id.*

31. *Id.*

32. *Id.*

33. EarthRights International, *More of the Same: Forced Labor Continues in Burma (October 2000-September 2001): A Report by EarthRights International October 11, 2001, at* http://www.earthrights.org/ilo/moreofthesame.pdf (last visited April 8, 2004) [hereinafter *More of the Same*].

government-owned petroleum company, the Myanmar Oil and Gas Enterprise ("MOGE"), to assist in setting up business operations and project development. The means by which the MOGE has satisfied and continues to satisfy such contracts involves extensively documented human rights violations.

It is important to note that President Clinton issued an executive order designed to prevent U.S. companies from doing business in Burma, citing Burma's human rights abuses as violative of the U.S. legal system that protects individual freedom.[34] The order banned new investment in the region by U.S. corporations but allowed companies with already existing business operations to be exempt from any charges of non-compliance.[35] Some of the largest petroleum operations had been established before the law took effect.[36] Essentially, the corporations decided that the continued production of petroleum took priority over preventing and deterring *proven* human rights violations against the citizens of the state in which they were doing business[37] (hence the phrase "ethically-challenged corporations.")

B. THE BURMA GAS PIPELINE PROJECT

The Burma (Yadana)[38] Gas Pipeline Project is one of the largest foreign investment projects in the country.[39] The project was initiated in 1992 and is funded and overseen by U.S.-owned Unocal and French-owned Total oil companies.[40] The companies contracted with the MOGE to provide "security" and clear the route for the project.[41] In an effort to fulfill the contract, the MOGE, using military troops, engaged in practices of forced labor and forced military duty, while actively displacing many villagers.[42] As mentioned earlier, such practices coupled with other

34. Exec. Order No. 13,407, 62 Fed. Reg. 28,301 (May 20, 1997).

35. *Id.*

36. The Unocal Pipeline is a $1.2 million project, which makes it the single largest source of outside investment in Burma. Gregory J. Wallace, *Linked to Slavery Doe v. Unocal Asks Whether American Companies Should Be Held Responsible for the Human Rights Abuses of the Foreign Governments that are their Business Partners*, 1057 PRACTICING L. INST. CORP. LAW AND PRACTICE HANDBOOK COURSE SERIES 1207 (1998) [hereinafter Wallace].

37. *See* Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-57195, 2002 U.S. App. LEXIS 19263, at *14-21 (9th Cir. Sept. 18, 2002) [*Unocal III*] (discussing the vast amount of information Unocal received from its own consultants as well as NGOs regarding the human rights violations being committed in Burma).

38. Aceves, *supra* note 24, at 310. Yadana is the name of the natural gas field that is being drilled in Burma.

39. Wallace, *supra* note 36, at 1209-10.

40. *Unocal III*, 2002 U.S. App. LEXIS 19263, at *3-4.

41. *Id.*

42. *See generally More of the Same*, *supra* note 33 (documenting interviews with the

unregulated and unchecked construction often results in environmental degradation. Specifically, the region in Burma that has been affected is one of the largest rainforest tracts left in mainland Southeast Asia. This rainforest is home to several types of rare species, including wild elephants, tigers, rhinoceros, and great hornbills whose existence is seriously threatened by the MOGE's practices of illegal hunting, logging (to clear the way for industry), and wildlife trade.[43]

The U.S. Department of Labor, the International Labor Organization, Amnesty International, Human Rights Watch, EarthRights International, and numerous other governmental and nongovernmental organizations have documented and condemned the continued human rights violations in Burma.[44] In response to this condemnation, the Burmese military regime claims that this is not a case of forced labor; it is merely the Buddhist tradition of volunteerism that compels tens of thousands of Burmese people to submit to unpaid, voluntary service to the military.[45]

The process of the abuse begins with a MOGE representative, usually a military officer, entering a village and informing the village headman that each family must provide a laborer for seven days of work.[46] If a family representative is unable to volunteer, the family must pay a "porter tax" to the MOGE to buy their way out of service.[47] For those families who do not have the means to pay the tax, they must send a family member to fulfill the compulsory duty, even if the only one available is very young, very old, or pregnant.[48] The workers are required to work fourteen hours per day with no breaks and no compensation.[49] If they are able, they provide their own food and are given very little water, if any;[50] they are beaten and chained if they work or walk too slowly;[51] and they are denied medicine or

SLORC and villagers).

43. *See generally* EarthRights International-Resource Center: Doe v. Unocal, *Doe v. Unocal* (last updated Oct. 6, 2003), *at* http://www.earthrights.org/unocal/index.shtml (last visited April 23, 2004) (discussing the environmental impacts of the project) [hereinafter Resource Center]. Although this paper will not address the environmental impact of the Burma Pipeline on native species, the violations committed could not be ignored.

44. *More of the Same*, *supra* note 33 (documenting interviews with the SLORC and villagers).

45. *Id.*

46. *See* EarthRights International Burma Project, *Entrenched: An Investigative Report on the Systematic Use of Forced Labor by the Burmese Army in a Rural Area* (June 2003), *available at* http://www.earthrights.org/pubs/Entrenched.pdf (last visited April 23, 2004).

47. *Id.*

48. *Id.*

49. On file with the author.

50. On file with the author.

51. EarthRights International, *See We are not Free to Work for Ourselves: Forced Labor and Other Human Rights Abuses in Burma*, EarthRights International Report (June 2002), *available at*

medical treatment if they become ill.[52] In fact, there are documented incidences where workers were left for dead, only to be half-eaten by wildlife, because family members were too afraid to claim the body in the presence of the soldiers.[53]

Women are particularly affected by these unethical practices. The Burmese military regime considers women to be inferior to dogs, and women belonging to minority groups are affected the most.[54] The MOGE are aware that such minorities refuse to subscribe or submit to the SLORC rule and that many of the minority men have left the family to fight for the resistance.[55] It is not unusual, given the circumstances, for the women to serve as the sole caretakers of their children and the elderly. Many times they are faced with being displaced from their home.[56] At night, the women and the men are separated to allow the soldiers easy access to the women in order to rape them.[57] As refugees, these women are subjected to all the dangers the military poses to men, such as forced labor, torture, and murder, not to mention the dangers exclusive to women, such as rape, forced marriage, and forced pregnancy.[58] Burma has no formal judiciary system, which leaves the victims of these human rights violations with virtually no means of seeking redress against their abusers, not to mention criminal justice. The only viable means of redress for the Burmese citizens involves outside forces, such as external governments and organizations, getting involved.

III. THE LAWSUIT

In an attempt to redress the human rights violations endured by the Burmese villagers, the Center for Constitutional Rights, Earthrights International, and several other human rights attorneys filed suit against Unocal and two of its executives, Total S.A. (the French petroleum company working with Unocal), the State Law and Order Restoration

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http://www.earthrights.org/pubs/fl2002overview.shtml (last visited April 23, 2004).

52. On file with the author.

53. On file with the author.

54. *See generally* The Women's Rights Project of EarthRights International, *The Situation of Women in Burma: A Review of Women's Rights in Context of the Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations Committee on the Elimination of Discrimination Against Women, June 22-July 10, 1998, *available at* http://www.earthrights.org/women/womenin98.doc (last visited May 13, 2004) (describing the horrible conditions of existence for the women of Burma) [hereinafter *The Situation of Women in Burma*].

55. *Id.* at 8.

56. *Id.*

57. *Id.* at 3-4.

58. *See id.* at 8.

Council, and the Myanmar Oil and Gas Enterprise.[59]

A. *DOE V. UNOCAL*[60] IN THE DISTRICT COURT

The lawsuit was initially filed in October 1996 as a class action suit with fourteen plaintiffs representing themselves and potentially tens of thousands of similarly situated villagers.[61] The suit alleged that the defendants committed numerous human rights violations including forced relocation, forced labor, rape, torture, and murder,[62] and laid out nineteen causes of action, including violations of the United Nations Charter, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[63] crimes against humanity, torture, and violence against women.[64] The villagers based their claim on the Alien Tort Claims Act and state law,[65] alleging that the SLORC and Unocal, along with Total, entered into an agreement to share production on the Yadana natural gas field and to construct a pipeline from Yadana to Thailand.[66] The villagers' allegations of human rights violations stem from the SLORC's agreement with Unocal and Total to provide labor, materials, and security in exchange for the petroleum company's financing of the project.[67] They sought injunctive and declaratory relief "including but not limited to, an order directing defendants to cease payment to SLORC, and an order directing defendants to cease their participation in the joint enterprise until the resulting human rights violations in the Tenasserim region cease."[68]

The defendants promptly filed a Motion to Dismiss based on lack of subject matter jurisdiction.[69] Unocal argued that the United States Federal Court did not have jurisdiction over the other named defendants, the SLORC and the MOGE, because of their status as foreign sovereigns,[70] which would entitle them to immunity under the Foreign Sovereign

59. Aceves, *supra* note 24, at 310.
60. Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000) [*Unocal II*].
61. Aceves, *supra* note 24, at 310 (class action status was disallowed by the District Court).
62. *See* Resource Center, *supra* note 43.
63. 18 U.S.C. § 1961 (2003).
64. *See* Doe v. Unocal, Case No. 96-6959-RAP (BQRx), Third Amended Complaint For Damages And Injunctive And Declaratory Relief, *available at* http://www.earthrights.org/unocal/fedcomplaint.shtml (last visited April 24, 2003).
65. Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-57195, 2002 U.S. App. LEXIS 19263, at *3 (9th Cir. Sept. 18, 2002) [*Unocal III*].
66. Aceves, *supra* note 24, at 310.
67. *Id.*
68. *Id.*
69. Doe v. Unocal Corp., 963 F. Supp. 880, 884 (C.D. Cal. 1997) [*Unocal I*].
70. *Id.*

Immunities Act.[71] Unocal further argued that the SLORC and the MOGE were indispensable parties under Federal Rules of Civil Procedure 19 and that the villagers failed to state a claim upon which relief could be granted under Federal Rules of Civil Procedure 12(b)(6).[72]

In March of 1997, the District Court granted in part and denied in part the Motion to Dismiss.[73] The Court dismissed the claims against the SLORC and the MOGE stating these defendants were entitled to immunity pursuant to the Foreign Sovereign Immunities Act[74] and held that the remaining defendants, Unocal, its executives, and Total were not immune pursuant to the state action doctrine.[75] The District Court further determined that the villagers established subject matter jurisdiction and had sufficient evidence to seek a claim under the ATCA.[76] Subsequently, in August 2000 the District Court granted Unocal's Motion for Summary Judgment stating that the villagers failed to show that Unocal intended the proven abuse by the military and Unocal could not be held liable under the ATCA.[77] The Court also dismissed any claims under the RICO Act claiming a lack of subject matter jurisdiction[78] and dismissed the state claims without prejudice.[79] The villagers appealed the summary judgment order.[80]

B. THE NINTH CIRCUIT'S REACTION TO SUMMARY JUDGMENT IN FAVOR OF UNOCAL

In September 2002, the Ninth Circuit Court of Appeals reversed the

71. *Id.*
72. *Id.*
73. *Id.* at 883.
74. *Id.* at 884 (noting that plaintiff's were required to show that the legally significant acts giving rise to the cause of action occurred within the United States). *See* 28 U.S.C. § 1330 (2003).
75. *See* 42 U.S.C. § 1983 (2003) (stating the color of law jurisprudence is used to determine state action when the doctrine is considered in conjunction with an ATCA claim; state action did not apply to the SLORC and the MOGE because the United States has openly denounced the human rights violations of the SLORC and the military, and therefore there is no chance that the adjudication of these defendants would give rise to hostile confrontation with the Burmese government).
76. *Unocal I*, 963 F. Supp. at 884.
77. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000) [*Unocal II*].
78. *Id.* at 1311.
79. *Id.* at 1312 (noting that plaintiffs re-filed the complaint for the claims under state law in state court, but for purposes of this paper, the complaint in California state court will not be addressed).
80. Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-57195, 2002 U.S. App. LEXIS 19263, at *25-26 (9th Cir. Sept. 18, 2002) [*Unocal III*].

District Court's ruling on the Motion for Summary Judgment, stating that the villagers had a valid claim under the ATCA with regard to the forced labor, murder, and rape allegations, and affirmed the decision regarding the allegations of torture, the dismissal of the SLORC and the MOGE, and the RICO claim.[81] The court cited evidence that Unocal had met with their own hired consultants as well as various NGOs to discuss the human rights violations *before* Unocal obtained an interest in the project and during implementation.[82] Furthermore, the Ninth Circuit dismissed Total as a defendant and the matter was remanded for further proceedings in accordance with the Appeals Court's decision.

However, on February 14, 2003, the Ninth Circuit set aside the September decision in order for the matter to be heard *en banc*.[83] According to one source, the Ninth Circuit conducted the rehearing but is holding its decision pending the outcome of Supreme Court review of another ATCA claim, which was granted *certiorari*.[84]

IV. THE HISTORY OF THE ALIEN TORT CLAIMS ACT

A. PAST APPLICATION OF THE ATCA

The Alien Tort Claims Act has a history that dates back to the First Congress of the United States.[85] The original ATCA construction restricted violations under the law of nations to three specific offenses, which included (1) violations of safe-conducts; (2) infringement of ambassador's rights; and (3) piracy.[86] This narrow interpretation is still endorsed by

81. *Id.* at *83.

82. *Id.* at *14-21.

83. Doe v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716, at *2-3 (9th Cir. Feb. 14, 2003) [*Unocal IV*].

84. *See Summary of ATCA Cases Involving Multinational Corporations*, *at* http://www.laborrights.org/projects/corporate/ATCA%20summaries.htm (last visited April 16, 2004). The symposium at St. Thomas University, which is the subject of this issue of *St. Thomas Law Review*, dealt primarily with the implications of the case currently going before the Supreme Court. The case granted *certiorari* is *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *cert. granted*, Sosa v. Alvarez-Machain, 124 S. Ct. 807 (2003). The facts of *Alvarez-Machain* are substantially different from the facts of *Unocal*, although both causes of action arise under the ATCA. What is critical to understand, though, is that the Supreme Court's decision in *Alvarez-Machain* will become the touchstone for future ATCA decisions, including the *en banc* decision in *Unocal*.

85. Andrew Ridenour, *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 TUL. J. INT'L & COMP. L. 581, 583 (2001) [hereinafter Ridenour].

86. Kieserman, *supra* note 3, at 890 (quoting Anne-Marie Burley, *The Alien Tort Statute and The Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475 (1989)).

conservative scholars.[87] In 1781, the Continental Congress widened the net for plaintiffs who were attempting to bring suit against an American by enacting a resolution that would allow for "offenses . . . not contained in the foregoing instrument."[88] Its current construction was enacted in 1948, and almost sixty years later, the statute is still basically open for interpretation.[89] The text of the statute simply states that "[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."[90] Despite the ATCA's lengthy history and apparently simple construction, there have been many different interpretations and applications of this statute by district courts, and the Supreme Court's only ruling (thus far) regarding an action based on the statute provides very little guidance.[91]

The study of the ATCA has led to many divergent opinions about its purpose. However, many scholars support the theory that the framers intended the ATCA to play an integral role in insuring national security and "provide federal oversight in cases involving the denial of justice to aliens mistreated by U.S. citizens."[92] This theory sets forth the argument that the framers realized foreigners would view any tortious acts, committed by a United States citizen, as an act of America.[93] This realization led Congress to provide federal courts with subject matter jurisdiction over alien tort claims, which allowed removal of such alien tort claims to federal courts from state courts.[94]

Another theory suggests that the framers did not literally mean that the protection of the statute was limited to torts against ambassadors but for any alien who has suffered at the hands of any American.[95] The framers wanted to promulgate the international laws that sought to regulate individual conduct, regardless of the location.[96] As early as the 1820s, the Supreme Court held that the law of nations should be regarded as the "universal law of society" and its definition unrestricted.[97] Dissenters believed that the courts should not decide the matter, and that the American

87. *Id.*
88. *Id.* at 892-93.
89. 28 U.S.C. § 1350 (2003).
90. *Id.*
91. Ridenour, *supra* note 85, at 584.
92. Kieserman, *supra* note 3, at 891.
93. *Id.* at 892.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 893-94.

people cannot be expected to interpret foreign law and international policy.[98] Further, the dissent argued that the legislature should create clear criteria for courts to follow - international law as it relates to federal claims had not been established in federal common law.[99] During this same period, the judiciary held that alien tort claims brought under the law of nations doctrine were to be interpreted using federal common law standards.[100] In addition to *stare decisis*, the judiciary utilized scholarly writings and state practice to define what constitutes the law of nations.[101]

B. MODERN APPLICATION OF THE ATCA

Modern application has provided some assistance in adjudicating claims under the ATCA. The District Court of the District of Columbia, with affirmation from the Court of Appeals for the District of Columbia Circuit, provides that in order for jurisdiction to vest under an ATCA claim three elements must be satisfied: (1) the claim must be made by aliens; (2) it must be for a tort, and (3) the tort must be in violation of the law of nations or treaties of the United States.[102] Further, this holding suggests that the ATCA is the proper mechanism for bringing a cause of action against a party that has committed torts in violation of the law of nations or international treaties that the United States is party.[103] The Second Circuit in *Filartiga v. Pena-Irala* interpreted the ATCA in a similar light.[104] This particular case involved a Paraguayan national who sued another Paraguayan national under a theory of tort based upon torture and extrajudicial killings.[105] The District Court for the Eastern District of New York had dismissed the case for lack of subject matter jurisdiction, but the Second Circuit reversed, holding that "tort" in the context of the ATCA means any wrong committed that is in violation of the law of nations.[106] Additionally, the holding provided that courts should use international law standards for guidance on substantive legal issues arising under an ATCA claim.[107] Although these cases shed some light on the interpretation of the ATCA, claims brought under the ATCA continued to be treated

98. *Id.* at 894.
99. *Id.* at 893-94.
100. *Id.* at 893.
101. *Id.* at 894.
102. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 548 (D.D.C. 1981), *aff'd* 726 F.2d 774 (D.C. Cir. 1984).
103. *Id.* at 549.
104. *See generally* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
105. *Id.* at 877-79.
106. *Id.* at 887.
107. *Id.*

inconsistently as courts struggled to grasp the full implications and legislative intent behind the statute.[108]

Consequently, in an attempt to enhance and clarify the ATCA's meaning, Congress enacted the Torture Victim Protection Act of 1991 ("TVPA").[109] The TVPA is an attempt to establish clear criteria for what constitutes an actionable claim under the ATCA and who may be held liable. Specifically, the TVPA provides that any individual who acts "under actual or apparent authority, or color of law, of any foreign nation, (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual."[110] The TVPA further allows relief to "any person who may be a claimant in an action for wrongful death" due to extrajudicial killings.[111] The claimant in such cases must prove that all avenues for relief have been fully utilized "in the place in which the conduct giving rise to the claim occurred" before bringing a cause of action in the United States federal courts.[112] The TVPA allows for a broad definition of "torture"[113] and allows for claims brought for "severe pain or suffering . . . whether physical or mental" used to obtain information or confessions, punishment, intimidation, coercion, or "for any reason based on discrimination of any kind."[114] Finally, the statute of limitations on such claims is ten years from the time the cause of action arises and the amount in controversy is immaterial.[115]

Despite the congressional attempt to define the scope and limits of the ATCA, courts remain very divided and independent in their approach to

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108. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 380 (E.D. La. 1997) (dismissing human rights claims for failure to satisfy the "color of law" requirement even though the abuses took place on corporate property by government contracted troops).

109. Torture Victims Protection Act of 1991, Pub. L. No. 102-256, § 106 Stat. 73 (enacted Mar. 12, 1992) (codified as Note to 28 U.S.C. § 1350). The TVPA is appended as a statutory note to the ATCA.

110. *Id.*

111. *Id.*

112. *Id.*

113. The TVPA defines torture as:

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Id.

114. *Id.*

115. *Id.*

these types of tort claims.[116] The most current applications of the ATCA provide that the alleged violations must be against the "law of nations" as presented in the plain text of the ATCA.[117] Further, the ATCA, in conjunction with the TVPA, has been interpreted to allow causes of action *only* in cases that are shockingly egregious violations of universally recognized principles of international law,[118] and the principles that guide should be viewed in light of modern standards of international law.[119] In effect, the TVPA has limited claims to those of *jus cogens* (fundamental human rights), which are recognized in international accords and treaties, and therefore local rules should not be consulted for standing or resolution.[120]

Another issue regarding U.S. courts' ability to effectively hear these types of tort claims is subject matter jurisdiction. The TVPA provides that individuals who commit such torts must have acted under the "color of law" of any foreign nation.[121] The courts are split as to the requirement of the involvement of a state actor in the alleged violations.[122] While some courts hold that state action is required to proceed with an ATCA claim, other courts have applied the "private actor" tests that are currently used for civil rights cases.[123] The "private actor" tests are the nexus test, the symbiotic relationship test, the joint action test, and the public function test. The private actor test and the parameters set forth by the Supreme Court (in the pending case of *Sosa v. Alvarez-Machain*) will be the most telling regarding the ATCA's effect on corporations.

In order for the nexus test to be satisfied, a plaintiff must establish a "sufficiently close nexus between the government and the challenged conduct such that the conduct may be fairly treated as that of the State itself."[124] The symbiotic relationship test requires that the state "insinuates itself" into the private party's conduct, thus becoming a mutual participant.[125] The joint action test allows a court to assess liability to a

116. Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts,* 18 STAN. ENVT'L L.J. 145, 206 (1999) [hereinafter Rosencranz & Campbell].

117. *Id.* at 151.

118. *Id.* at 174.

119. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) [*Unocal II*].

120. Ridenour, *supra* note 85, at 588.

121. Torture Victim Protection Act of 1991, Pub. L. No 102-256, 106 Stat. 73 (1991).

122. Rosencranz & Campbell, *supra* note 116, at 159.

123. *Id.* at 152-63.

124. *Id.* at 160 (quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1448 (10th Cir. 1995)).

125. *Id.* (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

private actor if there is an express agreement between the state and the private party creating a "joint action."[126] Finally, the court may determine a private actor may be liable under the public function test if the private actor is considered to be fulfilling the duty that is customarily performed by the state.[127] If any of these tests are satisfied, then the plaintiff may be able to pursue a claim under the "color of law" requirement set forth in the TVPA.

If the subject matter does not fall under the "color of law" requirement, a plaintiff may seek redress against a private individual if the individual violated the law of nations.[128] Once again, the courts are split on the interpretation of this status. There is not a consensus among them as to what truly constitutes a violation of the law of nations or international law. The Second Circuit has held that individuals who have acted under official authority or under color of such authority as well as private actors, can be found liable if the allegation against the defendant includes violations of recognized international law.[129] For instance in *Kadic v. Karadzic,* the court held that Karadzic, President of a three-man presidency of the self-proclaimed Bosnian-Serb republic, could be found liable in his personal capacity as well as his capacity as a state actor because the alleged torts involved genocide.[130] Contrary to the Second Circuit's opinion in *Kazic*, the Southern District of New York in *Amlon Metals, Inc. v. FMC Corp.*[131] held that the Restatement (Third) of Foreign Relations Law of the United States prohibiting the alleged tort was inapplicable and "did not constitute a statement of universally recognized principles."[132] Interestingly enough, the Second Circuit hears the Southern District of New York's appeals. The inconsistent approach to the requisites for satisfying subject matter jurisdiction, even between courts where one court has a binding effect upon the other, is a clear example of the disparate treatment of these particular types of claims. It is no wonder the rulings on subject matter jurisdiction are unpredictable; without any uniform criteria for guidance, courts will continue to haphazardly define international law leaving parties with very little assurance of possible outcomes. Furthermore, it seems that if these types of claims are not reviewed using a uniform criteria, the ATCA as a

126. *Id.* (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)).

127. *Id.* at 161.

128. *Id.* at 162.

129. *Id.* at 164.

130. Kadic v. Karadzic, 70 F.3d 232, 239-40 (2d Cir. 1995) (recognizing the act of genocide as an offense against international law under the Restatement (Third) of the Foreign Relations Law of the United States).

131. *See* Rosencranz & Campbell, *supra* note 116, at 155 (citing to Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991)).

132. *Id.*

mechanism for preventing and deterring private entities from committing human rights violations, will be sorely lacking.

V. THE ATCA/TVPA AS APPLIED TO CORPORATIONS

The TVPA clearly holds individuals liable for violations of international human rights but what about corporations—as is the case with *Doe v. Unocal*. Corporations have not been held liable for such violations under the TVPA, but they have not been found to be *per se* immune either.[133] The courts have applied several different methods for determining whether a corporation is sufficiently connected to the entities that inflict the various human rights violations that could result in the corporation being held liable.[134] The District Court for the Central District of California in *Doe v. Unocal* utilized the "joint action" test under the "color of law" philosophy for determining the nexus necessary for corporate liability.[135] The joint action test examined the corporation's "willful participation" in the Burma pipeline project and its relationship to the violations of recognized international human rights.[136] Additionally, under the color of law application, the plaintiff must show that the defendant corporation conspired with the local authorities to achieve a common unconstitutional goal.[137] According to the Central District of California District Court, in order to succeed under this test, the plaintiffs must show that Unocal acted in concert with the SLORC to effectuate the alleged human rights violations and that Unocal's conduct was the proximate cause of the injury.[138] Proximate cause is proven by showing that Unocal "exercised sufficient control over the public official's [SLORC] decision-making" resulting in the alleged violations.[139] As discussed previously, the lower Court's decision was reversed because the Ninth Circuit applied international law standards to conclude that Unocal may be held liable.[140] In order for the villagers to meet the elements of

133. Ridenour, *supra* note 85, at 590.
134. *Id.* at 591.
135. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000) [*Unocal II*].
136. *Id.* at 1306-07.
137. Ridenour, *supra* note 85, at 591.
138. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1307 (C.D. Cal. 2000) [*Unocal II*].
139. Ridenour, *supra* note 85, at 592.
140. Bowoto v. Chevron Texaco Corp., No. C 99-2506 SI, 2004 U.S. App. LEXIS 4603, at *31 n.9 (N.D. Cal. Mar. 22, 2004) (explaining: The same case has generated several other written opinions, including notably John Doe I v. Unocal Corp., 2002 U.S. App. LEXIS 19263, 2002 WL 31063976, 2002 Daily Journal DAR 10,794 (9th Cir. September 18, 2002), which reversed the district court's summary judgment in favor of US-based oil companies and which held that there was sufficient evidence to warrant trial on charges that the oil companies had aided and abetted the Myanmar military in committing alleged violations of the law of nations. On February 14,

their prima facie case, the Court must believe that the contractual obligations between SLORC and Unocal influenced the SLORC's decision-making process. Essentially, in order to prevail, the villagers must show that Unocal knowingly participated with the SLORC in committing the alleged violations.

It is quite apparent that the courts are split on how to proceed and what doctrines to consider when faced with a claim against U.S. corporations alleging human rights abuses outside of the United States. The courts are in dire need of Supreme Court guidance in this area to ensure consistent treatment of all claims. The established criteria could be utilized as a guide for corporations who seek to improve their foreign business practices.[141] If specific violations are outlined and clear parameters are set forth for what constitutes an actionable claim under the ATCA, then the statute may force corporations to become proactive and conduct ethical business practices in order to avoid costly litigation,[142] which would also avoid costly damage control on the public relations front.

With the advances in technology and communication, it is easier than ever for U.S. corporations to engage in business worldwide.[143] These advances have furthered opportunities for U.S. corporations seeking to do business in lesser developed countries, which translates into decreased operation costs and increased profits.[144] Too often these same business ventures encourage governments, such as the Burmese military government in the Unocal situation, to further commit human rights violations against their citizens in order to fulfill their contractual obligations to the U.S. corporations.[145]

Although there are several treaties in place that prohibit human rights violations and environmental damage by the United States government, none of these treaties apply to private actors, namely U.S. corporations.

2003, the Ninth Circuit agreed to rehear John Doe I *en banc;* accordingly, the opinion was vacated. On April 9, 2003, the Circuit ordered the parties to be prepared to address the question whether, in order to determine if Unocal may be held liable for the acts of the government of Myanmar, federal courts should apply an international-law aiding and abetting standard, or whether Unocal's liability should be resolved according to general federal common law tort principles. The *en banc* hearing was held on June 17, 2003. On December 9, 2003, the Circuit ordered the case withdrawn from submission pending issuance of the United States Supreme Court's decision in Sosa v. Alvarez-Machain, 157 L. Ed. 2d 692, 124 S. Ct. 807, 2003 U.S. LEXIS 8572, 2003 WL 22070605 (Dec. 1, 2003)).

141. Kieserman, *supra* note 3, at 881-82.

142. Costly litigation includes the costs associated with trial as well as potential judgments against them for such claims.

143. Kieserman, *supra* note 3, at 881-82.

144. *Id.* at 882.

145. *See id.* at 881-82.

The United States enters these agreements in their governmental capacity and has never professed to enforce such agreements against private actors such as U.S. corporations. U.S. corporations are in a unique position of immunity because they are not directly involved in the process and approval of such international laws.[146] Essentially, the U.S. corporations are "above the law," and their own moral and legal practices will dictate their behavior regarding business relations with "capital-hungry" foreign nations.[147]

The United States has entered into several international treaties in an attempt to criminalize the continuation of human rights abuses.[148] Unfortunately, these mechanisms are soft-law instruments or codes that have little impact on nations and no impact on non-state actors that are in violation.[149] Prevention has been attempted through trade initiatives that have proven to be ineffective and unsuccessful.[150] Additionally, Congress has enacted legislation to restrict U.S. corporations' investments in foreign countries that have a record of human rights abuses against their own citizens.[151] These policies have been held to be invalid because of international standard preemption issues and viewed by critics as counter-productive to establishing a global market.[152] In spite of this, ethically challenged U.S. corporations are beginning to consider rethinking their business relations with such governments because the ATCA may prove to be a useful tool in holding them liable for actions by governments that exploit their citizens for mutual benefit;[153] if the ATCA is applied to U.S. corporations doing business with corrupt governments in lesser developed countries, the potentiality of litigation may give those corporations pause. In essence, the ATCA could have a considerable deterrent effect on U.S. corporations conducting business abroad. Considering the amounts juries have returned plaintiffs, it is no wonder this type of litigation has been given attention by U.S. corporations.[154]

Proponents of the ATCA claim that the original framers were vague, and the reason the judiciary has not set clear standards for interpretation is because the nature of this type of litigation should be dynamic, changing

146. *See id.* at 882-83.
147. *Id.* at 882.
148. *See generally id.* at 883-85 (discussing United States' unsuccessful efforts to prevent the abuse of human rights).
149. *Id.* at 883-84.
150. *Id.* at 884.
151. *Id.* at 884-85.
152. *Id.*
153. *See id.* at 886-87.
154. Rosencranz & Campbell, *supra* note 116, at 170 n.160.

and adapting over time.[155] Further, the field of international law is evolving at an extraordinary rate and is constantly being modified and any finite interpretation would limit the reach and potential application of the ATCA.[156] A broad interpretation of the ATCA lends itself to the proponents understanding that its application should strike a balance between "national self-interest" and the federal government's duty as a responsible member of the international community.[157]

Critics suggest that Congress never intended the statute to reach private actors or U.S. corporations. They believe that the statute was constructed to prevent state actors from committing human rights abuses in violation of international laws, and not that the ATCA was construed for use involving business relations between U.S. corporations and other governments.[158]

VI. IMPLICATIONS FOR THE *DOE V. UNOCAL* DECISION

The *Doe v. Unocal* case has been the first of its kind which may survive summary judgment.[159] The ATCA has been effective in holding state actors liable for human rights violations, but it has never been successfully used against a U.S. corporation doing business abroad.[160] The implications of the outcome will have a great impact on the future of international business relations. It appears that the ATCA was created to protect associated United States interests of life, liberty, and freedom.[161] However, the courts are reluctant to apply such laws to U.S. corporations who in one fashion or another prevent these interests from coming to fruition.[162]

If the villagers of Burma are successful in their case against Unocal, corporations will be forced to rethink investing in such countries, or at the very least, how they go about doing business in lesser developed countries. Furthermore, the ATCA will be viewed as a mechanism to hold "big business" accountable for its contribution to governments that violate international norms for human rights. Corporations will no longer be above reproach for merely being a "passive investor."[163] There is little

155. *See* Kieserman, *supra* note 3, at 889.
156. *Id.* at 892-93.
157. *Id.* at 890.
158. *Id.* at 892.
159. Aceves, *supra* note 24, at 314.
160. Rosencranz & Campbell, *supra* note 116, at 152-54.
161. *See supra* notes 85-132 and accompanying text regarding ATCA history.
162. Rosencranz & Campbell, *supra* note 116, at 205-06.
163. Terry Collingsworth, Boundaries in the Field of Human Rights, *The Key Human Rights*

doubt such corporations do extensive research and consultation before ultimately deciding to establish business practices anywhere. If any of the research reveals potential human rights violations, corporations will no longer be able to ignore them and simply profit from their findings. U.S. corporations should be held to American standards regardless of where they invest or do business.

The United States government has gone through the motions to appear opposed to international human rights violations, but it is not willing to apply these standards to "big business."[164] If big business is entitled to reap the benefits of being a U.S. corporation, then it should have to bear the cost of conforming to American moral and legal standards—regardless of location. U.S. corporations are an extension of the country they represent and should be regarded as such. The violations that Unocal—and similarly situated corporations—are being accused of perpetuating are not mythical obstacles to discourage international business. These violations are formally recognized as running contrary to international human rights.[165]

If the judiciary steps up to the plate, then big business will get a clear message of the true cost of unethical business practices. Furthermore, the potential costs to litigate such claims will discourage these companies from engaging with corrupt governments. In a best case scenario, foreign countries who wish to attract U.S. corporations will be compelled to correct the treatment of their citizens, which would be a win-win situation for business as well as undeveloped countries. Additionally, the United States would be able to point to a clear example of its willingness to become a responsible advocate of human rights.

Granted, the ATCA has its limitations. Torts that involve international norms would be the only claims subject to the scrutiny of the federal judiciary.[166] Additionally, the practical limitations involved in pursuing an ATCA claim present enormous hurdles.[167] For example, the governments that engage such human rights abuses are likely to retaliate against citizens who pursue an ATCA claim.[168] Additionally, such governments have been known for making it extremely difficult for legal

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Challenge: Developing Enforcement Mechanisms, 15 HARV. HUM. RTS. J. 183, 200 (2002) [hereinafter Collingsworth].

164. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997).

165. *See supra* notes 10-19 and accompanying text regarding the history of international human rights.

166. Collingsworth, *supra* note 163, at 202.

167. *Id.* at 202-03.

168. *Id.* at 202.

advocates to enter the country in order to gather evidence and conduct client and witness interviews; some governments even take an additional interventionary step and threaten an advocate's health and safety.[169] Finally, the cost to litigate a claim can be enormous, which could deter U.S. attorneys from taking a case, even on a contingency fee basis.[170]

However, if the court sets a precedent by dismissing the villager's complaint, it will be business as usual. U.S. corporations will be able to construct contractual arrangements that will assist in escaping liability. The "race to the bottom" will become even more competitive. Corporations will be able to turn a blind eye to the treatment of the people who produce their goods while maximizing profits and decreasing costs, all in the name of capitalism and consumption.

VII. CONCLUSION

Doe v. Unocal has the potential to ignite serious changes in the way U.S. corporations do business abroad. This is particularly true for those corporations who choose to ignore serious situations of human rights abuses in pursuit of a larger profit, particularly in lesser developed countries. Furthermore, and perhaps even more importantly, the Ninth Circuit's *en banc* decision may provide victims of such abuses with a real mechanism for redress. It will be interesting to see if the judiciary will be able to sustain the pressure from corporate groups and rule in favor of humanity.

169. *Id.* at 202.
170. *Id.* at 202-03.