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I. INTRODUCTION

In *Flores v. Southern Peru Copper Corporation,*[1] the U.S. Court of Appeals, Second Circuit, re-examined its Alien Tort Claims Act (ATCA)[2] jurisprudence and assumed that a private domestic company acting in its private capacity could be liable to Peruvian nationals under the ATCA for a wide range of torts under international law, including violations of rights to "life and health."[3] Previous cases and other Circuits held that only a handful of egregious crimes, when committed by a private individual or corporation, can justify private liability under the ATCA.[4] Rather than abiding by these interpretations, however, the court examined in depth the sufficiency of the Peruvians' claims without addressing the threshold issue of private liability.[5]

Ultimately, the *Flores* court held that it lacked subject matter jurisdiction over the Peruvians' environmental claims, styled as claims for life and health.[6] Nevertheless, the court raised the prospect of wide-ranging

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[1] Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

[2] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

[3] *Flores,* 343 F.3d at 160.

[4] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that only a "handful of crimes" should lead to private liability under the ATCA); *see also* Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995) (suggesting that only crimes "committed in pursuit of genocide or war crimes" should engender private liability); *see also* Doe v. Unocal Corp., 2002 WL 31063976, at *9 (9th Cir. 2002), *vacated, en banc hearing granted* 2003 WL 359787 (abiding by previous two courts to set a threshold question for corporate liability as to whether the tort alleged fits into the egregious crimes suggested in those cases).

[5] *See Flores*, 343 F.3d at 160-72.

[6] *Id.* at 172.

ATCA liability by suggesting that if it had found sufficient consensus in "customary international law" regarding the illegality of Southern Peru Copper Corporation's intra-national pollution, the claims may have been granted subject matter jurisdiction.[7] The court came to the proper conclusion in rejecting subject matter jurisdiction. However, it wrongly applied the holding in *Filartiga v. Pena-Irala*–which considered only state-sponsored activity–to claims against a private corporation acting in its private capacity.[8] Whether this misplaced reliance on *Filartiga* and failure to set a threshold standard for private corporate liability was intentional or mistaken, it was a grave error, putting private corporations at risk for snowballing private corporate liability under the ATCA.

The *Flores* court should have issued a more limited holding and re-emphasized that private, non-state-sponsored actions will only engender *Filartiga*-style[9] ATCA analysis in a limited set of egregious circumstances.[10] Instead, as this note will examine, the court opened the door for endless and unpredictable liability, double recovery, and forum-shopping that could eventually stifle U.S. multi-national corporation ("MNC") investment and activity abroad, hamper the competitiveness of U.S. MNCs abroad, and cost such companies millions of dollars in extensive discovery and briefing on every claim brought in the Second Circuit.[11]

The ideal solution to the problem presented by the *Flores* decision would be for Congress or the Supreme Court to clarify all aspects of liability under the ATCA, particularly corporate liability.[12] While the

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[7] *Id.* at 160-72.

[8] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[9] As will be discussed in detail later in this note, the Second Circuit Court in *Filartiga* reinstated the ATCA as a viable cause of action, and allowed an ATCA claim against a state-sponsored entity who violated "universally accepted norms of. . .international law." *See Filartiga*, 630 F.2d at 877.

[10] Such limited ATCA liability was suggested in Judge Edward's concurrence in *Tel-Oren*, 726 F.2d at 794.

[11] For the propositions that private corporate ATCA liability endangers U.S. MNCs in a variety of ways, *see* Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 471 (2001) (forum shopping and discovery legal costs); PETER MARBER, FROM THIRD WORLD TO WORLD CLASS: THE FUTURE OF EMERGING MARKETS IN THE GLOBAL ECONOMY (1998) (uncertainty of investment); Mark Gibney and R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996) (MNCs will lose competitive advantage if subjected to U.S. labor, environmental, and other such laws abroad); Harvard Law Review Association, *Ninth Circuit Uses International Law to Decide Applicable Substantive Law Under Alien Tort Claims Act*, 116 HARV. L. REV. 1525, 1531 (2003) (noting that in decisions such as *Unocal*, extending liability to MNCs under *Filartiga*-style analysis could "strike deeply at the ability of parties to organize their conduct and protect their expectations").

[12] The suggestion that Congress or the Supreme Court needs to clarify the scope of the

Supreme Court recently issued its long-awaited first decision addressing the scope of the ATCA, *Sosa v. Alvarez-Machain*, it specifically left open the corporate actor question under the ATCA.[13] To respond to this confusion, and to redress cases such as *Flores*, Congress and the Circuits must set a standard which makes individual corporate liability a threshold question, as in the Ninth Circuit's panel decision in *Doe v. Unocal*.[14]

The *Unocal* decision sets a standard that provides an appropriate balance between corporate liability in the most egregious circumstances and jurisprudential stability which encourages investment abroad. If a U.S.-based MNC's violation does not match one of the few egregious crimes enumerated by the D.C. Circuit's Judge Edwards in his concurrence in *Tel-Oren v. Libyan Arab Republic*,[15] and reiterated by the Second Circuit in other cases, analysis under the broad *Filartiga* test should be precluded in cases like *Flores*.

Part II of this note will explain the history of the ATCA and discuss precedents in the Second, Fifth and Seventh Circuits that have led to private corporate liability under the ATCA. Part III will detail the *Flores* decision. Part IV will analyze *Flores* and argue that the court should have set a threshold standard for private corporate liability. Finally, Part V will lay out the detrimental consequences that the *Flores* decision will have on U.S.-based MNCs abroad.

II. ATCA JURISPRUDENCE

A. History of the ATCA

The Alien Tort Claims Act, drafted as part of the Judiciary Act of 1789, states that "the district courts shall have original jurisdiction of any

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ATCA is shared by scholars and Circuit Court Judges alike. *See, e.g., Tel-Oren*, 726 F.2d at 774 (Edwards, J., concurring) ("absent direction from the Supreme Court on the proper scope of the obscure section 1350, I am not prepared to extend *Filartiga*'s construction"); Bradley, *supra* note 11, at 471 (noting that Judge Edwards' observation in Tel-Oren is "even more apt today, given recent expansions in" ATCA litigation).

[13] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.20 (2004) (noting that "a related consideration" that should be undertaken by other courts interpreting the ATCA under the *Filartiga* standard "is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation").

[14] *Unocal*, 2002 WL 31063976 at *9. As mentioned above, at the time this article was submitted, an en banc decision in *Unocal* was pending, as the Circuit opted to wait and respond to the recent Supreme Court decision in *Sosa*. Regardless of the outcome of this en banc rehearing in light of the *Sosa* decision, it is the contention of this note that the standard set in the panel decision is the appropriate standard for addressing corporate ATCA claims, for reasons that will be discussed.

[15] *Tel-Oren*, 726 F.2d at 794 (Edwards, J., concurring).

civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[16] The statute became law in a time when the United States was a diplomatic infant, and it has been theorized that "the intent of the section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis."[17] The main original applications of the statute were to piracy prevention, the resolution of claims arising under the laws of prize, and the redress of offenses against ambassadors.[18]

The statute lay rarely used until 1980, when the Second Circuit sustained an action under the ATCA in the case of *Filartiga v. Pena-Irala.*[19] The main issue addressed by the *Filartiga* court was the definition of "law of nations."[20] The court settled on an evolving standard for determining which torts are actionable under international law, rather than a historical interpretation. A historical interpretation would have limited the statute's reach to piracy and other such offenses, as it traditionally had been used.[21] The evolving standard allows for modern tort claims to arise under the statute if a claimant can prove an international consensus on illegality under customary international law.[22] Customary international law is "composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern," and has been established by referencing treaties, multinational declarations and decisions, and international legal scholarship.[23] Possibly due to the proliferation of American industrial activity abroad, the cause of action recognized under *Filartiga* has recently been resurrected and applied to the private sector activities of U.S.-based MNCs abroad.[24] Most notably, the Second and Ninth Circuits have heard several private sector ATCA cases, and have been the most vociferous Circuits in applying the statute.[25] While most

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[16] 28 U.S.C. § 1350.

[17] *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring).

[18] 4 BLACKSTONE'S COMMENTARIES 67 (Welsby ed. 1845).

[19] *Filartiga*, 630 F.2d at 876.

[20] 28 U.S.C. §1350.

[21] *Filartiga*, 630 F.2d at 887.

[22] *Id.*

[23] *Id.* at 154-62.

[24] *See, e.g.*, Bradley, *supra* note 11, at 471 (noting that such litigation "has expanded significantly"); Brad J. Kieserman, *Comment: Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U.L. REV. 881, 883 (1999) (noting that due to the growth of MNC influence abroad, "human rights advocates turned recently to federal civil litigation in an effort to exert pressure on U.S.-based MNCs. . . [T]he primary statutory authority for these suits is the ancient and once obscure Alien Tort Claims Act.").

[25] *See, e.g., Filartiga*, 630 F.2d at 876; Doe v. Unocal Corp., 2002 WL 31063976, at *9 (9th Cir. 2002), *vacated, en banc hearing granted* by 2003 WL 359787.

modern attempts to apply the ATCA to MNCs have been unsuccessful,[26] the sheer volume of claims against corporate entities displays an emerging plaintiffs' bar and human rights litigation interest in this area. The pressure to expand this statute's influence over U.S.-based MNCs looks as though it will continue until either the Supreme Court or Congress directly addresses the application of the *Filartiga* test to U.S.-based MNCs.[27]

B. The Second Circuit's Landmark *Filartiga* Decision

As discussed, the Second Circuit resurrected claims under the ATCA in a landmark 1980 decision, *Filartiga v. Pena-Irala*.[28] An in-depth discussion of the case is necessary for a full understanding of current ATCA jurisprudence. The case dealt with a Paraguayan plaintiff suing a Paraguayan government official for torture following the death of the plaintiff's seventeen-year-old son.[29] The case was first brought in the District Court for the Eastern District of New York, which narrowly construed the "law of nations"[30] language in the ATCA to exclude torture,

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[26] This list has been adapted and updated from a list of unsuccessful ATCA claims against MNCs provided by Kieserman, *supra* note 24, at 883; Cases against MNCs dismissed for lack of subject matter jurisdiction, *see* Adbullahi v. Pfizer, Inc. 2003 WL 22317923 (2d Cir. 2003); Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003); Bigio v. Coca Cola Co., 239 F.3d 440 (2d Cir. 2000); Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103 (7th Cir. 1984); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142 (7th Cir. 1973); Sinaltrainal v. Coca Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003); Sarei v. Rio Tinto, P.L.C., 221 F. Supp. 2d 1116 (C.D. Cal. 2002); Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y. 2000); Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000); Friedman v. Bayer Corp., 1999 WL 33457825 (E.D.N.Y. 1999); Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997), *dismissed with prejudice*, No. CIV.A.96-1474, 1998 WL 92246 (E.D. La. Mar. 3, 1998); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991); De Wit v. KLM Royal Dutch Airlines, N.V., 570 F. Supp. 613 (S.D.N.Y. 1983); B.T. Shanker Hedge v. British Airways, No. 82-C-1410, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill. Dec. 27, 1982); Trans-Continental Inv. Corp., S.A. v. Bank of the Commonwealth, 500 F. Supp. 565 (C.D. Cal. 1980); Alomang v. Freeport- McMoRan, Inc., No. 96-9962 (Civ. Dist. for the Parish of Orleans Div. H-12 1997) (dismissing also for exception to venue), *aff'd on reh'g*, 718 So. 2d 971 (La. Ct. App. 1998), *cert. denied*, No. 98-C-1352, 1998 La. LEXIS 2308 (La. July 2, 1998). Cases against MNCs dismissed for forum non conveniens, *see* Aguinda v. Texaco, 303 F.3d 470 (2d Cir. 2002); Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988); Robert v. Bell Helicopter Textron, Inc., 2002 WL 1268030 (N.D. Tex, 2002); Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997); Alomang v. Freeport-McMoRan, Inc., No. CIV.A.96-2139, 1996 WL 601431 (E.D. La. Oct. 17, 1996); Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico S.A., 528 F. Supp. 1337 (S.D.N.Y. 1982).

[27] *Bradley*, *supra* note 11, at 471.

[28] *Filartiga*, 630 F.2d at 876.

[29] *Id.* at 878.

[30] 28 U.S.C. § 1350.

and denied subject matter jurisdiction, dismissing plaintiff's complaint.[31] Plaintiff appealed, and the Second Circuit Court reversed, holding that "deliberate torture committed under color of official authority violates . . . international law."[32] This holding seems relatively narrow, applying only to torture by a government official; however, the court set a broad standard for determining which torts fall under "international law" and can be claimed under the ATCA.[33] To determine which torts can be claimed, the court outlined sources to be used in finding an international consensus on illegality.[34] The court applied a broad definition of modern international common law, capable of evolving to include new torts as the international community reaches a consensus on their repugnancy.[35] Thus, the decision left MNCs and other ATCA defendants exposed to evolving liability in later cases. In summary, *Filartiga* ruled that the ATCA "authorizes US federal courts to adjudicate suits between foreign parties concerning violations of international human rights standards, and that such adjudications are consistent with the federal judicial power authorized by Article III of the Constitution."[36]

More specifically, the court held that the ATCA "open[ed] the federal courts for adjudication of the rights already recognized by international law."[37] In determining which rights are recognized by international law, the court suggested that an "international consensus"[38] on the illegality of the action must be proved, looking to "international accords and unilateral action."[39] In cases where plaintiffs make general tort claims under the ATCA and "'there is no treaty, and no controlling executive or legislative act or judicial decision,' the court held that "resort must be had to the customs and usages of civilized nations [and] the works of jurists.'"[40] The court then proceeded to analyze whether an international consensus existed regarding the legality of torture. Among other sources, the court

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[31] *Filartiga,* 630 F.2d at 880.

[32] *Id.* at 878.

[33] For the proposition that *Filartiga* sets a broad standard, *see* Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Abuses*, 27 YALE J. INT'L L. 1, 3 (2002) (suggesting *Filartiga* invokes a "broad doctrine"). *See also* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1011 (2001) (suggesting *Filartiga* is "sweeping").

[34] *Filartiga,* 630 F.2d at 884.

[35] *Id.* at 876.

[36] *See* Bradley, *supra* note 11, at 457. Note that ordinarily ATCA defendants must be served process while in the United States, although efforts have been made at serving defendants while visiting the United Nations. Bradley, *supra* note 11, at 469-70.

[37] *Filartiga*, 630 F.2d at 887.

[38] *Id.* at 884.

[39] *Id.* at 889.

[40] *Filartiga*, 630 F.3d at 881 (quoting The Paquette Habana, 175 U.S. 677 (1900)).

referenced: U.N. Resolutions, Harvard Law Review articles, American Conventions, and International Covenants.[41] This test, although accepted by many scholars,[42] has been described as a "broad doctrine [that] encompasses a wide range of administrative and judicial remedies for claims that may be styled as human rights violations, torts, or crimes, against both domestic and foreign defendants, for violations committed both at home and abroad."[43]

However, the court tempered the breadth of the test by suggesting that its main holding dealt strictly with torture committed through state action, under color of law, and perhaps was not meant to have broad-reaching effects and complete mutability. It specified that "deliberate torture perpetrated under color of *official authority* violates universally accepted norms of the international law of human rights" and that the ATCA "provides federal jurisdiction" upon "torturers . . . within our borders."[44] The limited nature of this holding is overlooked by courts, including the Second Circuit itself in *Flores*, which apply the *Filartiga* test without considering its "official authority" language.[45]

Because *Filartiga* sets an evolving standard for determining which torts are actionable under the ATCA, it allows for claims far outside the historical scope of the ATCA,[46] engendering a debate amongst the Circuits as to its applicability both to state-sponsored and private actions. Two circuits have explicitly followed the standard, but another has strictly limited it.[47] The resolution of this Circuit split, as it relates to corporate liability, will have enduring ramifications.

C. Codification of *Filartiga* in the TVPA

Congress took note of the *Filartiga* decision and legitimized the court's holding in a limited sense by providing a cause of action against state actors committing torture under color of law in the Torture Victim's Protection Act ("TVPA").[48] This act was codified as part of the ATCA.

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[41] *Id.* at 884.

[42] Christopher P. Meade, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in Hwang v. Japan*, 35 VAND. J. TRANSNAT'L L. 211, 250 (2002).

[43] *Stephens*, *supra* note 33, at 3.

[44] *Filartiga*, 630 F.2d at 877 (emphasis added).

[45] *Id.*

[46] *See* BLACKSTONE, *supra* note 18.

[47] *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994); Doe v. Unocal Corp., 2002 WL 31063976 (all accepting and applying the *Filartiga* standard). *But see* Tel-Oren, 726 F.2d 774 (D.C. Cir. 1984); Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (rejecting *Filartiga*-style analysis).

[48] Torture Victim Protection Act, Pub. L. No. 102-408, 106 Stat. 73 (1991) (codified as Note to 28 U.S.C. § 1350 (1992)).

The TVPA directly incorporates *Filartiga*'s holding, stating that "an individual who, under actual or apparent authority or under color of law of any foreign nation . . . [commits] torture . . . shall be liable for damages in a civil action."[49] Thus, the TVPA imposes a state action requirement. Furthermore, the TVPA expressly expands its breadth to cover U.S. nationals who are tortured abroad, not strictly foreign nationals, as the ATCA covers.[50] Congress noted that this specific codification of a torture claim in no way limits the evolution of other international common law claims under the ATCA, thus distinguishing the two statutes' subject matter.[51] However, Congress did not distinguish the scope of liability of the TVPA from the ATCA.[52] The scope of liability for the TVPA includes only acts committed under color of law, as interpreted under § 1983, or under an agency theory.[53] Therefore, considering that the scope of coverage of the Acts is similar, an argument can be made that the ATCA requires state action as well, as will be discussed later in this article.

D. Rejection of *Filartiga* by the D.C. Circuit

Congress enacted the TVPA not only in response to the breadth of *Filartiga*, but also in response to the D.C. Circuit's questioning of the *Filartiga* standard.[54] In *Tel-Oren v. Libyan Arab Republic*, the D.C. Circuit ruled on a case filed against the Palestine Liberation Organization and others by victims of an attack on a civilian bus in Israel in 1984.[55] All three concurrences in the Court's per curiam opinion rejected the plaintiffs' claims and called for a narrower reading of the ATCA than *Filartiga* had advanced.[56] *Tel-Oren* is particularly important because Judge Edwards' concurrence was the first time a major Circuit Court judge addressed the issue of private liability under the ATCA.[57]

Judge Edwards agreed with the mode of analysis of the *Filartiga* standard–determining customary international law through various treaties

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[49] *Id.*

[50] *Id.*

[51] S. Rep. No. 102-249, at 5 (1991).

[52] *Id.* at 8.

[53] *Id.*

[54] *Id.* at 4-5.

[55] *Tel-Oren*, 726 F.2d at 775.

[56] *See id.* at 776 (Edwards, J. concurring) (Judge Edwards was "not prepared to extend *Filartiga*'s construction of [the ATCA] to encompass this case"). *See also id.* at 799 (Bork J. concurring) (limiting jurisdiction under ATCA to only the explicitly referenced violations, either a violation of a treaty or violation of one of the original law of nations violations cited by Blackstone, piracy, etc.); *See also id.* at 823 (Robb J. concurring) (cases such as this under ATCA are non-justiciable under the political question doctrine).

[57] *Tel-Oren*, 726 F.2d at 776.

and other sources of law–when applied to government actors.[58] However, he suggested limiting private liability under the ATCA to a "handful of crimes," such as slave trading and piracy.[59] Edwards went on to determine that torture is not "among the handful of crimes to which the law of nations applies individual liability."[60] This limitation has been cited with approval by the Second and Ninth Circuits.[61]

E. The Second Circuit Applies the ATCA to Private Entities in the *Kadic* Decision

Fifteen years after the *Filartiga* decision, the Second Circuit took an opportunity to "build upon the foundation" of *Filartiga* and extended ATCA liability to private parties where the crimes verged on "genocide."[62] In *Kadic v. Karadzic*, citizens of Bosnia brought suit against Karadzic, the head of Serb military forces, claiming various torts and crimes including "rape, forced prostitution, forced impregnation, torture and summary execution."[63] The court held that, although Karadzic was a private individual, the claim was actionable because such conduct "violate[s] the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[64]

This is a broad reading, but it is limited in the sense that it suggests that only extreme crimes such as genocide will give rise to private ATCA liability. Thus, it abides by the D.C. Circuit, settling genocide-related crimes into the "handful"[65] of extremely offensive crimes that Judge Edwards suggested in *Tel-Oren* should engender individual private liability subject to the *Filartiga* standard. It has been noted that this step toward private corporate liability was an expansion of *Filartiga*, but it was limited by the requirement that Karadzic could only be charged with private liability for those actions that were committed in pursuit of genocide.[66] This limitation has been overlooked by those claimants latching onto the allowance of private liability signaled in *Kadic*, leading to the flood of ACTA cases against private actors for non-genocide-related private actions.

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[58] *Id.* at 792.

[59] *Id.* at 794-795.

[60] *Id.*

[61] *Kadic*, 70 F.3d 232 at 240; Doe v. Unocal Corp., 2002 WL 31063976 at *1 (9th Cir. Sept. 18, 2002).

[62] *Kadic*, 70 F.3d at 236.

[63] *Id.* at 237.

[64] *Id.* at 239.

[65] *Tel-Oren*, 726 F.2d at 794.

[66] Samuel A. Khalil, *The Alien Tort Claims Act and Section 1983: The Improper Use of Domestic Laws to 'Create' and 'Define' International Liability for Multi-National Corporations*, 31 HOFSTRA L. REV. 207, 222 (2002).

F. Other Circuits Respond to *Kadic*

In the wake of *Kadic*, plaintiffs have seized the opportunity to file suits against MNCs acting in their private capacities, as opposed to those acting in accordance with foreign governments. However, only one such case has survived summary judgment on the issue of subject matter jurisdiction.[67] Even fewer have addressed the issue of whether *Kadic*'s expansion of *Filartiga* should be applied to corporations and, if so, whether the torts alleged fall into the "handful" of crimes suggested in *Tel-Oren*. Two cases cited by *Flores* have dealt with environmentally based ATCA claims against MNCs in light of *Tel-Oren* and *Kadic*, and have handled the issue of private corporate liability in contrasting ways.[68] One case fails to address the private actor issue, and the other devotes analysis to the private actor consideration.

The *Flores* court relies on a Southern District of New York case, *Amlon Metals v. FMC Corp.*,[69] which disregards the consideration of whether the torts claimed under the ATCA are sufficiently egregious to engender private corporate liability, as per the *Tel-Oren* "handful" analysis. *Amlon* puts forth the proposition that environmental tort allegations against a U.S.-based MNC can be considered under *Filartiga*-style analysis. However, *Amlon* makes no reference to whether environmental torts are sufficiently egregious to impose liability on a private actor.[70] This case demonstrates the danger of ignoring *Tel-Oren* and *Kadic* when dealing with ATCA claims against private corporations.

Amlon deals with an ATCA claim by a British corporation's U.S. agent against Amlon, a Delaware corporation, alleging environmental and other torts arising from Amlon's shipment of material to the British corporation. The British corporation claimed the material posed "imminent and substantial danger to human health and to the environment." The district court did not devote one word of its opinion to the fact that both parties were private corporations, but rather launched directly into *Filartiga* analysis, namely the analysis of whether the international community recognizes the action as illegal, based on various sources of law.[71] The court came to the proper conclusion in dismissing the complaint for lack of subject matter jurisdiction, but did so in a way which allowed *Flores* to ignore the threshold issues of private liability under the ATCA.

However, the *Flores* court cites to another case against a private

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[67] *See* case list, *supra* note 26.

[68] *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

[69] *Id.*

[70] *See Amlon*, 775 F. Supp. at 668. *See also* Flores, 343 F.3d at 146 (discussion of *Amlon*).

[71] *See Filartiga*, 630 F.2d at 877.

corporation that had arisen in the wake of *Tel-Oren* and *Kadic*. This case did address the private liability issue. The *Flores* court relied on the environmental and corporate ATCA case *Beanal v. Freeport-McMoran, Inc.*[72] to analyze customary international law.[73] In *Beanal*, an ATCA suit was filed by citizens of an Indonesian tribe, claiming that environmental abuses of Freeport-McMoran in its mining operations amounted to genocide against the tribe.[74]

The *Beanal* court found that the facts of genocide were not sufficiently pled, so it "need[ed] not address whether state-action [was] required to sustain an action for individual human rights violations."[75] In making this statement, the court openly acknowledged that the private actor issue was an important consideration. The *Beanal* holding hinged on the fact that "neither the court nor the plaintiff was able to identify, absent state action, any germane universal norm in customary international law that could establish private corporate ATCA liability for environmental practices harmful to an indigenous tribe."[76] Unfortunately, this aspect of the holding is overlooked in *Flores*, which clearly foregoes in-depth consideration of the private actor issue.

G. Discussion of *Doe v. Unocal*

While the *Flores* court failed to adequately consider the implications of extending ATCA liability to U.S.-based MNCs acting in their private capacity, the recent *Doe v. Unocal* case thoroughly addressed the pertinent issues while controversially extending liability to a U.S.-based MNC.[77] Although decided prior to *Flores*, this case was ignored by the Second Circuit in its decision. Although an en banc rehearing of *Unocal* was pending at the time this article was written, the standard set out by the panel stands as an example of well-crafted ATCA analysis.[78]

The Ninth Circuit in *Doe v. Unocal* addressed claims by residents of Myanmar against Unocal for the corporation's alleged enslavement of workers and other torts in connection with the construction of an oil

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[72] *Beanal*, 197 F.3d at 161.

[73] *Flores*, 343 F.3d at 160.

[74] *Beanal*, 197 F.3d at 163. Note that this skillfully-crafted case illustrates awareness of the precedent of *Tel-Oren* and *Kadic*, asserting a hybrid genocide-environmental claim, because at that time only genocide had been a sufficient violation to engender private liability under *Kadic*.

[75] *Id.* at 166.

[76] *See Kieserman, supra* note 24, at 914.

[77] *Unocal*, 2002 WL 31063976 at *1 (9th Cir. Sept. 18, 2002).

[78] *Unocal*, 2003 WL 359787 at *1 (9th Cir. Feb. 14, 2003), *vacating decision and ordering en banc hearing.*

pipeline in that country.[79] The court held that such activity is actionable under the ATCA.[80] Most importantly, the court is the first to note that "another threshold question in any ATCA case against a private party is whether the alleged tort requires the private party to engage in state action for ATCA liability to attach, and if so, whether the private party in fact engaged in state action."[81] In other words, the court made a threshold question of whether the tort claimed is sufficiently egregious to fall into Judge Edwards' "handful."[82] If so, state action would not be required, and ATCA liability against the private party could attach.[83]

The court held that under *Tel-Oren* and *Kadic* the slavery-like forced labor imposed by Unocal on the Myanmar workers constituted a sufficiently egregious violation of customary international law, and deserved private liability.[84] After making this threshold determination, the court went on to analyze the facts of the case under the *Filartiga* method, looking at various authorities to determine whether there was a consensus that the tort of forced labor violated the law of nations. In light of this careful analysis, the court reversed a lower court's grant of summary judgment for the defendants on the issue of aiding and abetting forced labor.[85] The court went on to similarly consider the Myanmar residents' ATCA claims concerning Unocal's aiding and abetting murder, rape and torture.[86] The court applied the threshold inquiry to find that murder, rape and torture committed in furtherance of forced labor was sufficiently egregious to engender private liability.[87] Then the court undertook fact-based *Filartiga*-style analysis of each tort, and reversed summary judgment for the defendants on all grounds except torture.[88]

Even though both the Second and Ninth Circuits addressed the issue of subject matter jurisdiction for private entities or corporations and came to different conclusions in *Kadic* and *Unocal*, there was some semblance of logical consistency in abiding by Edwards' soundly-reasoned and widely accepted "handful"[89] analysis as a threshold to private liability and *Filartiga* analysis. In contrast, *Flores* did away with the *Tel-Oren*-style considerations, jumping directly into *Filartiga* analysis of the Peruvian's

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[79] *Unocal*, 2002 WL 31063976 at *1 (9th Cir. Sept. 18, 2002).
[80] *Id.*
[81] *Id.* at 9.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Unocal*, 2002 WL 31063976 at *9.
[86] *Id.* at 15.
[87] *Id.*
[88] *Id.* at 9-17.
[89] *Id.*

claims while failing to note that the alleged offenses did not fall into Edwards' "handful."[90]

H. The Supreme Court's Response: *Sosa v. Alvarez-Machain*

The Supreme Court addressed ATCA liability for the first time in a meandering, thirty-page opinion that denied a Mexican national's claim based on his alleged kidnapping by U.S. Drug Enforcement Agency officials.[91] In *Sosa v. Alvarez Machain*, the majority opinion found that the kidnapping offense "violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy" via the ATCA.[92] In its opinion, the majority applied limited *Filartiga*-style analysis, and cautioned that "the door" for ATCA claims "is still ajar subject to vigilant door-keeping, and thus open to a narrow class of international norms today." The majority noted that this view was "consistent with the reasoning of many courts and judges who faced the issue before it reached this Court," such as *Filartiga* and *Tel-Oren*.[93]

The Court suggested that Congressional guidance on the scope of what constitutes "norms of customary international law" under the ATCA, akin to the affirmative guidance offered by the TVPA, would be welcome.[94] However, until such guidance is available, it seems from this opinion that *Filartiga*-style analysis remains valid. In the most troubling aspect of the case, the Court specifically failed to address corporate ATCA liability, noting that careful judicial judgment is required in considering "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation," but failed to explicitly adopt the "handful" requirement.[95] Therefore, without sufficient guidance from the Supreme Court, the *Unocal* threshold analysis remains the most viable standard for addressing corporate ATCA liability.

It is unclear how the Circuits will interpret the *Sosa* decision in the coming year. However, it is important to note that the *Unocal* case has been vacated and an en banc hearing scheduled, but no decision had been rendered by the time this article was written.[96] Ideally, the Circuit en banc

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[90] *Id.*

[91] *Sosa*, 124 U.S. at 2769.

[92] *Id.*

[93] *Id.* at 2765-66.

[94] *Id.* at 2765 (noting that "we would welcome any Congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations," and Congress "may modify or cancel any judicial decision so far as it rests on recognizing an international norm").

[95] *Id.* at 2766 n.20.

[96] *See* Order Vacating Decision and Ordering En Banc Hr'g, 2003 WL 359787, (9th Cir.

will do what the Supreme Court failed to, and maintain their threshold analysis, regardless of how they hold in light of *Sosa*'s cautionary language. If the Circuit fails to do so, it will vindicate careless decisions such as *Flores*, which launch into *Filartiga* analysis of the liability of corporations without jumping the hurdle of the private liability threshold wisely suggested by the three-judge panel in *Unocal*.

III. THE *FLORES* CASE

A. Procedural History

The *Flores* case was originally brought by residents of Ilo, Peru under Texas state common law, but the case was successfully removed to Texas federal court based on federal question jurisdiction and diversity jurisdiction under 28 U.S.C. §§ 1331 and 1332.[97] A claim under the ATCA was never alleged, but the state tort claims were dismissed based on the facts that Peru provided an adequate alternative forum, private and public interest factors weighed in favor of dismissal and dismissal was warranted under the doctrine of comity of nations.[98] The Fifth Circuit Court of Appeals affirmed the District Court's dismissal of the action based on forum non-conveniens and comity among nations.[99]

The re-filing of this case by new plaintiffs, other residents of Ilo, as an ATCA claim in the ATCA-activist Southern District of New York on December 28, 2000 is a classic example of forum shopping, and serves as evidence of the Second Circuit and its feeder courts' unique laxity in application of the ATCA against corporations.[100] The re-filed *Flores* case was denied subject matter jurisdiction by the District Court for the Southern District of New York on July 16, 2002,[101] and this opinion was affirmed by a three-judge panel of the Second Circuit, in the opinion under consideration in this Note, on August 23, 2003.[102]

B. Facts of the Case

Southern Peru Copper Corporation ("SPCC") was accused by injured Peruvian citizens and their survivors of releasing copper residue and heavy

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Feb 14, 2003).

[97] Torres v. S. Peru Copper Corp., 965 F. Supp. 895 (S.D. Tex. 1995).

[98] *Id.*

[99] Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997).

[100] *See* Bradley, *supra* note 11, at 471.

[101] Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff'd* 343 F.3d 140 (2d Cir. 2003).

[102] *Flores*, 343 F.3d at 140.

metals into the air and water in and around Ilo, Peru.[103] Plaintiffs claim these emissions caused severe lung disease and other ailments, as well as environmental pollution.[104] However, plaintiffs did not allege the usual torts of bodily injury or environmental abuses; rather, they filed their claim under the ATCA, alleging violations of the "right to life," "right to health" and "right to a sustainable environment."[105] This may have been due, in part, to the fact that the Peruvian government had already inspected and levied sanctions on SPCC for environmental abuses and violations of Peruvian environmental law.[106]

C. District Court Opinion

Defendant SPCC filed a motion to dismiss the Peruvians' ATCA complaint on March 5, 2001, alleging a lack of subject matter jurisdiction and failure to state a claim on the basis that the plaintiffs failed to allege a violation of the law of nations.[107] Judge Haight, writing for the District Court majority, first analyzed the general principles of ATCA jurisprudence, discussing *Filartiga*, and citing *Kadic*'s holding "that under modern international law, 'certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.'"[108] However, the court did not opine further on whether the "right to life" and "right to health" environmental torts[109] claimed by the Peruvians constitute those "certain forms of conduct,"[110] that engender private liability. Rather, the court glossed over the point, and delved into a *Filartiga* analysis of "plaintiff's claims under international law."[111]

In doing so, the District Court diligently followed the *Filartiga* guidelines, citing U.S. case law, international declarations, and the works of jurists and scholars,[112] in an attempt to determine whether the plaintiffs provided sufficient evidence of a consensus of customary international law to support a claim. The court came to the conclusion that the plaintiffs

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[103] *Id.* at 143.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 144.
[107] *Id.*
[108] *Flores*, 253 F. Supp. 2d at 513.
[109] *Id.* at 514.
[110] *Id.* at 513.
[111] *Id.* at 514.
[112] *Id.* at 514-19 (discussing Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 668-71 (S.D.N.Y. 1991); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 161-68 (5th Cir. 1999)).

failed to identify any "conduct" on SPCC's part "that is universally prohibited,"[113] and granted defendant's motion to dismiss on the basis of a lack of subject matter jurisdiction.[114] However, the court noted that the failure to find subject matter jurisdiction precluded a need "to decide whether such a prohibition would apply to private actors or state actors," or whether SPCC "was a state actor."[115]

D. Circuit Court Opinion

The Peruvians appealed their claim to Second Circuit Court, which decided the case on August 29, 2003, affirming the District Court's summary judgment for the defendants based on failure of subject matter jurisdiction under the ATCA.[116]

In a unanimous three-judge opinion, the court began by detailing the facts and procedural history of the case, as discussed above.[117] The opinion then laid out the history of the ATCA, adopting the view that the statute "was intended to provide a broad remedy for all torts in violation of international law, as that body of law might evolve over time."[118] The court then outlined the *Filartiga* decision, discussing its significance in opening the Federal courts to claims by aliens under the statute, its method for determining whether actions constitute breaches of customary international law, and the requirement of international consensus on the illegality of the act claimed under the ATCA.[119] The opinion continued by discussing *Filartiga*'s varied reception by the Federal Circuit Courts, and the failure of the Supreme Court to clarify the law in this area.[120] Judge Cabranes then discussed the codification of *Filartiga* in the TVPA, and concluded that the *Filartiga* standard was the operative standard under which to consider the Peruvian's claim.[121]

Buried within the court's detailed discussion of *Filartiga* was a brief mention of the *Kadic* decision,[122] which extended *Filartiga* analysis to private individuals and corporations. *Kadic* was immensely important to the validity of the Peruvians' claims in this case because it set a limit on the types of claims that are justiciable under the ATCA against private entities.

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[113] *Flores*, 253 F. Supp. 2d at 520.

[114] *Id.* at 525.

[115] *Id.* The court went on to consider and analyze the defendant's forum non conveniens arguments, which are not at issue in this consideration of the case.

[116] *Flores*, 343 F.3d at 140.

[117] *Id.* at 143-148.

[118] *Id.* at 149.

[119] *Id.* at 149-50.

[120] *Id.* at 151-52.

[121] *Id.* at 152-53.

[122] *Flores*, 343 F.3d at 150.

However, this issue was glossed over by the court in one paragraph, which stated that "acts of piracy, slave trading, war crime and genocide violate customary international law regardless of whether they are undertaken by state or private actors whereas . . . torture and 'summary execution' constitute violations only when committed by state officials or under color of law."[123] This constituted the only discussion of the private liability issue in *Flores*. The court failed to determine whether the Peruvians' claims fit into the *Kadic* or *Tel-Oren* standards for private liability, and failed to give any reasoning for its disregard of this issue.

The court then delved into *Filartiga* analysis of the Peruvians' claims by laying out the "definition of 'Law of Nations,' or 'Customary International Law' for the purposes of the ATCA."[124] Then the court explained that for "a principle to become a part of customary international law, States must universally abide by it," as per *Filartiga*, and must exhibit "mutual concern" about the tort. The court then discussed the various "sources and evidence of Customary International Law" presented by the Peruvians to support their claim under the *Filartiga* standard, and rightfully concluded that the presented evidence did not constitute "competent evidence of customary international law."[125] Thus, the Circuit affirmed the District Court's grant of summary judgment for SPCC.[126] The court then cursorily dismissed the Plaintiff's forum non conveniens claims.[127]

IV. ANALYSIS OF *FLORES* AND MNC LIABILITY UNDER THE ATCA

The Second Circuit's decision in *Flores* failed to sufficiently address the issue of private corporate liability under the ATCA. As discussed,[128] other Courts have considered this issue in depth, some setting a threshold requirement for establishing private corporate ATCA liability. This precedent constitutes a superior alternative standard, supported by decisions such as *Kadic* and *Unocal*, which the Court should have employed. Alternatively, construing the ATCA *in pari materia* with the Congressional codification of *Filartiga* in the TVPA would address the issue of private corporate liability by barring claims under the ATCA unless committed under color of law. The court in this case should have used one of these alternative standards to avoid the devastating effects that will arise from *Filartiga* analysis of every ATCA claim brought against a U.S.-based MNC by a foreign national. These consequences will be addressed in Part (B) of

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[123] *Id.*
[124] *Id.* at 171.
[125] *Id.*
[126] *Id.* at 172.
[127] *Flores*, 343 F.3d at 172.
[128] *See supra* Part II.F.

this Section and include: endless evolution of liability leading to uncertainty and reduced investment, double recovery as a competitive disadvantage, increased legal costs, and forum shopping.

A. Alternative Standards Ignored by the Court

There were two other standards available to the *Flores* court in analyzing the issue of private corporate liability: setting private corporate liability as a threshold question, as the court did in *Unocal*, or interpreting the ATCA *in pari materia* with the TVPA, which would preclude actions under the ATCA against private corporate defendants acting in their private capacity.

1. Setting a Threshold Standard for Corporate Liability, as in Unocal

As previously discussed,[129] the Ninth Circuit's *Unocal* decision considered private liability as a threshold question before considering plaintiffs' ATCA claims under the *Filartiga* standard.[130] The court deftly interwove the jurisprudence of *Kadic*, *Tel-Oren* and *Filartiga* to determine that private corporate liability under the ATCA requires the commission of certain crimes, such as "slave trading, genocide or war crimes."[131] The court then analogized the forced labor claim in the case to slavery: "[f]orced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required."[132] Also, they rightfully concluded that, as per *Tel-Oren*, "slave trading is 'among the handful of crimes'. . .to which the law of nations attributes individual liability."[133] Such analysis preceded the court's *Filartiga* analysis of each claim asserted in the case, thus suggesting that the lengthy, detailed, time-consuming *Filartiga* analysis would be unnecessary had private liability not been found.[134]

Had the *Flores* claims been considered under this threshold, they would not have survived, and corporate liability would not have been possible. The threshold set by *Unocal* outlines three crimes that would engender private corporate liability – slave trading, war crimes and genocide – as well as crimes such as rape, torture and summary execution when "committed in furtherance other crimes like slave trading, genocide or war crimes."[135] Clearly, pollution's endangerment of the "right to life" and

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[129] *See supra* Part II.H.
[130] *Unocal*, 2002 WL 31063976 at *9.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 9 (omitted text in original) (quoting *Tel-Oren*, 726 F.2d at 794-95).
[134] *Id.*
[135] *Id.*

the "right to health," do not fall into these categories.[136] It would be difficult to argue that pollution resulting from industrial activity constituted genocide or arose in the pursuit of genocide. Furthermore, the pollution itself was found to be a violation, thus precluding this possible argument.[137]

Strengthening this threshold would be desirable, as it would simplify the process of adjudicating ATCA claims, decrease uncertainty over liability for U.S.-based MNCs, and reduce legal costs by eliminating the need for extensive briefing of *Filartiga* issues. The Supreme Court failed to adopt such a standard in its recent majority opinion in the *Sosa* case, likely because *Sosa* did not deal with a corporate tortfeasor.[138] However, the majority of the Court in *Sosa* suggested that the issue of corporate ATCA liability should be carefully considered by lower courts.[139] The *Unocal* standard should be adopted by the Circuits, and ideally by Congress, in addressing corporate ATCA liability in the wake of *Sosa*'s ambiguity. The *Unocal* standard supplies the appropriate balance between corporate responsibility and encouragement of foreign investment.[140] Such an interpretation rightfully places the responsibility of regulating corporations' environmental emissions and working conditions on foreign governments.

2. *Construction In Pari Materia with TVPA to Require State Action*

If the threshold standard remains ambiguous, another possibility for a workable standard would be to construe the ATCA *in pari materia* with the TVPA,[141] which requires state action for all claims. The *in pari materia* canon of statutory construction suggests that statutes that are on the same subject should be construed together, and any ambiguities in one statute can be resolved by looking at the other.[142] The TVPA was enacted as an addition to the ATCA, and covers the similar subject of alien liability for tort, thus making the statutes eligible for such construction.[143]

The TVPA states that "an individual who, under actual or apparent authority, or color of law, of any foreign nation [commits] torture shall be

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[136] *Flores*, 343 F.3d at 143.

[137] *Id.*

[138] *Sosa*, 124 S. Ct. at 2755-69.

[139] *Id.* at 2761-63.

[140] *See* MICHAEL RATNER & BETH STEPHENS, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 233-38 (1996) (suggesting that the ATCA, when properly enforced against human rights violators, could encourage corporate responsibility).

[141] Note to 28 U.S.C. § 1350, *supra* note 48.

[142] *In pari materia* refers to statutes "on the same subject; relating to the same matter," and "is a canon of construction that statues that are *in pari materia* may be construed together so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." BLACK'S LAW DICTIONARY 352 (2nd Pocket Ed. 2001).

[143] S. REP. NO. 102-249, at 5 (1991); Note to 28 U.S.C. § 1350, *supra* note 48.

liable to that individual."[144] Since the scope of the ATCA is ambiguous on the state action issue, Congress' specific drafting of the TVPA—a note to the ATCA—to require state action, can be interpreted as clearing up the ATCA's ambiguity on this issue, thus requiring state action under the ATCA as well.[145] Furthermore, Congress specifically noted that the TVPA does not preclude liability for other torts besides torture under the ATCA, thereby protecting the scope of the types of torts actionable under the ATCA.[146] Thus, Congress commented on the ATCA, and had the opportunity to suggest that the "state actor" limitation written into the TVPA did not apply to the ATCA. However, Congress chose not to limit the state action requirement specifically to the TVPA, suggesting that Congress interpreted the ATCA to require state action in all cases.[147]

Indeed, the state action requirement of the TVPA has been strictly imposed. In *Beanal*, the Fifth Circuit suggested that the definition of "individual" in the TVPA may not encompass corporations.[148] In *Wiwa v. Royal Dutch Petroleum Co.*, the Second Circuit itself applied an *in pari materia* interpretation of the statutes.[149] The court stated that "[w]hatever may have been the case prior to passage of the TVPA, we believe plaintiffs make a strong argument in contending that the present law, in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits" under the ATCA.[150] This suggests that the court considers the TVPA an extension of the ATCA, the language of which is operative on the ATCA. Such an interpretation suggests that the TVPA's bar against private corporate liability should be extended to the ATCA.

An *in pari materia* interpretation of the ATCA with the TVPA offers a predictable and corporation-friendly interpretation of the ATCA. Ideally, in response to the Supreme Court's request for Congressional guidance on ATCA claims in the majority opinion of the recent *Sosa* case, Congress would respond by amending the ATCA to include specific causes of action, and a state action requirement, akin to its drafting of the TVPA.[151]

B. Consequential Problems with *Flores*-Style Analysis

As discussed above, adopting *Flores*-style analysis of ATCA claims, which subjects private corporations to *Filartiga* analysis with no threshold

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[144] Note to 28 U.S.C. § 1350, *supra* note 48.
[145] S. REP. NO. 102-249, at 5 (1991); Note to 28 U.S.C. § 1350, *supra* note 48.
[146] S. REP. NO. 102-249, at 5 (1991).
[147] S. REP. NO. 102-249, at 8 (1991).
[148] *Beanal*, 197 F.3d at 169.
[149] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).
[150] *Id.* at 105.
[151] *Sosa*, 124 S. Ct. at 2765.

determination for private liability, will have significant negative consequences for U.S.-based MNCs.

1. Endless Evolution of Liability Leading to Uncertainty and Reduced Investment

The court in *Flores* adheres to the *Filartiga* standard, which provides that torts actionable under the ATCA increase as customary international law evolves and as the international community recognizes more crimes and torts as mutually illegal.[152] Without a clear minimum threshold, liability for corporations may snowball to include less egregious torts such as environmental and labor violations. Furthermore, it is even possible that legal obligations under the ATCA could be imposed ex post facto on U.S.-based MNCs that unknowingly commit a tort that a court later decides falls into the judicially expanded definition of customary international law.[153]

Such uncertainty will harm U.S. investment activity abroad, as companies can less readily assess their legal risks before investing. Furthermore, such increased liability will affect the prices at which a U.S.-based MNC is willing to operate abroad, since covering the cost of increased risks increases the price of products produced abroad. An expanded ATCA will also end up injuring those countries dependent on U.S.-based MNC investments for jobs and economic growth.[154] Any level of corporate activity in a nation with a poor human rights record, or lower environmental standards, would be discouraged, in effect forcing the ATCA to act as a preemptive sanction against such economically struggling nations.[155] While it is an ideal goal for foreign governments to strictly enforce their laws on these issues, it has been shown, at least in this case, that laws are being enforced by host governments.[156] Voluntary corporate governance of these issues is also a goal which should be worked toward, but the ATCA is not the best way to enforce compliance with environmental and labor standards.

Furthermore, not only will frequent and frivolous ATCA claims harm U.S. investment initiatives abroad, but publicized ATCA claims against corporations already operating on foreign soil may discourage shareholder investment. It has recently been noted that many socially-conscious investors will withdraw funds from companies implicated in illegal activity

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[152] *Flores*, 343 F.3d at 150. This *Filartiga*-style analysis is also supported by the Supreme Court in the majority opinion of the *Sosa* decision. *Sosa*, 124 S. Ct. at 2765-66.

[153] Pia Zara Thadhani, Note, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer?*, 42 WM. & MARY L. REV. 619, 634 (2000).

[154] *See generally* MARBER, *supra* note 11 (uncertainty of investment). *See also* RATNER & STEPHENS, *supra* note 140, at 233-38.

[155] Thadhani, *supra* note 153, at 635.

[156] *Flores*, 343 F.3d at 144.

or human rights abuses abroad.[157] Therefore, snowballing ATCA liability and the publicized nature of such claims, even when frivolous, will unwarrantedly injure corporations' shareholder relations.

2. Alternative Forums and Double Recovery as a Competitive Disadvantage

The Second Circuit in *Flores* noted that SPCC was fined and subjected to legal proceedings by the Peruvian government for its pollution of the Ilo area.[158] Therefore, at least in this case, an alternative forum existed for ATCA tort claims, and foreign tort laws were enforced in the host country.[159] Thus, the policy of allowing claims under the ATCA cannot always be justified by an argument that corporations can operate illegally without fear of liability without the ATCA.[160] The issue of alternative forum was discussed at length by the District Court for the Southern District of New York in the *Aguinda* case.[161] The court suggested that the availability of an alternative forum alone may be enough to defeat an ATCA claim, as it does under the TVPA.[162] The *Aguinda* court argued that

> even if Texaco participated in a violation of international law that would support the claim here brought under the ATCA, neither that assumption nor any of the other considerations special to these cases materially alters the balance of private and public interest factors that "tilt[s] strongly in favor of trial in the foreign forum."[163]

In addition to foreign forums, alternative forums available to plaintiffs who claim human rights abuses under the ATCA include the International Military Tribunal (which held the Nuremburg Trials), and the tribunals established under United Nations Resolution 827.[164]

Therefore, adequate alternative forums exist, because even if host countries fail to enforce laws against U.S.-based MNCs, the international tribunals offer an alternative. Furthermore, and more importantly, it is clear that in at least some cases, foreign governments are prosecuting and

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[157] John G. Scriven, *Corporate Responsibility and Regulating the Global Enterprise*, 16 TRANSNAT'L LAW 153, 163-64 (2002).

[158] *Flores*, 343 F.3d at 144.

[159] *See Kieserman, supra* note 24, at 883 (arguing that the ATCA should be enforced to check the power of MNCs abroad and assure that they adhere to legal standards).

[160] *See id.*

[161] *Aguinda*, 142 F. Supp. 2d at 538-43.

[162] *Id.*

[163] *Id.* at 554 (quoting *Wiwa*, 226 F.3d at 106).

[164] Robert J. Peterson, Comment, *Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v. Unocal and the Alien Tort Claims Act*, 5 U. CHI. L. SCH. ROUNDTABLE 277, 283 (1998).

sanctioning MNCs for their activities, as in *Flores*.[165] However, *Aguinda*'s suggestion that an ATCA claim be disallowed where an alternative forum exists has not been adopted by other courts. Therefore, it is plausible that MNCs will pay twice, once by paying foreign sanctions, and again by being prosecuted in U.S. court under an ATCA claim. Thus, U.S.-based MNCs are at a competitive disadvantage to foreign-based MNCs whose home countries do not have an ATCA-like statute. This may begin to discourage corporations who plan to do international business from incorporating in the United States, and thus have detrimental effects on the U.S. economy.

3. Legal Costs

A recent article on the ATCA included a quote from Competitive Enterprise Institute President Fred Smith, in which he observed of the ATCA, "If you're a business and you haven't yet been sued under this law, don't worry, you will be."[166] This quote demonstrates the concern in the business community over the skyrocketing legal costs that impending ATCA cases could cause. Companies are gearing up for the costs of zealous defense against rising ATCA claims, [167] taking valuable time and money away from corporate productivity at home and abroad.

For example, in the *Flores* case, SPCC filed a motion for summary judgment on March 5, 2001.[168] The motion was not ruled upon by the District Court until July 16, 2002.[169] In the interval, the court suggested "extensive and supplemental briefing to apprise the court fully of all relevant questions of customary international law and the adequacy of the Peruvian forum."[170] If the Circuit continues to seriously entertain extending jurisdictional grants to plaintiffs claiming torts as nebulous as "right to life," "right to health" and "right to sustainable environment,"[171] and suggest full briefing and discovery, the legal costs for MNCs implicated in ATCA actions will be considerable. While it may be argued that the costs of re-filing may be burdensome and thus discourage foreign plaintiffs, the contingent fee arrangement, unique to the U.S. legal system, may alleviate this burden and allow for multiple re-filings.

4. Forum Shopping

The legal costs referenced in the above section multiply as plaintiffs

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[165] *Flores*, 343 F.3d at 144.

[166] Jenna Greene, *Gathering Storm: Suits that Claim Overseas Abuse are Putting U.S. Executives on Alert and Their Lawyers on Call*, LEGAL TIMES, July 21, 2003, at 1.

[167] *Greene*, *supra* note 166, at 1.

[168] *Flores*, 343 F.3d at 144.

[169] *Id.*

[170] *Id.*

[171] *Id.*

are allowed to game the system by re-filing the same claim under an ATCA-friendly label in an ATCA-friendly Circuit. As mentioned, in the *Flores* case, the plaintiffs filed claims based on the Ilo pollution in the Fifth Circuit and, upon dismissal, renamed their environmental claims as claims for "right to life," "right to health," and "right to sustainable environment," re-filing them in the Second Circuit.[172] The legal costs and the costs to the judicial system for continued re-filing of such cases is an unfair burden on U.S.-based MNCs[173] and the U.S. Judicial system. These costs, combined with the various consequences above, militate toward restricting, if not barring, liability against U.S.-based MNCs under the ATCA.

V. CONCLUSION

The court in *Flores* failed to set a workable standard for the consideration of ATCA claims against private U.S.-based MNCs acting in their private capacity. The court ignored the complex, compelling precedent on this issue, which mandates a threshold consideration of private liability. Furthermore, the court failed to consider sounder alternatives to straight *Filartiga* analysis, such as the *Unocal* private liability threshold or construction *in pari materia* with the Congressional guidance provided by the TVPA. These alternatives provide a more predictable, workable standard that holds U.S.-based MNCs accountable for human rights violations abroad (as in *Unocal*), but stops short of allowing snowballing liability for lesser environmental torts, which can and should be addressed by host countries. The *Unocal* standard should be adopted by the Circuits, or mandated by the Congress, as an answer to the Supreme Court's failure to directly address the issue of corporate ATCA liability in *Sosa*.

MNCs based in the United States should not be put at a disadvantage to MNCs based in other countries because of an arcane but cleverly revived domestic law, the application of which could lead to considerable competitive disadvantage and a legal quagmire the likes of which the U.S. judiciary has never encountered. The ATCA, interpreted as it was in *Flores*, makes U.S.-based MNCs the "deep-pocket" legal target of plaintiff's attorneys and millions of foreign workers. The dire consequences of its overuse must be avoided, and those interested in the rights of workers must look to international corporate behavioral standards and host-country activism to regulate the activity of MNCs operating throughout the world.

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[172] *Id.*

[173] *See* Bradley, *supra* note 11, at 471.