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The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?

*Borchien Lai**

I. INTRODUCTION

As the world has become smaller through technological advances in travel and communication, the international marketplace has grown larger. The United Nations (“U.N.”) estimates that the number of multinational corporations tripled between 1988 and 1997 to 60,000.¹ As these corporations increase their investments abroad, they also face proportionately increasing pressure from investors to run successful operations and increase profits.

The result of this dynamic is well-documented. Multinational corporations invest heavily in underdeveloped countries where natural resources are abundant and labor is cheap. To facilitate operations in the country, the corporations must establish a rapport with the host governments—and often, in the course of establishing ideal business conditions, the host governments engage in criminal acts, including genocide and forced labor, that violate international human rights agreements. Not only do multinational corporations benefit from the government’s misconduct, but the corporation may influence or even encourage the government via the corporation’s substantial investments. Because of this facet of their relationship, it is commonly thought that multinational corporations should bear some responsibility for righting any violations that take place because of business dealings with underdeveloped countries and offer redress for victims. However, multinational corporations have largely escaped liability for these governments’ actions in the past.

This trend may soon change. Recent litigation in the United States has

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¹ UNCTAD, WORLD INVESTMENT REPORT 1999: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF DEVELOPMENT (1999).

featured foreign plaintiffs arguing that U.S. federal district courts have jurisdiction to hear their claims against multinational corporations under the Alien Tort Claims Act ("ATCA").² Prior to this resurgence, the ATCA had been used in litigation only a handful of times.³ The new development has drawn praise from human rights activists and even some corporate executives who believe the ATCA can solve the problem of imperfect business practices world-wide.⁴ Nonetheless, the ATCA is still an unproven tool.

Of the nearly three dozen cases brought against multinational corporations for human rights and environmental violations,⁵ not one has actually been fully litigated, nor has a judgment been entered against any corporate defendants. Before settling in December 2004, *Doe v. Unocal Corp.* was the furthest a case had advanced in the federal court system.⁶ *Unocal* was also the first case brought against multinational corporations under the ATCA for human rights violations, lasting nearly 10 years.⁷ The plaintiffs were citizens of Myanmar who alleged that the Unocal Corporation was responsible for human rights violations committed during the construction of a \$1.2 billion pipeline.⁸ Until the case settled, *Unocal* had been slated for rehearing by the Ninth Circuit pending the U.S. Supreme Court ruling in *Sosa v. Alvarez-Machain*,⁹ which was expected to provide some guidance for circuit courts attempting to interpret the ATCA.

Sosa may not have truly provided guidance for the lower courts, but it did effectively legitimize causes of action under the ATCA.¹⁰ Although the specific claim in *Sosa* was dismissed, the ruling was largely seen by human rights activists as a victory,¹¹ because the Supreme Court held that the First Congress intended "that the district courts would recognize private causes

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

³ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *on remand*, 577 F. Supp. 860 (E.D.N.Y. 1984).

⁴ See Lorraine Woellert, *And Justice for All?*, BUS. WK., May 3, 2004, at 76.

⁵ See USAENGAGE.ORG, *The Alien Tort Provision: Correcting the Abuse of an Early Federalist Statute*, at <http://www.usaengage.org/legislative/2003/alientort/alientorttpcases.html> (last visited Sept. 21, 2005).

⁶ See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part and rev'd in part sub nom.*, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2003), *aff'd en banc*, 403 F.3d 708 (9th Cir. 2005).

⁷ Kenny Bruno, *De-Globalizing Justice: The Corporate Campaign to Strip Foreign Victims of Corporate Induced Human Rights Violations of the Right to Sue in U.S. Courts*, MULTINATIONAL MONITOR, vol. 24, number 3 (March 2003), available at <http://multinationalmonitor.org/mm2003/03march/march03corp2.html>

⁸ *Unocal*, 395 F.3d. at 939–40.

⁹ See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

¹⁰ *Id.* at 2761–62.

¹¹ See Linda Greenhouse, *Human Rights Abuses Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A21.

of action for certain torts in violation of the law of nations”¹² However, the Court cautioned that there should be a “restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.”¹³ In addition, *Sosa* did little to assuage the doubts or smooth the kinks that had plagued ATCA litigation, and did not answer the question of whether the ATCA could become a future tool for holding multinational corporations responsible for human rights violations abroad.

Analysts will undoubtedly see Unocal Corporation’s willingness to settle as an indication that at least some corporate counsels think the ruling in *Sosa* bodes ominously for multinational corporations who persist in condoning, if not committing, human rights violations. Indeed, it seems likely that more corporations will choose to settle instead of risking a long, drawn out public trial. Threatening litigation under the ATCA and forcing corporations to settle will help to curb the incidences of human rights violations. However, it is still only a stopgap measure that should not be regarded as a permanent resolution to human rights litigation, despite the beliefs of many human rights advocates.¹⁴

As will be discussed in this article, the existence and availability of the ATCA as a vehicle for redress is too precarious and vulnerable to be consistently relied upon by the international community. If the ATCA is the only means available for holding multinational corporations responsible for human rights violations, then the world will find itself sorely unprepared for future corporate violations if the ATCA becomes unavailable. In addition, using ATCA litigation as a long-term mechanism for addressing human rights violations would create an inappropriate role for the United States court system as an international forum.

ATCA litigation may temporarily inconvenience multinational corporations and thereby deter some potential human rights violations, but there are too many problems for it to be sufficient in the long run. This article will focus on the flaws with the ATCA as a tool to bring human rights violators to justice. Part II will give a brief history of the ATCA and the path it has taken to grant U.S. federal courts jurisdiction over multinational corporations, some of which are not even incorporated or based in the United States. Part III will then examine four different cases brought before U.S. federal courts. The cases will serve as a backdrop to reveal some of the glaring problems with relying on the ATCA as a global solution to human rights violations. In Part IV, this article will discuss in detail the most glaring flaws of ATCA litigation.

Finally, the paper will briefly discuss how these problems expose a

¹² *Sosa*, 124 S.Ct. at 2761.

¹³ *Id.* at 2762.

¹⁴ See Michael O’Donnell, *Companies Abuse Human Rights and the Feds Don’t Care*, L.A. TIMES, June 9, 2003, at B11.

void in the international legal construct. Plaintiffs have rallied around the ATCA as a limited legal alternative because no other means of redress are available. Nonetheless, the ATCA is insufficient. That plaintiffs now rely heavily on the ATCA should bring these problems to the forefront of our society's conscience. The leaders of the world and human rights advocates must work together to craft a permanent solution, such as an international tribunal, instead of placing all their eggs in this porous, fragile basket of the ATCA.

II. MULTINATIONAL CORPORATIONS AND THE ALIEN TORT CLAIMS ACT

Using the ATCA to litigate human rights violations is a recent development. Using the ATCA to sue multinational corporations is an even newer option. The first multinational corporation was sued in 1996.¹⁵ Before human rights litigation, the ATCA was rarely used, and then for an entirely different purpose from suing human rights violators.

The ATCA 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."¹⁶ The three elements embedded in the statute are that 1) the plaintiff must be an alien; 2) the plaintiff must be suing for a tort; and 3) the tort must be in violation of the law of nations or a treaty of the United States.¹⁷

From 1789 until 1980, there were only twenty-one suits brought under the ATCA.¹⁸ In 1980, plaintiffs tried for the first time to use the ATCA to sue for human rights violations in the United States.¹⁹ In *Filartiga v. Pena-Irala*, the action was brought by Dr. Joel Filartiga and his daughter Dolly, both citizens of Paraguay, in the Eastern District of New York against Americo Norberto Pena-Irala, the Inspector General of Police in Ascension, Paraguay, for the wrongful death of Dr. Filartiga's seventeen-year old son, Joelito.²⁰ Although the district court had personal jurisdiction over Pena-Irala because Filartiga sued Pena-Irala while he was in the United States, the court dismissed the suit for want of subject matter jurisdiction.²¹

The Court of Appeals for the Second Circuit reversed the District Court, asserting that the court had jurisdiction under the ATCA, and that "deliberate torture perpetrated under color of official authority violates

¹⁵ *Unocal*, 963 F. Supp. at 880.

¹⁶ Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

¹⁷ *Id.*

¹⁸ Natalie Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 2 (2003).

¹⁹ *Filartiga*, 630 F.2d at 878.

²⁰ *Id.*

²¹ *Id.*

universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”²² The court further held that “whenever an alleged torturer is found and served with process by an alien within our borders, [the ATCA] provides federal jurisdiction.”²³ On remand, the district court awarded the plaintiffs both compensatory and punitive damages and attorney’s fees.²⁴

Human rights litigation under the ATCA progressed further with *Kadic v. Karadzic*, in which a district court indicated for the first time that private actors could be held liable for human rights violations.²⁵ In that case, the defendant, Karadzic, argued that since international law and norms applied only to nation-states and people acting under the color of state law, the plaintiffs did not have a cause of action under the ATCA.²⁶ The Second Circuit ultimately found that although Karadzic was not a state official *per se*, his position and status were sufficient to find that he acted under the color of law.²⁷ The court also held that for *jus cogens* violations such as war crimes and genocide, a plaintiff did not have to show state action.²⁸ *Kadic* further established that even for non-*jus cogens* violations a cause of action could exist against private actors under the ATCA, if the plaintiff showed that they acted with “the color of law.”²⁹

But despite decisions for plaintiffs in both *Filartiga* and *Kadic*, obtaining an actual remedy under the ATCA proved difficult. In *Filartiga*, after twenty-five years the plaintiffs have yet to recover damages from the defendant,³⁰ and in *Kadic*, the defendant refused to recognize the court’s jurisdiction and was not even present at the trial.³¹

Subsequent plaintiffs faced other difficulties when trying to sue state actors under the ATCA, and in fact, these difficulties still exist today. For example, to state a cause of action, plaintiffs must establish personal jurisdiction over the defendant by serving their complaints in the United

²² *Id.*

²³ *Id.*

²⁴ *Filartiga*, 577 F.2d. at 865.

²⁵ *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

²⁶ *Id.* at 237.

²⁷ *Id.* at 245.

²⁸ *Id.* at 239. A *jus cogens* norm is a rule of international law that prevails over any conflicting international rule. Egregious human rights violations such as genocide, slavery, and racial discrimination have been deemed to have *jus cogens* status. See DAVID WEISSBRODT ET AL., *INT’L HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 23 (3d ed. 2001).

²⁹ See *Kadic*, 70 F.3d at 244–45.

³⁰ See Jonathan A. Bush, *Nuremberg: The Modern Law of War and its Limitations*, 93 COLUM. L. REV. 2022, 2069 (1999) (reviewing ALFRED A. KNOPF, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992)).

³¹ See Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773, 795 (2000).

States.³² But when government defendants visit the United States on visits of state, they are protected by the Foreign Sovereign Immunities Act ("FSIA"), which provides specific guidelines for service of foreign states or a political subdivision of a foreign state.³³ The FSIA also states that "a foreign state shall be immune from the jurisdiction of the courts of the United States."³⁴

These obstacles were so encumbering that they soon led plaintiffs to sue corporations. Suing corporations enables plaintiffs to bypass many difficulties. For example, multinational corporations with minimum contacts in the United States are held to be under the jurisdiction of federal courts.³⁵ They are also private actors who do not have diplomatic immunity or sovereign immunity under the FSIA.³⁶ In addition, by the nature of the minimum contacts in the United States, corporations usually have assets here that can be frozen or used to satisfy court-ordered damages.

After Unocal became the first corporation sued under the ATCA in 1996,³⁷ other plaintiffs followed suit. As mentioned previously, ATCA litigation has put corporations on notice that they may be sued for human rights violations in the countries where they operate, but it is still unclear whether the suits will provide plaintiffs with redress. While district courts and circuit courts have affirmed causes of action under the ATCA, no judgment has ever been entered against a defendant corporation.

III. FOUR CASES SEEKING JURISDICTION UNDER THE ATCA

This article will focus on four ATCA human rights cases: *Aguinda v. Texaco, Inc.*,³⁸ *Aldana v. Fresh Del Monte, PLC.*,³⁹ *Wiwa v. Royal Dutch Petroleum*,⁴⁰ and *Sarei v. Rio Tinto*.⁴¹ None of the plaintiffs in these cases were U.S. citizens, and one of the multinational corporate defendants was

³² See *Kadic*, 70 F.3d at 248.

³³ Foreign Sovereign Immunities Act, 28 U.S.C. § 1608 (2004).

³⁴ *Id.* § 1604. In *Filartiga*, the defendant was in the United States of his own volition, and not on a diplomatic mission, when he was sued. 630 F.2d at 879.

³⁵ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938).

³⁶ See 28 U.S.C. § 1604.

³⁷ See *Unocal*, 963 F. Supp. at 880.

³⁸ *Aguinda v. Texaco, Inc.*, No. 93-C7527, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994), *dismissed*, 945 F. Supp. 625 (S.D.N.Y. 1996), *remanded sub nom, Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), *mandamus denied*, 241 F.3d 194 (2d Cir. 2001), *dismissed*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *modified and affirmed*, 303 F.3d 470 (2d Cir. 2002).

³⁹ *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), *aff'd in part and vacated in part*, 416 F.3d 1242 (11th Cir. 2005).

⁴⁰ *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-C8386, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

⁴¹ *Sarei v. Rio Tinto Plc.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

not even incorporated in the United States.⁴² The *Aguinda*, *Sarei*, *Aldana* and *Wiwa* opinions help to analyze the issues surrounding ATCA litigation today. Of these cases, *Aguinda* deals primarily with human rights from an environmental harm perspective, *Aldana* and *Wiwa* deal with human rights violations directly, and *Sarei* encompasses both environmental and direct human rights violations. Comparing these cases will lay a foundation for discussing the consequences of filing suit under the ATCA. The rationale of the decisions accompanying these cases reveals the problems with the theory that the ATCA can serve as a lasting mechanism to curb human rights violations.

These four cases are only a small, non-representative sample of the roughly sixty cases brought before U.S. federal courts under the ATCA between 1980 and 2003 (not all of which were against multinational corporations).⁴³ For example, two of the four cases in this sample survived motions to dismiss, but a much smaller percentage of all ATCA cases achieved even this minor victory in federal court.⁴⁴

Nonetheless, the cases are still illustrative of ATCA litigation. These cases follow the general trend characterized by a state actor and a corporation becoming involved in human rights violations in the course of the corporation's business dealings abroad. Sadly, the number of cases that plaintiffs bring, and the gross violations they allege, may be only a fraction of the human rights violations and environmental torts committed by multinational corporations. Despite the vigilance of non-governmental organizations such as Human Rights Watch, Human Rights Now and Amnesty International, violations may still go unreported or unnoticed.⁴⁵ There might also be cases that have been both reported and noticed, but that have not yet found legal representation. Finally, there may be plaintiffs that had been awaiting the outcome of *Doe v. Unocal* before determining in which circuit to sue. The increasing volume of ATCA cases involving corporations reflects the likelihood that international corporations either commit or implicitly consent to the commission of human rights violations. These violations have long gone unnoticed by the international community. The volume of cases also shows the world the lack of legal remedies available in the international community.

U.S. federal courts have struggled admirably to adjudicate these cases, but difficulties clearly remain. Examining the following four cases will

⁴² See *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *3 (explaining that Royal Dutch Petroleum was not incorporated in the United States).

⁴³ Bridgeman, *supra* note 18, at 9.

⁴⁴ *Id.* at 10–26.

⁴⁵ See Human Rights Watch/Helsinki, “Germany for Germans”: Xenophobia and Racist Violence in Germany (1995), available at <http://www.hrw.org/reports/pdfs/g/germany/germany954.pdf>.

highlight those difficulties and explain why an international tribunal is necessary. However, before analyzing the opinions it is important to first understand the facts.

*A. Wiwa v. Royal Dutch Petroleum Co.*⁴⁶

Wiwa was brought by former citizens and residents of Nigeria against Royal Dutch Petroleum Co. for a litany of human rights abuses.⁴⁷ Two of the four plaintiffs sued on behalf of Ken Saro-Wiwa and John Kpuinen, in addition to themselves. Both Saro-Wiwa and Kpuinen were active in the Movement for the Survival of the Ogoni People ("MOSOP"), which was formed to oppose the appropriation of Ogoni land without adequate compensation. MOSOP also rallied to oppose the severe environmental damage caused by the defendant's operations in the region.

Royal Dutch Petroleum Co. and Shell Transport and Trading Company, a co-defendant, were at the time corporations incorporated in the Netherlands and the United Kingdom, respectively. Through their wholly-owned subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), these corporations had extensive operations in Nigeria.⁴⁸

In one of the more harrowing course of events to reach U.S. federal courts under the ATCA, the corporate defendants recruited Nigerian police and military to suppress MOSOP. They also "provided logistical support, transportation, and weapons to Nigerian authorities to attack Ogoni villages and stifle opposition to Shell's oil-excavation activities."⁴⁹ In the course of these events, "Ogoni residents . . . were beaten, raped, shot and/or killed . . ."⁵⁰ Finally, and most egregiously, in the events leading directly to the current litigation, Ken Saro-Wiwa and John Kpuinen were hanged after a scripted murder conviction before a special tribunal.

The plaintiffs in *Wiwa* sued for the tortious acts of: 1) summary execution; 2) crimes against humanity; 3) torture; 4) cruel, inhuman, or degrading treatment; 5) arbitrary arrest and detention; and 6) violation of the rights to life, liberty and security of person and peaceful assembly and association.⁵¹

The district court granted the defendants' motions to dismiss the claims by Owens Wiwa for the fifth and sixth claims, and denied the

⁴⁶ *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *1.

⁴⁷ *Id.* at *6.

⁴⁸ *Id.* at *3-4.

⁴⁹ *Id.* at *5.

⁵⁰ *Id.*

⁵¹ *Id.* at *6.

motion to dismiss with regard to all other claims. The court also granted plaintiffs time to re-plead those claims that were dismissed.⁵²

*B. Aldana v. Fresh Del Monte Produce, Inc.*⁵³

The *Aldana* case was brought by Guatemalan citizens who filed suit against the multinational corporation that owns Compania De Desarrollo Bananero De Guatemala, S.A. (“Bandegua”).⁵⁴ The plaintiffs were, at the time, former union officers who had represented the unionized workers at Bandegua.

On October 13, 1999, after labor negotiations failed, the workers of the banana plantation were on the eve of a union-organized strike.⁵⁵ That evening, a band of Guatemalans armed with guns kidnapped the union officers, forced them to lure other officers to the union office, and threatened to kill them. The gunmen also shoved and beat the union officers. While the union officers were detained at gunpoint, a mayoral candidate arrived and “brokered a consensus” with the union officers. Despite the so-called agreement, the gunmen continued their conduct. The mayoral candidate, two union officers and some of the gunmen went to a radio station where the gunmen forced the two union officers to announce on the radio that the labor dispute was over, and that the workers should return to work the next day. The union officers were also forced to announce that they were resigning their union posts.⁵⁶

Still at gunpoint, the two union officers were then taken back to the union office, where they were made to sign resignation letters. These letters were immediately faxed to the owners of the plantation. The Bandegua security officer was present at the union office and allegedly communicated by walkie-talkie with members of the Bandegua management staff. The gunmen threatened to kill the union officers if they did not leave the plantation area immediately and then released them. The union officers collected their families and fled to Guatemala City where they attempted to file a complaint with the Minister of Labor. There, they found that the General Manager of Bandegua had already notified the Minister of Labor of the officers’ “voluntary” resignations. With the intervention of the United States Embassy, the union officers were relocated to the United States and filed suit in federal court.⁵⁷

⁵² *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *101.

⁵³ *Aldana*, 305 F. Supp. 2d at 1285.

⁵⁴ *Id.* at 1288.

⁵⁵ *Id.* at 1288–89.

⁵⁶ *Id.* at 1290.

⁵⁷ *Id.*

The plaintiffs in *Aldana* brought their case against the corporation for the tortious acts of: “1) torture, 2) kidnapping, 3) unlawful detention, 4) crimes against humanity and 5) denial of fundamental right to associate and organize.”⁵⁸

The district court granted defendant’s motion to dismiss all claims. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court on all counts except torture.⁵⁹

*C. Sarei v. Rio Tinto*⁶⁰

Sarei is the most illustrative case where the actions of a multinational corporation were shown to profoundly impact the civil and political situation of a foreign country.⁶¹ The defendant corporations, Rio Tinto PLC and Rio Tinto Limited (together “Rio Tinto”), wanted to build a copper mine on Bougainville, a small island just off the main island of Papua New Guinea. However, Rio Tinto needed the cooperation of Papua New Guinea’s government “because constructing the mine necessitated displacing villages and destroying massive portions of the rain forest.”⁶²

To overcome this dilemma, Rio Tinto allegedly offered the Papua New Guinea government a portion of the profits from this venture. When Rio Tinto encountered resistance on the island from residents who fought displacement, the government of Papua New Guinea responded swiftly. The government arrested 200 Bougainvilleans for expelling an exploration team from their land; when other Bougainvilleans rejected an offer to purchase their land, the government flew 100 riot police to the island to help the Rio Tinto surveyors. At one point, the riot police fired tear gas canisters at villagers, and when the villagers did not disperse, the riot police “charged them with their batons, clubbing both men and women.”⁶³

As planned, Rio Tinto commenced their operations, causing extensive environmental harm. The corporate defendants razed huge portions of rain forest, destroyed “fertile river valleys,” killed fish populations by depositing mine waste into the river, caused “respiratory infections and asthma” from mine emissions, damaged crops, and “forced many animals out of their habitats.”⁶⁴ In short, the plaintiffs alleged that “Rio Tinto’s destruction of the island’s land and environment ‘ripped apart’ the culture, economy, and life of Bougainville.”⁶⁵ Amazingly, the violations do not end there.

⁵⁸ *Id.* at 1291.

⁵⁹ *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005).

⁶⁰ *Sarei*, 221 F. Supp. 2d at 1116.

⁶¹ *Id.*

⁶² *Id.* at 1121.

⁶³ *Id.* at 1122 (quoting the First Amended Compl. ¶ 105).

⁶⁴ *Id.* at 1122–23.

⁶⁵ *Id.* at 1124 (quoting the First Amended. Compl. ¶ 155).

For sixteen years after the mine's opening, the Bougainvilleans organized protests. Rio Tinto continued to operate until some of the removed landowners demolished machinery with dynamite. In response, Rio Tinto warned the Papua New Guinean government that it would no longer invest in Papua New Guinea "if the government did not quell the uprising so that the company could recommence operations."⁶⁶ The government promptly sent troops to the island. Rio Tinto allegedly provided those troops with logistical support. The actions resulted in civil war. Plaintiffs estimate that 15,000 Bougainvilleans died during this conflict, of which 10,000 died during a blockade which "prevented medicine, clothing and other essential supplies from reaching" Bougainville.⁶⁷

The plaintiffs sued in the U.S. federal courts for the human rights violations of: 1) crimes against humanity; 2) war crimes/murder; 3) violation of the rights to life, health, and security of the person; 4) racial discrimination; 5) cruel, inhuman, and degrading treatment; 6) violation of international environmental rights; and 7) a consistent pattern of gross violations of human rights.⁶⁸

The district court ultimately dismissed all of plaintiffs' claims, in large part on the basis of the political question doctrine.

*D. Aguinda v. Texaco, Inc.*⁶⁹

In a purely environmental claim, the plaintiffs in *Aguinda* are Ecuadorian and Peruvian citizens. They filed suit against Texaco, Inc. for allegedly dumping tens of millions of gallons of crude oil and toxic waste water into the surrounding ecosystem on a daily basis.⁷⁰ The plaintiffs claim that the practice continued for twenty years while the defendant corporation drilled for oil in Ecuador's Amazon Basin. By improperly disposing of the hazardous material, the corporation annihilated tropical rain forest habitats, debilitated the indigenous people living in the rain forest, and threatened the existence of the Amazon Basin habitats.⁷¹

As a result of the corporation's operations in the Amazon Basin, there has been a noticeable increase in cancer and miscarriages. The plaintiffs also allege that the defendant's waste-dumping practices pushed three indigenous tribes to the brink of extinction.⁷²

⁶⁶ *Sarei*, 221 F. Supp. 2d at 1125.

⁶⁷ *Id.* at 1126–27 (quoting the First Amended Compl. ¶ 196).

⁶⁸ *Id.*

⁶⁹ *Aguinda*, 303 F.3d at 470.

⁷⁰ FRENTE PARA LA DEFENSA DE LA AMAZONIA, *Aguinda v. Texaco: Why a Law Suit?*, at <http://www.texacorainforest.com/why/index.htm> (last visited Oct. 20, 2005).

⁷¹ *Id.*

⁷² *Id.*

The Peruvian plaintiffs joined the suit when they discovered that the toxic waste had entered a river and flowed into the Peruvian Amazon.⁷³ The Second Circuit dismissed all of the plaintiffs' claims.

IV. THE PROBLEMS WITH THE ATCA ILLUSTRATED BY THESE FOUR CASES

These cases identify and illustrate the drawbacks of ATCA litigation. Although three of these cases were summarily dismissed, and the fourth is not yet resolved, these cases are still diverse enough to provide various perspectives on the issues addressed here. Not only did each court use distinct and conflicting rationales, but the courts alternately followed and ignored previous federal court precedent to reach their decisions. These perplexing opinions will help us to identify five general problems with ATCA litigation: 1) the opinions reveal the federal courts' reluctance to grant causes of action under the ATCA; 2) even after *Sosa*, federal courts are uncertain which standards to apply when determining if the ATCA applies; 3) rulings under the ATCA against even a private party can impinge on the constitutional duties of both the executive and legislative branches of the United States;⁷⁴ 4) it is problematic for the U.S. courts to impose their own policies and opinions on the international community by being the sole forum for hearing international human rights violations committed by foreign governments and multinational corporations; and 5) even assuming a successful outcome for the plaintiff, the actual perpetrators of human rights violations are not brought to justice.

A. Federal Courts' Reluctance to Establish New Causes of Action Under the ATCA

The U.S. Supreme Court ruled in *Sosa* that the jurisdictional element of the ATCA "enabled federal courts to hear claims in a very limited category defined by the law of nations."⁷⁵ The Court also acknowledged that "torts in violation of the law of nations would have been recognized with the common law of the time."⁷⁶ This ruling has been lauded by some as "losing the battle but winning the war,"⁷⁷ but the Supreme Court insisted that the jurisdictional intent of the ATCA was likely "enacted on the

⁷³ FRENTE PARA LA DEFENSA DE LA AMAZONÍA, *After the Gold Rush: The Problem*, at <http://www.texacorainforest.org/problem.htm> (last visited Oct. 20, 2005).

⁷⁴ See U.S. CONST. art. II, § 2, cl. 2; see also U.S. CONST. art. I, § 8, cl. 10.

⁷⁵ *Sosa*, 124 S.Ct. at 2754.

⁷⁶ *Id.* at 2755.

⁷⁷ Anthony J. Sebok, *Is the Alien Tort Claims Act a Powerful Tool?* (July 12, 2004), at <http://www.cnn.com/2004/LAW/07/12/sebok.alien.tort.claims>. This phrase refers to the fact that the U.S. Supreme Court recognized the possibility of a cause of action under the ATCA but ultimately found no cause of action in *Sosa*.

understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability.”⁷⁸ *Sosa* actually restricted the scope of the ATCA to a very narrow cause of action.

Even when a court holds that a cause of action exists under the ATCA, it must consider other issues that would promote limiting its scope. Therefore, the federal courts’ reluctance to find causes of action is not so much the problem in itself, but rather a manifestation of their recognition of other problems. The courts that presided over the ATCA cases examined in this article were clearly reluctant to recognize ATCA claims against multinational corporations; despite abundant and compelling facts, the courts still dismissed most claims.

The *Aldana* court used a bewildering rationale to dismiss the plaintiffs’ claim of unlawful detention, while acknowledging that unlawful or arbitrary detention does violate the law of nations. The court ruled that “[t]here is often some egregious quality to the action that must be present for the conduct to be a violation of international law cognizable under the ATCA.”⁷⁹ The court effectively pulled out of thin air another element to the cause of action created by the ATCA: only egregious violations. This reasoning is directly contrary to *Eastman Kodak v. Kavlin*, which the *Aldana* court actually cites to support its ruling.⁸⁰

Eastman Kodak held that a determination of the length of detention is arbitrary and not relevant to whether or not an action existed. The court stated that “[t]he actionability of one plaintiff’s claims cannot depend on the degree of evil perpetrated on another plaintiff.”⁸¹ In *Eastman Kodak*, the court concluded that with “deep reservations” the plaintiff’s claim was actionable.⁸²

Under *Eastman Kodak*, the *Aldana* court should not have dismissed the plaintiff’s claim. Nonetheless, the *Aldana* court displayed its unwillingness to uphold ATCA claims against corporations and held that the “[c]ourt’s review of other ATCA cases confirms that the added quality of egregiousness is what confers subject matter jurisdiction under the ATCA.”⁸³

In coming to a conclusion contrary to cited precedent, the court necessarily belittled the suffering of the plaintiffs. In effect, the holding stated that unless the plaintiffs suffered more than they had alleged in their complaint, then the court would not find the claims actionable under the

⁷⁸ *Sosa*, 124 S.Ct. at 2761.

⁷⁹ *Aldana*, 305 F. Supp. 2d at 1296.

⁸⁰ *Id.* at 1294 (citing *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997)).

⁸¹ *Eastman*, 978 F. Supp. at 1094.

⁸² *Id.*

⁸³ *Aldana*, 305 F. Supp. 2d at 1295.

ATCA.⁸⁴ The court's aversion to ATCA claims against corporations was such that the court was willing to find that being held overnight by armed men who poked and shoved with weapons, and threatened the victims at gunpoint for the purpose of avoiding a union-organized strike was not arbitrary detention.⁸⁵

The Eleventh Circuit, upholding the dismissal of the arbitrary detention claim also based its holding on a questionable argument.⁸⁶ The court fixed blindly to the Supreme Court's statement in *Sosa* that "a single illegal detention of less than a day . . . violates no norm of customary international law."⁸⁷ The court did not consider the many differences between the circumstances in *Aldana* and in *Sosa*, even though it emphasized the Supreme Court's holding that international law is necessarily static and requires some judgment on the part of the judges.⁸⁸

The *Aldana* district court also held that the plaintiffs failed to state a cause of action for the right to organize and associate, and dismissed that claim. The court found that the numerous authorities cited by the plaintiffs in support of their claim "are only evidence of international law and do not provide a basis for development of a customary norm of international law that is actionable under the ATCA."⁸⁹ The cited authorities included international conventions established by the United Nations, and provided the perfect opportunity for the *Aldana* court to recognize the claims. In fact, previous court precedent had used one of these conventions as evidence of international law.⁹⁰ Nonetheless, the *Aldana* court held that the evidence failed to establish the existence of "customary international law for the right to associate and organize."⁹¹ In *Wiwa*, the court dismissed one of the claims for arbitrary arrest and detention in comparable perfunctory manner, stating only that "[p]laintiffs provide only a cursory assertion that Owens Wiwa 'had previously been arrested' . . . at some undefined time in

⁸⁴ *Id.* at 1296.

⁸⁵ *Id.*

⁸⁶ *Aldana*, 416 F.3d at 1248.

⁸⁷ *Id.* (quoting *Sosa v. Alvarez-Machain*, 124 S.Ct. 2769 (2004)).

⁸⁸ *Id.* The circumstances of Alvarez-Machain's abduction in *Sosa* and the detention of the union official plaintiffs in *Aldana* vary on many points. For example, Alvarez-Machain assisted in torturing and murdering an individual on behalf of the Mexican police. Alvarez-Machain was then detained by police and military while awaiting trial. In *Aldana*, however, the union officials were mere workers attempting to organize. Those union workers were harassed and kidnapped at gunpoint by a group of unknown, armed gunmen.

⁸⁹ *Aldana*, 305 F. Supp. 2d at 1297 (the plaintiffs cited the International Covenant for Civil and Political Rights ("ICCPR"), the United Nations Universal Declaration of Human Rights, and Conventions 87 and 89 adopted by the International Labor Organization and the ICCPR).

⁹⁰ See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002); see also *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001).

⁹¹ *Aldana*, 305 F. Supp. 2d at 1298.

the past.”⁹² The court held that this bare assertion was insufficient. However, since the court granted leave to re-plead the claim,⁹³ this ruling is less revealing of the courts’ reluctance to grant ATCA claims than that of the other cases. Nonetheless, the court chose to dismiss the claim even when it seemed clearly to be one of arbitrary arrest and detention. In addition, and in direct contradiction with the *Aldana* opinion, the court chose not to consider whether “as a matter of law, Owens Wiwa must plead ‘prolonged’ detention in order to assert a valid claim under the ATCA.”⁹⁴

In *Sarei*, the court held that the “plaintiffs [had] not articulated a specific, universal and obligatory norm underlying this claim”⁹⁵ and dismissed their claim for cruel, inhuman, and degrading treatment.⁹⁶ Like in *Aldana*, the plaintiffs offered evidence that cruel, inhuman and degrading treatment was a recognized violation of human rights under international law, but the court was unwilling to recognize the claim.⁹⁷

In both *Sarei* and *Aguinda*, despite particularly dire factual findings, the environmental claims were dismissed. In *Sarei*, emissions from the copper mine caused asthma and respiratory disorders, forced wildlife from their natural habitat and destroyed crops.⁹⁸ Waste from the mine polluted a local river, turning fertile valleys into wastelands and exterminating fish populations that villagers needed to survive.⁹⁹ The court justified its dismissal by ruling that allowing the cause of action would violate the Act of State Doctrine, which bars certain claims against foreign sovereigns.¹⁰⁰

Aguinda involved toxic waste that was pumped into the rainforest, caused cancer and miscarriages, nearly rendered two indigenous tribes extinct, and impacted residents of a neighboring country.¹⁰¹ The Second Circuit held that Ecuador was an adequate forum for the case, despite the plaintiff’s contention that Ecuador did not recognize torts or mass claims, and was inefficient and corrupt.¹⁰² The court neither affirmed nor rejected the district court’s conclusion that “because environmental torts are unlikely to be found to violate the law of nations, plaintiff’s ATCA claim is unlikely

⁹² *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *20.

⁹³ *Id.*

⁹⁴ *Id.* at n.6.

⁹⁵ *Sarei*, 221 F. Supp. 2d at 1162.

⁹⁶ *Id.* at 1162.

⁹⁷ *Id.* (plaintiffs offered the Universal Declaration of Human Rights as evidence of international law).

⁹⁸ *Id.* at 1123.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1184–85 (The Act of State Doctrine only bars claims that involve an official act of a foreign state, performed within its own territory, and that the claim seeks relief that would require the court to declare the foreign sovereign’s act invalid).

¹⁰¹ *Aguinda*, 303 F.3d at 470.

¹⁰² *Id.* at 478.

to survive dismissal.”¹⁰³

Despite the severity of these violations and the low standard for surviving a motion to dismiss,¹⁰⁴ the federal courts chose not to recognize these causes of actions. The courts used widely varying rationales in each case as they looked for reasons to dismiss the claims, demonstrating an apparent reluctance to grant causes of action under the ATCA. Thus far, post-*Sosa* jurisprudence only serves to confirm this trend.

B. Lack of Clear Standards Leave Case Rulings Uncertain

Sosa did not add much clarity to the standards used to determine if a cause of action exists against multinational corporations under the ATCA. In fact, *Sosa* largely left the federal courts to determine if the law of nations was implicated, stating that ATCA jurisprudence must inevitably “involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹⁰⁵ *Sosa* left the federal courts as uncertain as ever.

The ATCA cases reveal two major areas of discrepancy. First, courts are uncertain how to determine what constitutes a violation of the law of nations.¹⁰⁶ Second, the federal courts have not agreed on a single standard to apply to determine what constitutes state action.¹⁰⁷ This lack of clear standards undermines the ATCA by creating disparate effects throughout the United States.

1. The “Law of Nations”¹⁰⁸

As the *Aldana* court stated, “[d]efining customary international law is no simple feat.”¹⁰⁹ It is no wonder, then, that the most contested element in ATCA litigation is that the alleged tort must violate “the law of nations.”¹¹⁰

The cases examined here have taken slightly different views on the meaning of the law of nations. It is undisputed that there are certain *jus cogens* violations that always violate the law of nations, such as genocide, slavery, torture and war crimes.¹¹¹ Recent case law has also established that forced labor of any kind is a form of slavery, and therefore a *jus cogens*

¹⁰³ *Id.* at 476.

¹⁰⁴ *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

¹⁰⁵ *Sosa*, 124 S.Ct. at 2766–68 (2004).

¹⁰⁶ *See generally id.* at 2739.

¹⁰⁷ *Bridgman*, *supra* note 18, at 9.

¹⁰⁸ *Sosa*, 124 S.Ct. at 2739.

¹⁰⁹ *Aldana*, 305 F. Supp. 2d at 1292.

¹¹⁰ *Id.*

¹¹¹ *See Unocal*, 395 F.3d at 945.

violation.¹¹²

In addition to the *jus cogens* violations, the *Wiwa* court also found that the right to be free from arbitrary detention,¹¹³ the right to be free from cruel, inhuman or degrading treatment,¹¹⁴ the right to life, liberty, and personal security,¹¹⁵ and the right to peaceful assembly and expression¹¹⁶ were all rights guaranteed by the law of nations. Therefore, any denials of these rights would “constitute fully recognized violations of international law” and be actionable under the ATCA.¹¹⁷ In coming to this conclusion, the court cited international agreements such as the Universal Declaration of Human Rights,¹¹⁸ and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹¹⁹

However, though the plaintiffs in *Aldana* cited similar conventions and agreements, including the International Covenant for Civil and Political Rights and the United Nations Universal Declaration of Human Rights, the court ruled that there was *not* customary international law prohibiting violations of the right to peaceful assembly and expression.¹²⁰ The court stated that “[t]he characteristics of customary international law are often open to ‘creative interpretation,’ and this Court must progress with extraordinary care and restraint.”¹²¹ *Sosa* reinforced that sentiment.¹²²

In addition, while the *Aguinda* and *Sarei* decisions took contradicting positions on whether an international convention was evidence of international law, both courts reached the same result. When *Aguinda* first came before the district court in 1994,¹²³ the judge delayed ruling on whether or not the alleged actions violated customary international law,¹²⁴ but appeared to be leaning towards recognizing international environmental agreements such as the Rio Declaration on Environment and Development (“Rio Declaration”),¹²⁵ as evidence of customary law.¹²⁶ The judge

¹¹² *Id.*

¹¹³ *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *17.

¹¹⁴ *Id.* at *24.

¹¹⁵ *Id.* at *33.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *17 (quoting *Xuncax v Gramajo*, 886 F. Supp. 162, 184 (S.D. Mass. 1995)).

¹¹⁸ *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., pmble. & arts. 9–11, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

¹¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. Treaty Doc. No. 100-20 (1988), 145 U.N.T.S. 85.

¹²⁰ *Aldana*, 305 F. Supp. 2d at 1297.

¹²¹ *Id.* at 1299.

¹²² *Sosa*, 124 S.Ct. at 2755–56 (judges will have to exercise discretion in defining international law).

¹²³ *Aguinda*, 1994 U.S. Dist. LEXIS 4718, at *1.

¹²⁴ *Id.* at *25.

¹²⁵ Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874.

eventually held that “[n]ot all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations,”¹²⁷ and cited several U.S. statutes that he believed were relevant to the discussion of when customary international law prohibited specific actions.¹²⁸ Looking at the exact same agreement, the *Sarei* court ruled that the Rio Declaration tended to *disprove* the existence of customary international law for granting environmental claims.¹²⁹ Rather, the court held that the Rio Declaration limited liability for environmental harms only to the sovereign’s responsibility to prevent the environmental harm from affecting other countries.¹³⁰

Every case brought under the ATCA after *Filartiga* discusses the meaning of the “law of nations.” But even after the U.S. Supreme Court decided *Sosa*, the courts are still without an exact meaning to “the law of nations.” As we saw from these cases, courts are unable to agree on what customary international law consists of, even when interpreting the exact same convention. Some courts recognize international covenants as proof of an international consensus, while others do not.¹³¹ Still other courts see international covenants as persuasive evidence that customary international law does *not* exist.¹³² Courts are unable to reach a consensus on when international law exists, and have barely scratched the surface on interpreting international law that already does exist.

2. State Action

The federal appellate courts have also had trouble determining when there is “state action” under the ATCA. While courts are fairly consistent with the general premise of state action articulated in *Wiwa* and *Kadic* (that “plaintiffs usually must demonstrate that the defendant was a government actor or committed the violation while acting ‘under color of law’”),¹³³ the various federal appellate courts use different tests to determine if state action is present. Of the tests articulated by the Supreme Court,¹³⁴ the Second Circuit relies exclusively on the joint action test, as in *Wiwa*.¹³⁵ The Ninth Circuit, which decided *Sarei*, emphasizes the joint action test but also

¹²⁶ *Aguinda*, 1994 U.S. Dist. LEXIS 4718, at *22.

¹²⁷ *Id.* at *24.

¹²⁸ *Id.* at *23–24.

¹²⁹ *Sarei*, 221 F. Supp. 2d at 1159.

¹³⁰ *Id.*

¹³¹ *See Aguinda*, 1994 U.S. Dist. LEXIS 4718, at *23–24.

¹³² *See Sarei*, 221 F. Supp. 2d at 1116.

¹³³ *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *9 (referring to *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995)).

¹³⁴ *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982).

¹³⁵ *See Kadic*, 70 F.3d at 245; *see also* *Bridgman*, *supra* note 18, at 5–6.

considers the proximate cause test.¹³⁶ The Fifth Circuit considers a combination of many tests, including the nexus test, the symbiotic relationship test, the joint action test and the public function test.¹³⁷ Other circuits, such as the Eleventh Circuit, have not had to answer the state action question (as in *Aldana*) or have not yet determined how to approach it. The Supreme Court never reached the question of state action, having determined that the alleged violations in *Sosa* did not violate international law.¹³⁸

In sum, federal courts are inconsistent in their attempts to interpret the “law of nations” and “state action.” While it is not uncommon for the federal appellate courts to interpret the same legislation in divergent ways, the Supreme Court generally discourages these occurrences, and addresses circuit splits as they arise. However, it can be argued that it is more important that interpretations of the ATCA be consistent. Interpretations of the ATCA affect not only those cases brought under the circuit’s jurisdiction but also have international ramifications. The U.S. federal court system cannot hope to cover the entire international community with one law, yet promulgate various interpretations of the same law.

This may result in such detrimental consequences as forum-shopping, which the Supreme Court has held is undesirable.¹³⁹ Domestic federal courts are simply not yet equipped to interpret international law when international plaintiffs are suing international defendants with international consequences. At the moment, however, there is no comparable alternative.

C. Courts That Allow Causes of Action Under the ATCA Impinge on the Powers of Both the Executive and Legislative Branches of the United States

For the majority of human rights violations, private parties can only be found liable if the plaintiff can show state action.¹⁴⁰ Therefore, even though the ruling is technically against a private party, it is still a denunciation of a sovereign state and can impinge on the functions, perhaps even the constitutional duties, of the executive and legislative branches of the U.S. government.¹⁴¹ In fact, the Department of Justice and the Department of State have both submitted briefs arguing that the political question doctrine

¹³⁶ See *Unocal*, 395 F.3d at 954. See also *Sarei*, 221 F. Supp. 2d at 1116; Bridgman, *supra* note 18, at 6–8.

¹³⁷ Bridgman, *supra* note 18, at 8 (referring to *Beanal v. Freeport McMoRan, Inc.*, 969 F. Supp. 362 (E.D.La. 1997)).

¹³⁸ *Sosa*, 124 S.Ct. at 2739.

¹³⁹ *Erie*, 304 U.S. at 64.

¹⁴⁰ See *Kadic*, 70 F.3d at 232.

¹⁴¹ See U.S. CONST. art. I, § 8, cl. 10; see also U.S. CONST. art. II, § 2, cl. 2; *Sosa*, 124 S.Ct. at 2763 (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

normally mandates the dismissal of ATCA claims.¹⁴² The conflict between the governmental branches was especially glaring in the case of *In re South African Apartheid Litigation*, which was dismissed by the Southern District Court of New York on November 29, 2004.¹⁴³

The plaintiffs in *In re South African Apartheid Litigation* sought to hold corporations and businesses liable for any benefits they may have received while under the rule of apartheid.¹⁴⁴ These benefits included the advantage of conducting business in South Africa. Both the South African and the U.S. governments took the position that granting jurisdiction in U.S. federal courts undermined the identity of a sovereign nation, South Africa specifically, and ignored the domestic remedies available in the nationality country.¹⁴⁵ The governments protested that ATCA litigation in this case undermined the policy of confession and absolution deliberately chosen by the South African government to avoid any semblance of "Victor's Justice."¹⁴⁶ The subsequent dismissal in the case indicates that the federal courts are aware of, and sensitive to, the potential conflict with the other branches of government. The court cited the *Sosa* decision, which in turn referred to the early stages of *In re South African Apartheid Litigation* when it recognized that "in such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."¹⁴⁷

The Executive Branch has weighed in on other cases as well. The Department of Justice filed an amicus brief in response to the *Unocal* case, stating that allowing ATCA claims would have "significant potential for interference with the important foreign policy interests with the United States, and is contrary to our constitutional framework and democratic principles."¹⁴⁸

The *Sarei* court also recognized a potential conflict with the executive branch of the U.S. government, and thought it necessary to request a brief or statement of interest from the executive branch.¹⁴⁹ A letter from the State Department asserted that continued adjudication of this lawsuit "would risk

¹⁴² Brief for the United States, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

¹⁴³ *Ntsebeza v. Citigroup, Inc. (In re S. Afr. Apartheid Litig.)*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

¹⁴⁴ *Id.*

¹⁴⁵ Press Release, USA *Engage, *USA *Engage Hails Court Decision Limiting Use of Alien Tort Provision: South African Lawsuits Dismissed* (Nov. 30, 2004).

¹⁴⁶ *Sosa*, 124 S.Ct. at 2766 (referring to *In re S. Afr. Apartheid Litig.*, 238 F. Supp. 2d 1379 (JPML 2002)).

¹⁴⁷ *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d at 554.

¹⁴⁸ Brief for the United States as Amicus Curiae at 4, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

¹⁴⁹ *Sarei*, 221 F. Supp. 2d at 1181.

a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [U.S.] foreign relations.”¹⁵⁰ The *Sarei* court responded by holding that “the court must accept the statement of foreign policy provided by the executive branch as conclusive of its view on that subject.”¹⁵¹ As such, the court was unwilling to “unduly interfere with that policy.”¹⁵²

The *Wiwa* court also acknowledged the need for deference to the executive branch, and followed Second Circuit precedent that courts “consider whether resolution of the case will ‘likely impact on international relations’ or ‘embarrass or hinder the executive in the realm of foreign relations.’”¹⁵³ Under the unique circumstances of *Wiwa*, however, the court was able to avoid this concern by ruling that the Act of State Doctrine would not hinder its recognition of a cause of action because a new democracy had already replaced the the government responsible for the violations.¹⁵⁴ Needless to say, this unusual situation is not often the case.

Finally, the Supreme Court recognized the potential to impinge on the legislative branch when it held that “this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority.”¹⁵⁵ U.S. courts agree that while the ATCA confers jurisdiction to the federal courts, it does not explicitly grant a private cause of action. This privilege is normally reserved for the legislative branch. However, since courts now consistently read a private cause of action into the ATCA, they have the responsibility to be restrictive and responsible, so as not to abuse that privilege. The Court stated its concern more succinctly in the same passage: “[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.”¹⁵⁶

All of these opinions reflect the courts’ awareness of a significant risk of encroachment on the executive branch by interfering with foreign relations concerns. Even though some plaintiffs today ask the courts to sit in judgment of private corporations, and not governments, an accusation of the corporate defendants necessarily implicates the sovereign state as well. The judicial branch is unwilling to assume the responsibility for maintaining diplomatic relations, or for turning legislation into a tool that could jeopardize those relationships. The risk of diplomatic conflict would be alleviated if the cases were relegated to an international body, rather than

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1181–82.

¹⁵² *Id.* at 1181.

¹⁵³ *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *92.

¹⁵⁴ *Id.*

¹⁵⁵ *Sosa*, 124 S.Ct. at 2762–63.

¹⁵⁶ *Id.*

one sovereign state.

D. The United States is not an Appropriate Forum For All International Human Rights Violations Committed by Multinational Corporations

Human rights advocates laud the ATCA as the means of allowing victims worldwide to seek redress and hold corporations responsible for certain actions. However, these advocates do not have to bear the immense responsibility of creating and maintaining a forum in the United States for potentially any international human rights violation. That responsibility falls to the federal courts, and they tread very carefully.

In dismissing one of the plaintiffs' claims, the *Aldana* court stated that "while Plaintiffs claim not to advocate that U.S. courts should be the forum for all labor disputes worldwide, it is hard to imagine what claims of violations of the fundamental right to associate and organize would *not* be heard under the ATCA if this Court allowed the claims to proceed."¹⁵⁷

In addition, the *Aguinda* court considered the possibility that U.S. policy and jurisprudence, especially with regard to environmental policy, would pervade the international community if U.S. courts were required to become the forum for all international human rights violations committed by multinational corporations. The court held that federal courts "should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."¹⁵⁸

The United States is also inappropriate as a forum for all human rights claims against corporations because of its temporal potential. Even if plaintiffs have absolutely no form of redress in their native country, and a U.S. federal court decides to grant a cause of action, the more unsettling question still looms large: What would happen if the United States decided to shut the door? Plaintiffs who depended on the ATCA as a last resort would be left without any remedy at all. Therefore, the United States is an inappropriate forum not only because it would impose its policy beliefs on the rest of the world, but also because it could disappear at any moment, leaving plaintiffs without opportunity for redress.

This scenario might not come to pass. Congress has passed on more than one opportunity to repeal the ATCA; the very issue of judicial legislation and recognizing private rights of action was before Congress when it passed the Torture Victim Protection Act.¹⁵⁹ In addition, the Senate expressly declined to give the federal courts the task of interpreting and

¹⁵⁷ *Aldana*, 305 F. Supp. at 1299.

¹⁵⁸ *Aguinda*, 142 F. Supp. 2d at 552 (citing *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)).

¹⁵⁹ *Sosa*, 124 S.Ct. at 2764.

applying international human rights law when it considered ratification of the International Covenant on Civil and Political Rights.¹⁶⁰ Nonetheless, the U.S. Constitution dictates that the issue of federal jurisdiction is wholly within the province of the legislature. As the Supreme Court stated in *Sosa*, “[i]t is enough to say that Congress may [shut the door] at any time, just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”¹⁶¹

Various interest groups are already lobbying Congress to reach this very outcome, including the U.S. Chamber of Commerce and National Foreign Trade Council.¹⁶² If this happens, the international community will be thrust back into the same situation as it was before human rights violators were sued under the ATCA. That is, there will be no remedies available for victims of human rights abuse because the international community has not created a permanent forum to hear them. Furthermore, it appears that so long as the ATCA exists, the international community will make no progress on this issue. Instead, it will continue to rely on the court system of only one nation. The responsibility of protecting the world’s citizens against the world’s corporations is too great for any single sovereign nation.

E. Human Rights Violators are Still not Prosecuted, Either Under the ATCA or Otherwise

Even if some decisions are rendered against corporations under the ATCA, the actual perpetrators themselves are not being prosecuted or forced to defend their actions in a court of law. In *Wiwa*, the Nigerian government never had to answer for its actions because it had been replaced by a fledgling democracy.¹⁶³ In *Aguinda*, the Ecuadorian government declined to waive sovereign immunity in the suit,¹⁶⁴ and in *Aldana*, the Guatemalan mayoral candidate who arrived at the union office while the gunmen were there became the mayor.¹⁶⁵ Even after the plaintiffs’ allegations in *Sarei*, the United States attempted to facilitate the peace process with the same Papua New Guinea government that presided over the alleged violations.¹⁶⁶ None of the government actors who committed the human rights violations were ever sued, nor were they ever required to offer any remedy to the victims of their actions.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2765–66.

¹⁶² See generally Jenna Greene, *Use of 1789 Alien Tort Claims Act Against Business Growing*, 44 BROWARD DAILY BUS. REV. 158, July 24, 2003.

¹⁶³ *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *93.

¹⁶⁴ *Aguinda*, 303 F.3d at 470.

¹⁶⁵ *Aldana*, 305 F. Supp. 2d at 1285.

¹⁶⁶ *Sarei*, 221 F. Supp. 2d at 1116.

The corporations that are being called into court to defend their actions are often only tangentially related to the actual violations. The corporations undeniably have some responsibility for the violations, and many violations might not have taken place were it not for the involvement and potential financial benefits of corporate investments, but oftentimes the corporation and its employees do not commit any of the acts. Even if a court found the multinational corporation liable under the ATCA for its actions, the actual actors are not prevented from continuing to rape, murder, wrongfully imprison, enslave, and otherwise impose their will on victims in their own country. The state actors do not suffer the inconvenience of defending themselves in court. They do not even have to deny the allegations. This result detracts from the supposed value of the ATCA in preventing human rights violations, and may help to hasten the ATCA's demise.

This is not to say that ATCA litigation against corporations is not effective. In fact, suing corporations can be an effective means of deterrence. After undergoing litigation, a corporation will be more cautious with its international investments and in turn will put pressure on a host-country and its government actors. Nonetheless, ATCA litigation fails to hold the actors directly responsible for their actions, and does not allow the remedy to flow directly from the perpetrators to the victims. In order for plaintiff complaints to be fully vindicated, an alternative form of redress must be available. However, as long as plaintiffs are content to sue corporations and believe that the ATCA can do justice to their claims, these mechanisms will never be created.

V. CONCLUSION – A NEW INTERNATIONAL TREATY AND TRIBUNAL

The days of litigation under the ATCA as a tool to prevent human rights violations are numbered. The problems are too numerous and pervasive. Moreover, a simple legislative bill in the United States could nullify the ATCA and again leave victims with no recourse. Although many multinational corporations implement codes of conduct, these are not legally required nor binding, and no external mechanisms exist to enforce them. In addition, many international treaties do not provide for remedies or retributive action if they are broken or violated.¹⁶⁷ Furthermore, the international tribunals established by the U.N., or by other regional authorities such as the Organization of American States and the African Union, are neither equipped nor designed to hear these cases. The

¹⁶⁷ See *Universal Declaration*, *supra* note 118; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 999 U.N.T.S. 171.

International Court of Justice is available only to state parties,¹⁶⁸ and the Inter-American Court of Human Rights will also only hear cases submitted to the court by state parties.¹⁶⁹

The International Criminal Court ("ICC")¹⁷⁰ is the entity that serves a function most similar to what plaintiffs need. The ICC allows individuals to ask the prosecutor to investigate a case, and both individuals and states can be defendants. In addition, the ICC has the power to order compensation to victims.¹⁷¹ Nonetheless, the ICC is still insufficient. The furor over bringing suits in the United States under the ATCA is evidence that the ICC does not fulfill the need for an international judicial remedy. The ICC has a specific, although growing, list of crimes that it may hear. So far, the list includes only genocide, war crimes, crimes against humanity and the crime of aggression.¹⁷² Although "crimes against humanity" includes other actionable crimes, the list is still specific and exclusive. In addition, as of September 10, 2005, the Statute of the ICC has garnered only 99 ratifications.¹⁷³ Of the relevant state parties in the four cases examined here, only Nigeria and Ecuador have ratified the Statute of the ICC.¹⁷⁴ Guatemala and Papua New Guinea have not.¹⁷⁵

It will eventually be necessary to either expand one of the existing tribunals to incorporate cases like those being brought under the ATCA, or to create a new one. Neither the United States, nor any other country, can be expected to serve as the sole forum for all human rights violations brought by common citizens. Multinational corporations must play a key role in the process of creating a new tribunal. However, this will not be easy. In all of the ATCA cases examined in this Article, the allure of financial incentives from multinational corporations influenced government actions resulting in human rights violations. Multinational corporations must also be willing to submit to the jurisdiction of the tribunal, or engage in more responsible practices when investing in suspect nations. With the exceptions of a few exemplary corporations, this result is unlikely unless a market demand for

¹⁶⁸ Statute of the International Court of Justice, *entered into force* Oct. 24, 1945, art. 35–36, 59 Stat. 1031, *available at* <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>.

¹⁶⁹ American Convention on Human Rights, *entered into force* July 18, 1978, art. 62, 1144 U.N.T.S. 123, *available at* <http://wwwserver.law.wits.ac.za/humanrts/oasinstr/zoas3con.htm>.

¹⁷⁰ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in* 37 I.L.M. 999.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ UNITED NATIONS, *Ratification Status of the Rome Statute*, *available at* <http://www.un.org/law/icc>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

responsible practices develops to drive corporate decisions.

We may remain hopeful that the ICC, or one of the other existing tribunals, will eventually be able to accommodate these cases. After all, the covenants condemning human rights violations must be meant to have some meaning. Nonetheless, the U.N. and other international or regional bodies will probably not act to create a new tribunal. The U.N. has only acted to create tribunals such as the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda when calamitous and shocking crimes such as genocide have occurred.¹⁷⁶ These tribunals are highly specific and not equipped to handle global, large-scale litigation.¹⁷⁷

The United States is working with other nations to create the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments on Civil and Commercial Matters.¹⁷⁸ This new agreement would help alleviate the burden on the United States and would govern the use of domestic courts to rule on international issues.¹⁷⁹ It remains to be seen what effect it would have if ratified.

The opinions of the four domestic U.S. cases examined here cast light on an issue that has engendered a great deal of conflict. While the U.S. federal courts are serving an admirable and necessary role to halt human rights violations, it is not an appropriate role for them to play permanently. The federal courts are aware of the dangers in allowing the United States to serve as the default forum for human rights violations. Not only have they been unable to articulate clear standards to apply, but they also risk violating the political question doctrine. The courts are proactively attempting to prevent a rising tide of ATCA-inspired litigation by refusing to establish certain precedents. However, if they are thoroughly successful, then human rights violations will go unaddressed in the world because there is no other private civil forum available to these plaintiffs. Though this is unfortunate, a greater danger arises if the courts are unsuccessful: The United States will be cast in the inappropriate role of international judge and jury. To avoid this outcome, a separate covenant and tribunal incorporating the business world must be established.

This proposed solution to the dilemma is unlikely to occur soon. As long as the world, and human rights activists in particular, believe that the

¹⁷⁶ See *S.C. Res. 827*, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (resolving to establish an international tribunal pursuant to Chapter VII of the Charter of the United Nations).

¹⁷⁷ *Id.*

¹⁷⁸ *Draft on Exclusive Choice of Court Agreements* (Hague Conference on Private International Law, Special Commission on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, Work Doc. No. 110E Apr. 2004), available at http://www.hcch.net/upload/wop/jdgm_wd110_e.pdf.

¹⁷⁹ *Id.*

ATCA is the answer to human rights violations, we will not turn our attention to creating a long-lasting solution. It is crucial that the international community recognize that the ATCA, however useful, cannot serve indefinitely as the world's answer to human rights violations. There are too many irreconcilable issues. Only once we are able to face this fact can we begin tackling the obstacles to creating an international tribunal.

