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**ALIEN TORT STATUTE LITIGATION AND
TRANSNATIONAL BUSINESS ACTIVITY
INVESTIGATING THE POTENTIAL FOR
A BOTTOM-UP GLOBAL REGULATORY REGIME**

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ALIEN TORT STATUTE LITIGATION AND TRANSNATIONAL BUSINESS ACTIVITY

Investigating the Potential for a Bottom-Up Global Regulatory Regime

Christen Broecker

Abstract

Corporate Alien Tort Statute (ATS) litigation is an increasingly established feature of U.S. law, and it possesses the unique capacity to promote corporate responsibility worldwide by establishing baseline limitations on the conduct of transnational business activity. Yet to date, there has been surprisingly little investigation into whether the United States *should* be pursuing global regulation of corporate behavior through the ATS; whether ATS adjudication is structurally capable of serving as an effective form of global regulation of corporate behavior; and the implications of global administrative law for ATS adjudication – particularly whether U.S. courts incur obligations beyond those imposed by domestic law when they participate in a broader global regulatory enterprise. This paper undertakes an initial inquiry into these issues, assessing the potential effectiveness and legitimacy of the ATS from a regulatory standpoint and offering suggestions for modifying key aspects of ATS adjudication to increase the legitimacy and effectiveness of the regulatory enterprise. It concludes that ATS adjudication in U.S. courts is a global regulatory tool with the potential to effectively and legitimately articulate and provide for the enforcement of minimum human rights standards for global corporate behavior. However, it cautions that this potential is as yet unrealized and that the success of the ATS as a tool of global regulation will depend on the ability of U.S. courts to conceive of their adjudication of such claims as one component of a broader global regulatory effort and to exercise their jurisdiction in a principled and legitimate manner.

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Table of Contents

I. INTRODUCTION	3
A. ATS Adjudication as Global Regulation – Initial Questions	6
B. ATS Adjudication as Global Regulation – Framework for Analysis	7
1. Relevant Functions and Goals of Transnational Regulation	8
2. Predicting the Likely Effectiveness of Transnational Regulation	8
3. Broader Obligations	9
II. THE PREVAILING ANTI-GOVERNANCE REGIME FOR TRANSNATIONAL CORPORATIONS AND THE NORMATIVE CASE FOR INCREASED STATE REGULATION	12
A. The Anti-Governance Regime	12
1. Host States Unwilling or Unable to Regulate	12
2. Home States Unwilling to Engage in Transnational Regulation.....	15
3. Advantages and Drawbacks of Regulation through Private Ordering	17
B. The Normative Case for Regulation	18
1. Why Normative Justification is Necessary	18
2. The Case for Regulation.....	20
III. THE ALIEN TORT STATUTE AS A BOTTOM-UP MECHANISM FOR REGULATION OF CORPORATE BEHAVIOR	22
A. Major Features of the ATS Regulatory Regime	22
1. Private Litigation.....	23
2. Scope of Liability	25
B. Challenges Posed by the ATS Regulatory Regime	29
1. The American approach to civil litigation.....	29
2. Consequences of unilateral regulation by US courts.....	36
3. The “Doing Business” Justification for Personal Jurisdiction	38
4. U.S. law and foreign state-owned companies	46
5. US Courts’ Approaches to Adjudicative Jurisdiction	53
IV. MANAGING CORPORATE ATS LITIGATION: EXTERNAL AND INTERNAL MODIFICATIONS TO THE ATS APPROACH	59
A. Introduction	59
B. Recognizing International Law Limitations on ATS Jurisdiction	61
C. Modifying the Application of Foreign Sovereign Immunity to State-Owned Corporations in US Courts	65
D. External Coordination – Allocating Jurisdiction and Resolving Competing Claims for Authority	72
1. Determining the “Nexus” with the United States.....	73
2. Conducting the <i>Forum Non Conveniens</i> Inquiry	74
3. Determining Whether Local Remedies Have Been or Must Be “Exhausted”	82
4. The Doctrines of Judicial Abstention and International Comity.....	85
V. CONCLUSION	88

ALIEN TORT STATUTE LITIGATION AND TRANSNATIONAL BUSINESS ACTIVITY

Investigating the Potential for a Bottom-Up Global Regulatory Regime

I. INTRODUCTION

In late spring of 2009, a federal court in New York prepared to hear a jury trial in an extraordinary civil lawsuit brought by ten individual plaintiffs. Many aspects of the impending trial were noteworthy. First, the relative strength of the parties: the plaintiffs were a handful of private individuals, while their opponents were Royal Dutch Petroleum Co. (“Shell”), the second largest private sector energy company in the world, and one of its subsidiaries.¹ Second, the nationality of the parties: the plaintiffs were all current and former citizens of Nigeria, Shell is incorporated in the United Kingdom and the Netherlands, and its subsidiary is incorporated in Nigeria.

The third extraordinary aspect of the case was the nature of the claims at issue: the plaintiffs alleged that from 1993-1995, Shell enlisted the Nigerian military to conduct “security operations” in their tribal region, knowing or intending that members of the security forces would use deadly force against unarmed civilians and that they would target a local protest group opposed to Shell’s operations in the region. The plaintiffs further sought to prove that the leaders of that protest group, the Movement for the Survival of the Ogoni People (MOSOP), were eventually detained by the security forces on false charges, tortured in custody, convicted before a sham tribunal in which the government’s witnesses were bribed, and then hanged. The plaintiffs, victims injured in the violence surrounding the “security operations” and relatives of those who died, sought to hold Shell vicariously responsible for a number of offenses committed by the Nigerian security forces, allegedly on its behalf and with its support and assent. Yet the nature of those offenses was the fourth extraordinary aspect of the trial: all were rooted in international law, and included summary execution; cruel, inhuman, and degrading treatment; arbitrary arrest and detention; and crimes against humanity.²

Had the case, *Wiwa v. Royal Dutch Petroleum*, proceeded to trial, it would have been only the fourth case against a corporate defendant to go before an American jury under the Alien Tort Statute (ATS),³ an American law that the federal courts have interpreted to permit non-U.S. citizens to bring tort claims based on certain egregious offenses prohibited by international law against individual and corporate defendants, regardless of their nationality, so long as they are amenable to the jurisdiction of the U.S. courts.⁴ In the end, however, the parties reached a public settlement on the eve of trial, in which the plaintiffs received \$15.5 million, comprising

¹ The former managing director of that subsidiary was also named as a defendant in the case. *Id.*

² *Wiwa v. Royal Dutch Petroleum*, 96 Civ. 8386 (4/23/09) (Order on subject matter jurisdiction).

³ 28 U.S.C. § 1350.

⁴ The past three trials in “corporate ATS cases” to have taken place under the statute all ended with victories for the corporate defendants, at least on the issue of ATS liability. *Romero v. Drummond*, *Bowoto v. Chevron*, and *Jama*. Note, however, that in *Jama*, the corporate defendant was found liable on negligence grounds and ordered to pay \$100,000 in damages. Additionally, note that while the majority the litigation under the ATS is aimed at current and former government officials or other non-commercial actors, that litigation is not the subject of this paper.

individual compensation; a \$5 million trust for the benefit of their indigenous group, the Ogoni; and compensation for legal fees and costs.⁵

Yet even before the settlement was reached, over the course of a thirteen-year period, U.S. federal courts at the district and appellate levels issued several important decisions in the *Wiwa* case. Those rulings, issued between 2000 and 2002, determined that the conduct the plaintiffs alleged that Shell had engaged in was prohibited under international law and that the U.S. courts were in fact a proper forum to hear the case, despite the fact that the plaintiffs, Shell, and Shell's subsidiary were all foreign natural or corporate citizens.⁶ In reaching these conclusions, the courts indicated that corporations – regardless of their nationality and place of business – could incur private liability in the United States for failing to adhere to certain minimum levels of conduct in their interactions with foreign governments and their security forces in the context of foreign business operations. While some recent decisions – particularly an October 2009 decision by the Second Circuit on the scope of aiding and abetting liability under the ATS – have raised the bar for plaintiffs seeking to hold corporations liable as accomplices to internationally-recognized crimes, they certainly have not eliminated the potential for corporate liability under the ATS.⁷ Indeed, aiding and abetting remains a viable theory for recovery under the ATS to date, and plaintiffs may continue to rely on a number of alternative theories of liability in bringing claims against corporations in the future.⁸

As one might expect, the adjudication of corporate ATS cases has given rise to a variety of reactions from observers both within and outside the United States. Some have been decidedly negative, and objections have come not just from scholars, but from high-level representatives of several governments, including Canada, Switzerland, Germany, the U.K., and South Africa. These government representatives have claimed at various times that U.S. practice under the statute is not permitted under international law, that it is an affront to the sovereignty of other states, and that if it continues unabated, it will have disastrous consequences for the future of foreign investment in certain developing countries.⁹

⁵ See Center for Constitutional Rights, *Settlement Reached in Human Rights Cases against Royal Dutch/Shell*, press release (June 8, 2009) available at http://wiwavshell.org/documents/Wiwa_v_Shell_Settlement_release.pdf.

⁶ See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

⁷ See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (determining that under the ATS, “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime”).

⁸ *Id.* at 256 (holding, “in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]”) (citing *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007)); see Note: *Who Is to Blame? (and What Is to Be Done?): Liability of Secondary Actors Under Federal Securities Laws and the Alien Tort Claims Act*, 74 BROOKLYN L. REV. 1539, 1575-79 (2009) (noting that even if the Supreme Court were to eliminate aiding and abetting liability as a theory of liability under the ATS, corporate liability claims would nevertheless endure); see also Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39, 39 (2005-06).

⁹ See Nathan Koppel, *Arcane Law Brings Conflicts from Overseas to U.S. Courts*, THE WALL STREET JOURNAL (Aug. 27, 2009), available at <http://online.wsj.com/article/SB125133677355962497.html>. See also Brief for the United States as Amicus Curiae in Support of the Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Feb. 2008); Appendix B: Communication from Dominick Chilcott, Deputy Head of Mission at the British Embassy in Washington, D.C. (“broad assertions of extraterritorial jurisdiction...can interfere with national sovereignty...and risks damaging international relations with several affected foreign countries including close allies of the United States”); Appendix

Yet the global reaction to ATS litigation has not been exclusively hostile. To the contrary, some observers have welcomed ATS jurisprudence, particularly as it relates to corporate accountability, as a positive development and a model which other states might emulate in the future.¹⁰ For example, the International Commission of Jurists Expert Legal Panel on Corporate Complicity reported quite favorably on the use of the ATS as a means for promoting corporate accountability, stating:

ATS litigation has reverberated around the world. It has motivated lawyers in other jurisdictions to explore the feasibility in their own countries of seeking the civil liability of actors involved in gross human rights abuses...these developments are creating a network of avenues to accountability and justice that is slowly establishing opportunities for victims to obtain civil redress when companies are involved in human rights abuses... governments must take steps necessary to ensure that the law of civil remedies is able to respond in an effective manner when it is called upon to address claims for remedy in respect of gross human rights abuses.¹¹

The ICJ Panel's claim regarding the potential of the ATS to serve as a driver of change received some validation in August 2008, when in response to controversy surrounding a different ATS claim involving a Canadian energy company, Justice Ian Binnie of the Supreme Court of Canada spoke out in its defense. Calling the ATS "a very effective mechanism," he urged Canadian lawmakers to consider enacting similar legislation, stating:

[Y]ou cannot have a functioning global economy with a dysfunctional global legal system: there has to be somewhere, somehow, that people who feel that their rights have been trampled on can attempt redress — and if the complaints turn out to be unfounded, so be it...if [the ATS] were replicated in more countries, there would be more avenues whereby companies could clear their names of allegations made against them, or complainants could obtain redress, depending on what the evidence shows.¹²

Finally, in the wake of the *Wiwa* settlement, a group of prominent Dutch citizens, including former Prime Minister Ruud Lubbers, deplored the fact that the *Wiwa* plaintiffs had no legal avenues in Europe for pursuing their claims against Shell. Lubbers and his colleagues wrote,

We should be ashamed, as Dutch and Europeans, that there was no place in the Netherlands for Saro-Wiwa's relatives to take their grievances. There is work to be done here for Dutch and

C: Aide Memoire from the Government of Switzerland, December 2007 ("Such an assertion of extraterritorial jurisdiction interferes with the sovereignty of foreign nations"); Appendix D: Diplomatic Note No.126/2007 from the Government of the Federal Republic of Germany and Her Britannic Majesty's Government, 13 December 2007 (same as text from Appendix B). Additionally, the South African government stated that the litigation could have a destabilizing effect" because it would "discourage much-needed growth and employment," while the UK government claimed, "[l]itigation of this nature may hinder global investment in developing economies, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries."

¹⁰ Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, 40 Y.B. INT'L L. 117 (1997) (envisioning the spread of such civil litigation beyond the United States, creating an "international network" in the service of this goal).

¹¹ ICJ Panel Report at 6.

¹² Cristin Schmitz, *Binnie Calls for Corporate Accountability*, THE LAWYERS WEEKLY, August 29, 2008, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=745>.

European lawmakers.... Society has the right to expect corporations to act in a social responsible manner, especially so in the case of multinational corporations because of the great power and influence they have.¹³

A. ATS Adjudication as Global Regulation – Initial Questions

As the preceding paragraphs have suggested, it appears that corporate ATS litigation is increasingly becoming an established feature of U.S. law and a mechanism for promoting extraterritorial corporate accountability. While it remains highly controversial, it has been tacitly accepted, and even endorsed, by an increasing number of international observers. Yet to date, there has been surprisingly little investigation into (1) whether the United States *should* be pursuing global regulation of corporate behavior from a normative perspective, (2) whether ATS adjudication is structurally capable of serving as an effective form of global regulation of corporate behavior, and (3) the implications of ATS adjudication from a global regulatory perspective, and particularly whether or not U.S. courts that entertain such cases incur duties or obligations beyond those imposed by domestic law by virtue of their participation in a broader global regulatory enterprise. Specifically, few authors have inquired into the sufficiency of the procedures U.S. courts employ when determining whether or not to relinquish jurisdiction over an ATS claim in favor of the courts of another state or out of deference to the preferences of states more directly interested in the dispute.

This paper seeks to begin an initial inquiry into these complex issues. The remainder of this section will briefly outline theoretical considerations related to global regulation by domestic courts, including considerations relevant to the assessment of the effectiveness and legitimacy of such efforts at regulation, and noting considerations that arise when the regulating entity is part of a decentralized network. Part II will outline the normative case for increased regulation of transnational corporate behavior by domestic courts, exploring why states have largely opted to refrain from regulation of transnational corporate behavior to date and demonstrating why increased regulation – particularly by domestic courts – might be desirable. Part III will assess the potential effectiveness and legitimacy of the ATS from a regulatory standpoint, drawing on the factors highlighted in Part I. Finally, Part IV will outline suggestions for modifying certain aspects of ATS adjudication to increase the legitimacy and effectiveness of the regulatory enterprise.

This paper concludes that, at least for the time being, ATS adjudication in U.S. courts is a global regulatory tool with significant potential for effectively and legitimately articulating and enforcing minimum standards governing global corporate behavior in the area of human rights. However, it cautions that this potential is as yet unrealized and can only be fulfilled if ATS regulation is exercised as one component of a broader global regulatory effort. Moreover, it reveals that U.S. courts may incur obligations beyond those imposed by domestic law when they adjudicate ATS claims with little or no connection to the United States. To a significant degree, the success of the ATS as a tool of global regulation will depend on the ability of U.S. courts to manage their adjudication of such claims as part of a broader network of domestic courts and in a principled and legitimate manner.

¹³ Ruud Lubbers, Tineke Lambooy and Jan van de Venis, *Ken Saro-Wiwa Jr. was let down by the Netherlands*, NRC HANDELSBLAD (June 10, 2009).

B. ATS Adjudication as Global Regulation – Framework for Analysis

Certainly, the U.S. courts' demonstrated willingness to apply the ATS to corporate defendants, regardless of their state of incorporation, has wide-ranging implications and deep significance from an international legal perspective. Most significantly for this paper, in adjudicating ATS cases against corporate defendants (particularly those of non-U.S. nationality), the U.S. courts appear to be engaging in a form of global regulation that increasingly can be seen as defining the outer limits of corporations' obligations with respect to human rights and providing a form of accountability¹⁴ for those harmed when corporations fail to comply with those obligations.

In this paper, I use the broad definition of regulation put forth by Walter Mattli and Ngaire Woods: "the organization and control of economic, political, and social activities by means of making, implementing, monitoring, and enforcing of rules."¹⁵ By "global" regulation I mean that at least part of the regulatory activity takes place at the global level, and the nature of the rules being set is different from that in the case of national regulation. In the case of the Alien Tort Statute, while U.S. courts certainly operate from a national – rather than international – stage, the source of the law they purport to apply is derived from international law, and their reliance on such law serves as a partial justification for their willingness to apply that law in order to regulate conduct occurring outside the U.S. and which does not affect the U.S. or its citizens directly. Moreover, although the rules applied by U.S. courts in ATS cases against corporations are derived from international human rights law and international criminal law, they can nevertheless be seen as examples of "regulation."¹⁶

Certainly, domestic courts possess the capacity to engage in a broader project of "transnational global governance," performing such functions as allocating global governance authority between themselves, determining the rights and obligations of transnational actors, and articulating rules of conduct on a global scale.¹⁷ By "global governance," I mean "the process of guiding and restraining transnational activity."¹⁸ Moreover, transnational regulation can be implemented by states or private actors in a variety of forms. Among the forms available to states are regulation in the form of transnational public law and transnational private law. In

¹⁴ I rely on Grant and Keohane's definition of accountability, which implies that "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities...and to impose sanctions if they determine that these responsibilities have not been met." One potential form that such accountability can take is legal accountability. Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POLITICAL SCI. REV. 29 (2005).

¹⁵ Walter Mattli and Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in THE POLITICS OF GLOBAL REGULATION 1, 1 (Walter Mattli and Ngaire Woods, eds.) (2009).

¹⁶ Kathryn Sissink, *From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations*, in THE POLITICS OF GLOBAL REGULATION 121, 121 (Walter Mattli and Ngaire Woods, eds.) (2009) (noting that the concept of regulation is "a useful and not unfamiliar way to think about standard-setting and enforcement in the human rights realm").

¹⁷ See, e.g., Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67 (2009).

¹⁸ *Id.* at 71 (citing ROBERT O. KEOHANE, POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD 202, 245-246 (2002) (defining governance as "the processes and institutions, both formal and informal, that guide and restrain collective activity.")). The term "transnational" is intended to imply governance applied to activity involving both state and non-state actors. *Id.* (citing Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT'L ORG. 329, 329 (1971)).

transnational public law litigation, states employ – or permit the employment by aggrieved individuals of – the capacity of domestic courts in order to enhance global compliance with international law.¹⁹ Thus, domestic courts “apply international law norms in order to secure remedies for violations of those norms.”²⁰ In transnational *private* law, or “transnational litigation involving private suits by private actors under private laws,”²¹ the state “offers a set of background norms that can be used by private parties to make claims against each other. The state has a necessary role in this plural system, but it forgoes dominant ‘command and control’ regulation, and acts rather as a kind of indirect ‘facilitative’ actor.”²²

Any analysis of such public or private transnational regulation must take consideration of (a) the policy goals of the regulation in question; (b) whether or not those regulatory institutions are likely to act effectively, that is, to produce “common interest” regulation as opposed to “private interest” regulation, which results when the institution is captured by the very actors it was intended to control; and (c) whether the regulatory institution complies with broader obligations imposed on it by international law.

1. Relevant Functions and Goals of Transnational Regulation

The first step in analyzing the potential effectiveness of a regulatory tool is identifying the functions of and policy goals underlying the regulation at issue. Private law mechanisms such as the ATS may serve a distributive function, by providing compensation for harm and determining the extent to which a transnational actor that generates negative externalities will be obliged to compensate the party that bears the associative costs.²³ Private law mechanisms can also serve regulatory functions, by deterring undesirable activity, particularly through “social deterrence,” or “structure[ing] incentives and punishments such that private actors rationally act in a way that is socially optimal.”²⁴ Moreover, private law mechanisms may have communicative and norm-generative goals. Private international law decisions can “introduce [new] policy values (sometimes through new policy actors) into political negotiations or decision making in other venues, domestic or international.”²⁵ Private law may also function “as a mechanism for framing and constructing national interests.”²⁶

2. Predicting the Likely Effectiveness of Transnational Regulation

¹⁹ Koh defines transnational public law litigation as “the coupling of a substantive notion – individual and state responsibility – with a familiar process – adjudication – and a normative goal – the promotion of universal norms of international conduct.” Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2372 (1991).

²⁰ Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 253-54 (2006).

²¹ Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT’L L. 209, 244 (2002).

²² Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L.J. 471, 469 (2005).

²³ Whytock, *Domestic Courts and Global Governance*, at 94.

²⁴ Wai, *Transnational Private Law* at 474; see also Wai, *Transnational Liftoff* at 233 (emphasizing that a central concern of private law, and particularly tort law, is “to structure incentives and punishments such that private actors rationally act in a way that is socially optimal”).

²⁵ Wai, *Liftoff*, at 244; see also Wai, *Transnational Private Law* at 481 (discussing the “ideational” or “communicative” function of transnational private law in a fragmented transnational order).

²⁶ Wai, *Transnational Private Law* at 481.

At the outset, it is necessary to clarify the conditions required in order for regulation can be considered “effective.” Certainly, where a political activity like regulation is concerned, effectiveness must be conceptualized more broadly than mere means-ends effectiveness.²⁷ For example, regulations must “balance the interests of stakeholders and instantiate prevailing norms.” Most importantly, to be effective, regulatory institutions must advance the public interest – which can be determined and assured, at minimum, through the provision of an inclusive forum that offers proper due process²⁸ – and deters capture.²⁹

Global regulatory theory suggests that regulatory mechanisms that supply participatory mechanisms that are fair, transparent, accessible, and open are more likely to produce common interest regulation.³⁰ However, such conditions are difficult to fulfill in global politics, and common interest regulation additionally requires that certain demand-side considerations, which include “information, interests, and ideas,” must also be satisfied if regulation in the public interest is to be assured.³¹ Additionally, institutions must possess certain “competencies” if they are to act effectively throughout the regulatory process: independence, representativeness, expertise, and operational capacity.³² Without such independence and representativeness, such institutions may not be able to guarantee openness and a commitment to proper due process required for common interest regulation to occur. Moreover, a regulatory institution’s effectiveness may turn on a host of other factors, such as material resources, legitimacy, and public support.³³

3. Broader Obligations

While it is important to analyze ATS adjudication by the U.S. courts acting alone, it is equally critical to consider the implications of the broader global context in which U.S. courts act when resolving such disputes. ATS adjudication can be seen as merely one component of a broader global governance regime, in which the domestic courts of many states act in a decentralized manner – through public or private transnational litigation – to articulate baseline standards for corporate behavior and to allocate responsibility for resolving specific disputes regarding corporate compliance (or failure to comply) with such standards.

Transnational networks, including networks of domestic courts, are but one set of actors in a variegated “global administrative space.”³⁴ Despite the fact that such domestic courts engage in the administration of global governance in a highly decentralized and unsystematic way, they –

²⁷ Kenneth W. Abbot and Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 46 (Walter Mattli and Ngaire Woods, eds.) (2009).

²⁸ Mattli and Woods argue in favor of a “proceduralist” definition of “public interest,” according to which the institutional context in which regulation is produced is likely to determine whether or not the public interest will be satisfied. Mattli and Woods, *In Whose Interest?* at 14.

²⁹ I use Mattli and Woods’ definition of “capture”: “the control of the regulatory process by those whom it is supposed to regulate or by a narrow subset of those affected by regulation, with the consequence that regulatory outcomes favor the narrow “few at the expense of society as a whole.” Mattli and Woods, *In Whose Benefit?* at 12.

³⁰ See Mattli and Woods, *In Whose Benefit?*, *supra* at n. X.

³¹ *Id.*

³² Abbot and Snidal, *The Governance Triangle*, *supra* n. ___ at 46.

³³ *Id.*

³⁴ Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 *EJIL* 23, 24-25 (2009).

along with other evolving global regulatory structures – are increasingly confronted with demands for greater accountability.³⁵ These demands may reflect broader rule-of-law obligations on global governance network participants, including “publicness” and generality.³⁶ In essence, these obligations reflect a fundamental requirement incumbent upon global regulators: “that the law applied by participants in such a transnational network be wrought by the whole society, by the public, and address matters of concern to the public as such.”³⁷ In order to comply with the demand for “publicness,” regulatory entities must comply with general principles of public law, including the principle of legality, the principle of rationality, the principle of proportionality, the rule of law, and basic human rights protection.³⁸ Moreover, they must meet adequate standards of transparency, consultation, and participation, and must provide effective review mechanisms.³⁹ Where actors work through network-type linkages and weakly coordinated, decentralized legal bodies, it can be difficult to claim that they are creating real “law” or “regulation,” particularly to the extent that such networks fail to respect these rule-of-law obligations.⁴⁰ Moreover, even where a regulatory entity or network possesses some of the prerequisites for legitimacy, it may still fail to satisfy the broader obligation of “publicness”: Benedict Kingsbury points out that this “publicness” deficit may occur where a court decides an issue “with full participation of its public under a deliberative model, and careful framing of arguments and reasons so as genuinely to encompass all of those who spoke; yet the decision [is] taken by an entity whose public is not the public truly affected.”⁴¹

In addition to “publicness” and generality obligations, U.S. courts purporting to derive primary rules governing corporate liability from international law may incur additional rule-of-law obligations. For example, Jeremy Waldron posits that the Rule of Law contains an obligation that states pay regard to *ius gentium*: deep background principles “common to all mankind” that can be inferred from multiple legal systems on the basis of a grounded consensus.⁴² This is because in certain situations, the Rule of Law also obligates courts – even when not part of the same legal system – to treat like cases alike (in accordance with the principle of consistency), based on principles of fairness and integrity.⁴³ Waldron claims these rule-of-law principles are relevant even in the international context both because (a) our sense of community can be expanded to the global level where human rights are concerned, particularly because states have bound themselves to such principles, jointly and severally, through binding treaties; and (b) the

³⁵ *Id.*

³⁶ *Id.* at 31. See also Jeremy Waldron, *Can there be a democratic jurisprudence?*, NYU PILT Research Paper 08-35 (Nov. 2008 version) (SSRN).

³⁷ *Id.*

³⁸ Kingsbury, 32-33.

³⁹ *Id.* at 25.

⁴⁰ *Id.* at 52-53. For example, Kingsbury notes that “private ordering” schemes are particularly likely to fail to specify in advance which norm applies, lack adequate corrective and control mechanisms, or lack clarity about the identity of the real “decider.” *Id.*

⁴¹ *Id.* at 56.

⁴² Jeremy Waldron, *Partly Laws Common To All Mankind: Foreign Law in American Courts*, Storrs Lectures, delivered at Yale Law School (September 2007) at 8, available at <http://iilj.org/courses/documents/2008Colloquium.Session1.Waldron.pdf>.

⁴³ *Id.* at 25. Waldron defines the principle of fairness as positing that it is unfair to treat case B differently than case A when the two cases are similar in all relevant respects, and the principle of integrity to posit that the law must be developed in a coherent way, to give credibility to the idea that it governs a genuine community, even when members of the community are divided about what the principles that govern them ought to be. *Id.*

people with whom our domestic courts interact are bound together in a single community to a sufficient degree to generate a bottom-up demand for fairness in the administration of human rights law.⁴⁴ In the context of ATS litigation, Waldron's theory can be extended to suggest that in applying international law and deliberately participating in an exercise of global governance, domestic courts may incur even greater obligations to the ideal of legality and to the Rule of Law. In particular, principles of consistency, fairness, and integrity may apply not just to the interpretation of the specific primary rules governing the liability of corporate defendants, but also to judicial decisions regarding the exercise or restraint of judicial power by U.S. courts.

The conformance of global regulation with rule-of-law obligations is particularly critical insofar as it enhances the legitimacy of the regulatory effort. Joseph Weiler points out that the traditional source of legitimation of governance, the democratic process, is unavailable at the international level. Thus, for international governance to be legitimated, some comparable legitimating device must be sought.⁴⁵ Moreover, ends-means effectiveness is often insufficient to give rise to legitimacy: Weiler notes that "a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all."⁴⁶ Thus, if regulators are to be able to claim or justify obedience to exercises of governance, they must seek some legitimating device comparable to the democratic process but yet applicable at the international level.⁴⁷ Moreover, "network" theories of international governance are particularly vulnerable to this legitimacy deficit: a decentralized network of domestic courts that allocate responsibility among themselves for resolving disputes between individuals and corporations regarding potential serious violations of human rights law is exactly the sort of "governance without government and without demos" of which Weiler warns.⁴⁸ In such networks, "there is no purchase, no handle whereby we can graft democracy as we understand it from Statal settings," and the network members must strive to establish "mechanisms which...would legitimate such government."⁴⁹ Weiler suggests that international governance may nevertheless be fully justified despite the fact that it constitutes "governance without government," but that States and their domestic courts must take certain steps in recognition of the vast legitimacy deficit they face. Namely, domestic organs must both "embrace international normativity" and simultaneously "treat international normativity with considerable reserve," recognizing the international legal order but declining to celebrate its benefits "when it is gained by a disenfranchisement of people and peoples."⁵⁰

Thus, as participants in a global governance network of domestic courts adjudicating disputes involving corporate behavior that constitutes egregious, internationally-prohibited conduct, U.S. courts adjudicating ATS cases may incur additional obligations, beyond the dictates of national law or standard inter-state law, to adhere to certain norms and norm-guided practices in their

⁴⁴ *Id.* at 27-33. Waldron also notes, however, that certain factors that may weaken the demand for harmonization in the practices of national courts, including (a) the quest for universal truth about rights; (b) demands of local integrity; and (c) predictability and certainty within certain legal systems. *Id.* at 34-35.

⁴⁵ *Id.* at 548.

⁴⁶ *Id.* at 562.

⁴⁷ *Id.* at 548.

⁴⁸ *Id.* at 560.

⁴⁹ *Id.* at 561.

⁵⁰ *Id.* at 562.

adjudication of transnational disputes.⁵¹ In particular, domestic courts should be guided in their decisions to exercise or abstain from exercising power, particularly over non-US parties, by concerns of publicness and legitimacy.

II. THE PREVAILING ANTI-GOVERNANCE REGIME FOR TRANSNATIONAL CORPORATIONS AND THE NORMATIVE CASE FOR INCREASED STATE REGULATION

A. The Anti-Governance Regime

Over the course of the last 30 years, the nearly worldwide adoption of state policies encouraging at least some degree of trade liberalization, privatization, and deregulation has fostered the worldwide expansion of business. These forces have particularly encouraged the rise of multinational corporations (MNCs), or businesses with operations spanning more than one country. As one expert recently noted, the universe of MNCs consists of more than 77,000 firms and more than 800,000 subsidiaries, not including the millions of suppliers, subcontractors, and distributors that constitute their production chains.⁵² Nor are private corporations the only entities expanding their operations across national borders: state-owned corporations, particularly in the oil, gas, and mining sectors, are increasingly pursuing ventures abroad.⁵³ Moreover, many MNCs have enormous economic and political power, allowing them to exercise significant political influence to lobby for favorable regulatory schemes in the host states that would otherwise be best positioned to control them.⁵⁴ Yet despite their significant power, several phenomena have combined to prevent the emergence of effective regulation of transnational MNC activity in either the states in which they are incorporated (“home states”) or the states in which they conduct significant production activities (“host states”). Some of these phenomena occur at the interaction of state and business conduct, while some occur at the level of businesses themselves. These phenomena particularly affect the ability and willingness of host states to independently regulate the behavior of MNCs in an effective manner.

1. Host States Unwilling or Unable to Regulate

Sustained regulatory capture is most likely in situations in which limited global due process and a weak demand for change resulting from a suppression of information about the social costs of poor regulation or the failure of other demand side-conditions intersect.⁵⁵ Indeed, “states as a

⁵¹ Kingsbury, “*The Concept of ‘Law’ in Global Administrative Law*,” at 26.

⁵² John Ruggie, *Business and human rights – Treaty road not travelled*, ETHICAL CORPORATION (May 6, 2008), available at <http://www.ethicalcorp.com/content.asp?contentid=5887>.

⁵³ See Valérie Marcel, OIL TITANS 190 (2006) (noting, for example, that an executive of Petronas, the Malaysian national oil company, stated a few years ago that “we are in 30 countries. And 25 percent of our reserves come from outside the [Malysian] concession. And 20 percent of our revenues are generated from Malaysia.”).

⁵⁴ Stephens, *supra* note 69, at 58; see generally Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat’?*, 5 MELBOURNE J. INT’L L. 37 (2004) (discussing the use of extraterritorial laws to regulate multinational corporations in the context of human rights); see also Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 17 (Philip Alston ed., 2005) (discussing how many corporations generate more revenue than all but the world’s most powerful states).

⁵⁵ Mattli and Woods, *In Whose Benefit?* at 5.

group vary greatly in their will and capacity to regulate,” and regulation is unlikely to occur both where governments are “captured” or corrupt, rendering them “unwilling” to regulate in the public interest, and where governments “view regulation as a trade-off against economic growth, and lack the information, resources, and technical competence to manage complex regulation,” rendering them “unable” to regulate in the public interest.⁵⁶ Moreover as entities driven by a desire to lower their operational costs and outperform competitors, MNCs can only be expected to seek out those host governments that will allow them to externalize costs to the greatest extent, to exploit gaps and conflicts among national regulatory regimes, and to take full advantage of decentralized international markets.⁵⁷

The substance of these arguments has been noted and endorsed by the top United Nations Official on the issue of transnational corporate activity, Special Representative to the Secretary General for Business and Human Rights John Ruggie. Ruggie has noted that some host governments are *unable* to effectively regulate MNC behavior on their own, whether or not they desire to do so.⁵⁸ Not only might the enforcement capacity of some states be too weak to impose effective regulation, but further, the judicial systems of these states may be ineffective fora for resolving human rights claims, perhaps in part due to their inability to facilitate complex litigation.⁵⁹ Some states may suffer from corruption in government so that entities with significant resources are able to prevent the enforcement of the regulations that do exist or to obstruct judicial or prosecutorial inquiries into their conduct. Similarly, some host governments are *unwilling* to impose an effective regulatory framework on MNC activity within their jurisdictions. Many developing country governments face considerable pressure to create an attractive environment for foreign investment, and may unilaterally lower their domestic regulatory standards in an effort to entice businesses to their territory.⁶⁰ Additionally, host state governments may work with MNCs in implementing harmful policies that directly infringe upon human rights, whether in the context of armed conflict or otherwise. In such situations, there is almost no chance that effective host-state regulation of MNCs will occur.⁶¹

Moreover, even where states are capable of and willing to impose effective regulations on transnational corporations, those entities have proven their ability to perceive the specter of impending government interference and to respond effectively. By design, MNCs are internally structured so as to minimize the degree to which they are exposed to liability in host states to the greatest degree possible. According to the legal concept of limited shareholder liability, which has been embraced by the vast majority of jurisdictions worldwide, each separately incorporated

⁵⁶ *Id.* at 57.

⁵⁷ Wai, *Transnational Liftoff and Juridical Touchdown*, *supra* n. ___ at 251.

⁵⁸ John Ruggie, *Business and Human Rights: The Evolving Agenda*, 101 AM J INT LAW 819 (2007)

⁵⁹ Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, 4 (Nov. 2008), available at <http://www.law.ox.ac.uk/opbp>.

⁶⁰ Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 103-4 (2002) (“In order to attract investment, many nations, particularly developing ones, will acquiesce to a corporation’s needs. For example, many of these nations will establish a corporate-friendly legal environment...because of their size and power, TNCs have the potential to influence a country’s social and economic policies.”).

⁶¹ For examples of such conduct, see, e.g., Oxford Pro Bono Publico, *Obstacles to Justice* at 3-4 (discussing efforts by state officials in Papua New Guinea the Democratic Republic of the Congo to prevent or obstruct lawsuits against MNCs alleging their complicity in state-sponsored killings and other abuses).

component of a company is treated as a separate legal person.⁶² Thus, the parent company of an MNC will be directly liable only for conduct committed by its own officers, directors, and employees, but not necessarily for that of its subsidiaries or other affiliates.⁶³ MNCs take full advantage of this opportunity presented by entity law to minimize their potential liability for harm by structuring themselves into “complex multi-tiered corporate structures consisting of a dominant parent corporation, subholding companies, and scores or hundreds of subservient subsidiaries scattered around the world,” but which nevertheless have “common control, common business purpose, economic integration, financial and even administrative interdependence and often [a] common public persona...”⁶⁴ For example, British Petroleum (BP) “consists of more than one thousand separate interrelated corporations acting under common control.”⁶⁵ By fragmenting its legal identity in this way, BP and other MNCs can “localize liability exposure to one corporate person at a time.”⁶⁶ Moreover, MNCs can then structure each component part of their enterprise so that entities at the periphery of the group, such as local subsidiaries or quasi-affiliates, face much higher “liability exposure” than the entities at the core of the MNC.⁶⁷ Finally, MNCs often structure their investments so as to maintain a strong bargaining position vis-à-vis the host states in which they operate, primarily by ensuring that their assets are, to the highest degree possible, outside the enforcement jurisdiction of those host states.⁶⁸ All of these “liability minimization” techniques ensure that host states have as little regulatory influence over the MNC as possible.

However, MNCs do more than merely engage in “liability minimization;” rather, they actively exploit the presence of regulatory competition between states in order to exacerbate and enhance regulatory gaps. Some MNCs seek out the most inexpensive manufacturing and operation sites, leading them to countries that offer cheap labor or scarce natural resources and in which abuses of labor, health, and other basic human rights go largely unchallenged.⁶⁹ Those that can diversify their production and operation locations do so in order to attain maximum flexibility⁷⁰ and in order to generate pressure on particular states to lower their domestic regulatory standards, for example by gaining the potential to make credible threats to move their operations elsewhere.⁷¹ Once those regulatory barriers have been lowered or the threat of sanction has been

⁶² Philip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 495 (2002) (In such a system, “[f]or legal purposes...it is as if the group did not exist.”).

⁶³ *Id.* at 495; see also Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 BERKELEY J. INT’L L. 410, 431 (2008).

⁶⁴ *Id.* at 493-94.

⁶⁵ Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law*, *supra* at 493-94.

⁶⁶ Hansen, *Multinational Enterprise Pursuit of Minimized Liability*, *supra* n. ___, at 431.

⁶⁷ *Id.* at 448.

⁶⁸ *Id.* at 447.

⁶⁹ Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY INT’L L. J. 45, 52 (2002); see generally NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS (Andrew Ross, ed., 1997); Clean Clothes Campaign, <http://www.cleanclothes.org> (last visited Sept. 26, 2008). Note, however, that this is less true with respect to those MNCs in the extractive sector.

⁷⁰ Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT’L L. & POL’Y, 1, 8 (1993) (“The fact that they have multiple production facilities means that TNCs can evade State power and the constraints of national regulatory schemes by moving their operations between their different facilities and the world.”).

⁷¹ Wai, *Transnational Liftoff and Juridical Touchdown*, *supra* n. ___ at 254.

neutralized, it is in MNCs' best interest to exploit the opportunity to externalize as many of their costs as possible. In fact, "private actors receive direct economic benefits if they are able to externalize costs onto parties who are either too weak on their own or too diffusely spread to organize effective opposition."⁷²

2. Home States Unwilling to Engage in Transnational Regulation

While capture and competition often pose significant challenges to states attempting regulation, at least at the domestic level, some states have managed to structure political, administrative, and judicial processes in a way that promotes independence and pursuit of the public interest.⁷³ Yet states tend to consider regulation of transnational business a lower priority when the adverse effects of their activities are primarily felt abroad rather than at home.⁷⁴ As a result, many home states, including the United States, have strong regulatory controls in place to protect their own citizens from harm caused by business activity, but those domestic regulations typically apply only within their territorial borders and not in the host states in which MNCs domiciled in their territory conduct their production operations.⁷⁵ Moreover, business actors may exert powerful influences over home states beyond merely dissuading them from attempting extraterritorial regulation; rather, they may attempt to incentivize home state governments to structure the relations between their domestic investors and their foreign hosts in ways that heavily favor the former.⁷⁶

The effect of these domestic legal structures and business strategies on the regulation of MNCs is only exacerbated by the nearly complete absence of international regulatory bodies that could control their conduct with respect to third-party cost externalization. Certainly, in the face of claims that MNCs have engaged in egregious conduct abroad, many scholars have argued that the most effective means for holding MNCs accountable would be through a binding international regime.⁷⁷

⁷² *Id.*

⁷³ Abbot and Snidal, *The Governance Triangle*, at 66-67.

⁷⁴ *Id.* at 58.

⁷⁵ See generally Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT'L L. F. DU DROIT INT'L 281, 283 (2005). Certain U.S. labor laws apply beyond the borders of the United States, but only in order to protect American citizens working for American companies abroad. See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (hereinafter *Aramco*) (holding that Title VII, which prohibits discrimination with respect to employment on the basis of race, color, religion, sex, or national origin, does not apply extraterritorially). Following the *Aramco* decision, Congress provided for limited extraterritorial application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (2000), to citizens employed abroad by U.S. firms and to foreign firms under the "control" of a U.S. firm. 42 U.S.C. § 2000e-1(c).

⁷⁶ Stephens at 58 ("Economic power carries with it a growing political clout. Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy."); Deva, *supra* note 54, at 40; see also John Ruggie, *American Exceptionalism*, *supra* note 52, at 12 ("The rights enjoyed by transnational corporations have increased manifold over the past two decades, as a result of multilateral trade agreements, bilateral investment pacts and domestic liberalization – often urged by external actors, including states and the international financial institutions.")

⁷⁷ See Craig Scott and Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation*, in Christian Joerges, Inger-Johanne Sand, Gunther Teubner (eds) TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 287, 287-88 (2004); see also David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights*

Yet scholarship on international regulation suggests that the barriers to the emergence of an international mechanism to regulate transnational corporate conduct are extraordinarily steep. For example, structural issues that impede states' ability to regulate are particularly pervasive in the transnational context. There, "states have far less operational capacity (including authority for rule-making, monitoring, and enforcement), information (on foreign business operations and their effects), and expertise" and "their independence is compromised to the extent that they act on behalf of a particular domestic interests...while their representativeness is weak insofar as they pursue primarily national interests."⁷⁸ Moreover, business actors have significant influence on state policies, which is reflected at the international as well as the local level. As a result of this influence, states are often unwilling to support mechanisms that would constrain the extraterritorial actions of "their" MNCs.⁷⁹ Thus, it is somewhat unsurprising that SRSR Ruggie has repeatedly indicated his unwillingness to pursue the negotiation of a multilateral treaty that would specify companies' responsibilities under international law, citing as a justification the fact that such a process would take decades to complete and could do more harm than good for companies' respect for human rights principles in the short and long term.⁸⁰

Additionally, existing international institutions are presently incapable of assuming the task of regulating transnational MNC activities. For example, some observers have pointed to international criminal law and the International Criminal Court (ICC) as potential sources of baseline regulation of corporate conduct, noting that modern international criminal law, unlike the classical "law of nations," purports to govern wrongs committed by both states and by private parties.⁸¹ Yet although the ICC has the capacity to prosecute individuals for certain egregious offenses recognized under international law, neither it nor any other existing international criminal tribunal is presently authorized to exert its jurisdiction over corporate entities.⁸² Moreover, while the ICC might one day try individual corporate officers for direct or indirect commission of the crimes over which it has jurisdiction – genocide, crimes against humanity, and war crimes – such enforcement would be far too sporadic to constitute a source of effective transnational regulation of MNC conduct.

Responsibilities for Corporations at International Law, 44 VA. J. INT'L L. 931, 933 (2004) (arguing that the current state-based framework of international human rights law is inadequate to regulate powerful non-state actors, and proposing direct international legal regulation of transnational corporations).

⁷⁸ *Id.*

⁷⁹ For example, the U.N.'s Global Compact was made a voluntary initiative because corporations would not accept a binding commitment. Stephens, *supra* note 69, at 81 (citing Irwin Arief, *UN: One Year Later Global Compact Has Little to Show*, REUTERS, July 27, 2001).

⁸⁰ John Ruggie, *Business and human rights – Treaty road not travelled*, ETHICAL CORPORATION (May 6, 2008), available at <http://www.ethicalcorp.com/content.asp?contentid=5887>

⁸¹ See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals rather than States*, 32 Am. U.L. Rev. 1, 9 (1982); see, e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR (No. 51), Art. 4, U.N. Doc. A/39/51 (1984).

⁸² During the negotiations that established the ICC, France made a proposal that would have given the court jurisdiction over corporate entities. However, that proposal was found to be incompatible with the fundamental principle of complementarity (Art. 17 of the Rome Statute) that is central to the court. Specifically, because some states do not provide for the criminal liability of corporate entities in their national legislation, there was a concern that such a state would not be able to request the ICC to relinquish a case against a corporate entity to such a state's courts. See Kai Ambros, in O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 25, margin No. 4.

For the present, then, it seems as if effective regulation of transnational business conduct – even where that conduct amounts to offenses prohibited under international law – is unlikely to occur at the international level. The result is a situation in which states opt not to regulate the transnational activities of MNCs, leaving those entities with opportunities to externalize the social costs of their operations. In such a situation, the pursuit of a seemingly rational business strategy might well result in MNC imposition of significant and disproportionate costs on a host state or its population which that state is unable or unwilling to compel the MNC to internalize.

3. Advantages and Drawbacks of Regulation through Private Ordering

To be sure, those seeking to impose greater regulation on MNC activities have looked to a variety of sources of power outside of host states – including international law, public and consumer opinion, and even the power of other businesses – to effect change. Existing “soft-law” initiatives, which primarily take the form of voluntary and non-binding guidelines, ethical principles, and codes of conduct, include the UN Global Compact,⁸³ the codes of conduct promulgated by the Organization for Economic Cooperation and Development (OECD) and International Labor Organization (ILO)⁸⁴, the performance standards established by the International Finance Corporation (IFC)⁸⁵, and the “Equator Principles,” which have been adopted by banks that make project finance loans. In addition to intergovernmental initiatives, other initiatives supported by national governments, industry groups, and NGOs seek to regulate business activity.⁸⁶ Finally, many individual businesses have engaged in self-regulation by adopting their own codes of conduct, which typically assume the form of voluntary, written

⁸³ The Global Compact, a voluntary initiative established in 2000 with over 2,300 participating businesses, encourages its members to implement ten principles touching on human rights, labor standards, and environmental and anti-corruption practices within their “sphere of influence” by sharing and adopting good practices.

⁸⁴ The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy proclaims that all parties, including multinational enterprises, “should respect the Universal Declaration of Human Rights and the corresponding international Covenants.” Int’l Labor Org., Tripartite Declaration of Principles Concerning Multinational Enterprises & Social Policy 3, ¶ 8 (2000), *available at* <http://www.ilo.org/public/english/employment/multi/download/english.pdf>. The OECD Guidelines for Multinational Enterprises recommends that firms “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments.” OECD Guidelines for Multinational Enterprises 19 (2000), *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

⁸⁵ The IFC’s performance standards include some human rights elements that companies are required to meet in order to obtain investment funding. The IFC occasionally requires companies to complete impact assessments that include human rights components. *See* INTERNATIONAL FINANCE CORPORATION’S POLICY AND PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY, (2006), *available at* [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Policy+and+Performance+Standards+FINAL+03-06-06/\\$FILE/Policy+&+Performance+Standards+PUBLIC+FINAL-03-06-06.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Policy+and+Performance+Standards+FINAL+03-06-06/$FILE/Policy+&+Performance+Standards+PUBLIC+FINAL-03-06-06.pdf).

⁸⁶ The U.S. and U.K. governments facilitated the adoption of the Voluntary Principles on Security and Human Rights in the Extractive Industries (VPS) in 2000, an initiative which promotes business human rights risk impact assessments and training of security providers. U.S. DEP’T OF STATE, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2001), *available at* <http://www.State.gov/g/drl/rls/2931.htm>. Additionally, several “Socially Responsible Investment” (SRI) funds have emerged that promote human rights impact assessments and community engagement and dialogue by businesses participating in the fund. *See* Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 77 U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) (*prepared by* John Ruggie) [hereinafter Human Rights Council, *Mapping International Standards*].

commitments by a business that it will observe certain standards (sometimes based on human rights instruments) in its relations with employees and customers.⁸⁷

Many of these efforts have proven to be extremely valuable with respect to certain businesses and certain industries, and have arguably improved the expectations and behavior of some business entities. Yet several scholars have highlighted the significant deficits that attend such “private ordering” mechanisms, particularly from an effectiveness perspective. They note, for example, that “single-actor” schemes like company codes of conduct have low regulatory value insofar as they “manifestly lack crucial competencies, notably independence and representativeness, and may be driven by motives akin to capture rather than by common interests.”⁸⁸ Moreover, even multi-actor schemes rely on the voluntary participation of host governments or businesses for their effectiveness; as a result, the worst offenders and those who come under little or no media scrutiny feel no pressure to alter their offending practices.⁸⁹ Additionally, these initiatives would seem to lack some of the key hallmarks of legitimacy identified above and to be particularly incapable of satisfying any requirement of “publicness.” As might be expected, then, in the area of human rights, these efforts have largely been nearly toothless, and at best, they apply only to a fraction of multinational corporations. Thus, although delegated regimes of authority such as codes of conduct may seem as if they could serve as a positive influence on MNC behavior, there is a significant risk that they will only give rise to “a patchwork of regulation that varies substantially in its effectiveness,” fails to exert significant regulatory power, and does so in a manner that is largely illegitimate.⁹⁰

B. The Normative Case for Regulation

1. Why Normative Justification is Necessary

As a result of the various phenomena described above, states have generally declined to engage in robust regulation of transnational corporate behavior, either unilaterally on a state-by-state basis or multilaterally at the international level. At least in the short term, a consensus seems to be emerging that states, rather than international bodies, will need to play a significant regulatory role if excessive externalization of costs by MNCs is to be effectively deterred and if those affected by harmful MNC conduct are to be guaranteed the access to remedies to which they are entitled under human rights law. John Ruggie has repeatedly emphasized that “any ‘grand strategy,’ if it is to succeed, needs to strengthen and build out from the existing capacity of states and the state system to regulate and adjudicate harmful actions by corporations.”⁹¹ Elsewhere, he has stated that “*states* will need to structure business incentives and disincentives more

⁸⁷ See, e.g., Alston, *supra* note , at 13.

⁸⁸ Abbot and Snidal, *The Governance Triangle*, at 46.

⁸⁹ As of 2006, the FLA had only 18 members, only 10 countries had implemented the EITI’s provisions, and only 16 companies had committed to participation in the VPs. See Human Rights Council, *Mapping International Standards*, ¶¶ 43, 45, 49; see also Lisa Misol, *Private Companies and the Public Interest: Why Corporations Should Welcome Global Human Rights Rules*, in HUMAN RIGHTS WATCH, WORLD REPORT 2006 6-7 (2006), available at <http://www.hrw.org/wr2k6/corporations/corporations.pdf>.

⁹⁰ Wai, *Transnational Liftoff* at 262-264.

⁹¹ John Ruggie, *Standards and practices – Guiding principles for business and human rights*, ETHICAL CORPORATION (Sept. 6, 2007), available at <http://www.ethicalcorp.com/content.asp?ContentID=5353>.

proactively...”⁹² Significantly, Ruggie has pointed to domestic state courts as a source of such regulation, stating

States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims...[and] should address obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic human rights violations.⁹³

Moreover, Ruggie further suggested that extraterritorial regulation of the activities of MNCs (specifically, those domiciled in the regulator’s jurisdiction) is not only *permitted* by international law, but that in certain situations, such regulation is to be strongly *encouraged*.⁹⁴

Some authors have termed the lack of prevailing lack of effective transnational corporate regulation to be an instance of “regulatory” or “accountability” gaps. As Wai defines them, regulatory gaps arise “where there are transnational problems, but few or inadequate international regulatory bodies,” and typically involve “problems of externalities – the ability of a private actor, such as a polluter, or a state whose interests are aligned with that actor, to act so as to impose some of the costs of their activities on others. The result is that not all of the social costs of an action are internalized into the cost-benefit assessment of the actor.”⁹⁵

However, as the foregoing analysis has suggested, states appear to have somewhat deliberately refrained from exercising greater control over transnational corporate conduct. Thus, it may be more useful to regard the prevailing state as one of deliberate “non-regulation” rather than as a “regulatory gap.” Yet this slight change in terminology has significant implications. If the status quo is regarded as one of deliberate non-regulation, then advocates of increased global regulation by individual states – and particularly advocates of corporate ATS litigation in U.S. courts – must be able to demonstrate that such increased regulation is normatively desirable, despite the demonstrated preference of states to refrain from engaging in multilateral regulation in this area. The following section puts forth such a normative argument for increased regulation of transnational corporate activity by US courts, albeit only in a limited context.

Regardless of how the absence of transnational corporate regulation is perceived, as has been demonstrated by NGO reporting and litigation in several ATS cases brought in U.S. courts, in some instances, unregulated conduct on the part of transnational corporations, both state-owned and privately-owned, has negatively affected human rights in a variety of locations across the globe. Moreover, the victims of these abuses face significant obstacles to justice before their

⁹² Ruggie, *The Evolving International Agenda*, at 26 (emphasis added).

⁹³ UNHRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises’ (7 April 2008) UN Doc A/HRC/8/5 [91].

⁹⁴ Ruggie, *The Evolving International Agenda*, at 16.

⁹⁵ Wai, *Transnational Liftoff and Juridical Touchdown*, *supra* n.____ at 251 (citing See David Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 *TRANSNAT’L L. & CONTEMP. PROBS.* 329, 371-373 (1994)); see also Stephens, *The Amoral of Profit*, *supra* n.____ at 58–60.

own domestic courts.⁹⁶ On occasion, NGOs and U.S. courts have found that MNC conduct has constituted one of several particularly severe offenses recognized as giving rise to individual responsibility under international law. This conduct ranges from directly committing involuntary medical testing to providing substantial assistance to government forces committing such internationally-recognized offenses as war crimes, crimes against humanity, torture, extrajudicial killing, and genocide. Thus, the prevailing non-regulation of MNC conduct appears to be leaving certain individuals – particularly in developing countries – as the victims of human rights abuses, and without access to effective remedies.⁹⁷

2. The Case for Regulation

Certainly, the primary obligation to regulate the behavior of business entities, MNCs or otherwise, rests with the state in which those entities act. Governments have an obligation to protect all individuals within their jurisdiction and control from human rights abuses, in part by regulating the behavior of private actors, and in part by holding private parties to account when their conduct infringes on the rights of others. To the extent that MNCs enjoy virtual impunity, the “host states” in which they operate have failed to uphold their responsibility under human rights law and may incur liability for that failure pursuant to the doctrine of indirect state responsibility.⁹⁸ Moreover, with increasing frequency, international human rights treaty bodies have argued that States are permitted – if not necessarily required – to exercise their jurisdiction to prevent and punish extraterritorial human rights abuses committed by corporations domiciled in their territory.⁹⁹ However, as described in the previous section, several phenomena have combined to prevent the emergence of effective MNC governance by either host states or home states. These phenomena particularly affect the ability and willingness of host states to independently regulate the behavior of MNCs in an effective manner, and have thus far led states as a group to abstain from creating international-level institutions to regulate their behavior.

Relying on the same arguments outlined above, Steven Ratner has demonstrated that limiting the direct applicability of human rights law to states alone is inadequate for the protection of human dignity.¹⁰⁰ As a result, Ratner argues that it is legitimate and desirable to impose liability for

⁹⁶ See, e.g., HUMAN RIGHTS WATCH & CENTER FOR HUMAN RIGHTS & GLOBAL JUSTICE, ON THE MARGINS OF PROFIT: RIGHTS AT RISK IN THE GLOBAL ECONOMY (Feb. 2008), available at <http://hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf>.

⁹⁷ Oxford Pro Bono Publico, *Obstacles to Justice*, supra n. __ at 5 (citing Stephens, *The Amoralty of Profit*, supra n. __ at 58–60).

⁹⁸ See C. Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in TORTURE AS TORT (2001).

⁹⁹ Committee on Economic Social and Cultural Rights, 'The Right to Water, General Comment No 15' (26 November 2002) UN Doc E/C.12/2002/11 (stating that State parties should take steps to ‘prevent their own citizens and companies’ from violating rights in other countries); Committee on the Elimination of Racial Discrimination, ‘Concluding Observations for Canada’ (25 May 2007) UN Doc CERD/C/CAN/CO/18, p 4 para 17 (noting reports of adverse impacts by MNCs registered in Canada on the rights of indigenous peoples in host states, and encouraging Canada to “take appropriate legislative or administrative measures” to prevent such acts and to explore further ways to hold registered MNCs accountable); see also Concluding Observations for the United States of America’ (8 May 2008) UN Doc CERD/C/USA/CO/6, p 10 para 30 (similar).

¹⁰⁰ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001). This is true particularly because some governments lack the resources and/or the interest to monitor corporate behavior, some governments use corporate resources to commit abuses of human rights, and transnational corporations have demonstrated their capacity to operate largely independently of government control.

human rights violations directly on corporations in a limited number of situations. The imposition of liability is justified from a deterrence perspective, as it places obligations on the entities with the greatest ability to prevent offenses from occurring and also provides them with an incentive to do so.¹⁰¹ In this way, the justification for such direct corporate liability is the same as that which motivated the evolution of international law beyond state liability to individual criminal responsibility for serious human rights abuses: governments and nonstate actors have proved inadequate to deter the commission of specific forms of unjustifiable conduct, and thus the law must place obligations on additional actors with the capacity to prevent the commission of such conduct (i.e. the individual or corporate actors themselves).¹⁰² Drawing on arguments by Joseph Raz, Ratner notes that human rights law gives rise to a variety of dutyholders, and that the imposition of human rights obligations on new dutyholders (corporations) is justified because corporations – as well as states – can pose threats to human dignity.¹⁰³

It is normatively and practically desirable to impose such obligations on corporations as such, and not merely on the individual employees or directors that authorize the conduct prohibited by international law.¹⁰⁴ Corporations act as organizations and are not simply the sum of individuals working for them; because they have autonomy of action, including the capacity to change their policies, they can be held responsible for the outcomes resulting from these policies.¹⁰⁵ Moreover, corporate liability is practically desirable because research has demonstrated that placing liability upon enterprises deters corporate managers more effectively than placing liability upon individuals, because corporate agents are judgment-proof and cannot bear the costs of sanctions and because corporate liability encourages shareholders to monitor corporate actions.¹⁰⁶

Ratner acknowledges, however, that “[j]ust as the human rights regime governing states reflects a balance between individual liberty and the interests of the state (based on its nature and function), so any regime governing corporations must reflect a balance of individual liberties and business interests.”¹⁰⁷ Thus, he recognizes that the full spectrum of human rights duties incumbent on states is not simply transferable to corporations. At the very least, however, there is a clear normative justification for imposing liability on corporations which commit or facilitate “true atrocities.”¹⁰⁸ These include offenses such as genocide, crimes against humanity, and war crimes, which have elements that “internationalize” the offenses and distinguish them from ordinary crimes, as well as offenses like torture and forced disappearances which give rise to individual criminal responsibility only when committed in the context of a clear nexus to official conduct.¹⁰⁹ What distinguishes these offenses from other violations of human rights is the fact that the international community has reached consensus on the severe gravity of those offenses

¹⁰¹ *Id.* at 465.

¹⁰² *Id.* at 464-65.

¹⁰³ *Id.* at 465-472.

¹⁰⁴ *Id.* at 473-475.

¹⁰⁵ *Id.* (citing Fisse and Braithwaite).

¹⁰⁶ *Id.* (citing Gruner).

¹⁰⁷ *Id.* at 492.

¹⁰⁸ *Id.* However, Ratner also emphasizes that it would be appropriate to expand corporate liability for human rights offenses beyond those defined by international law that give rise to individual criminal responsibility.

¹⁰⁹ *Id.* at 465-48.

and had determined that it is appropriate to enforce the prohibition of such offenses using both individual and state responsibility.

III. THE ALIEN TORT STATUTE AS A BOTTOM-UP MECHANISM FOR REGULATION OF CORPORATE BEHAVIOR

A. Major Features of the ATS Regulatory Regime

Over the course of the last twenty five years, the courts of the United States, with some support from Congress, have interpreted the Alien Tort Statute (ATS), 28 U.S.C. § 1350, to provide extraterritorial and universal jurisdiction over crimes prohibited under international law when invoked pursuant to a civil claim brought by a non-U.S. citizen.¹¹⁰ The ATS provides jurisdiction for causes of action present in U.S. federal common law, which automatically incorporates norms of customary international law even in the absence of legislative action. In 2005, the Supreme Court confirmed in *Sosa v. Alvarez-Machain* that the ATS permits suits for offenses that violate international norms recognized at the time of the statute's enactment in 1789 (including piracy) as well as for causes of action that have entered the modern law of nations and have been incorporated into U.S. federal common law since that time.¹¹¹ In accordance with that ruling, lower courts have interpreted the ATS to permit claims alleging violations of the law of war, crimes against humanity, genocide, torture, extrajudicial executions, and apartheid, among other offenses.¹¹²

Both before and since the *Sosa* decision, U.S. courts have recognized that certain forms of conduct violate the law of nations “whether undertaken by those acting under the auspices of a state or only as private individuals.”¹¹³ Thus, individuals have been found liable for offenses including genocide and war crimes even in the absence of state action.¹¹⁴ Courts have also recognized that private actors can even incur liability for international offenses that require state action, such as torture, provided that they either acted under color of law in the course of committing the offenses, or that they conspired with or aided and abetted the state actors that committed them. Moreover, since the early 1990s, several U.S. courts have addressed corporations in the same manner as private individuals for the purposes of ATS liability.¹¹⁵

¹¹⁰ The ATS states that the U.S. 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.” 28 USC § 1350. Although the statute dates back to the 18th century, it was only in the second half of the 20th century that it was cited in cases seeking remedies for human rights abuses. See ICJ Panel Report, Vol. 3, at 54. A recent amendment to the ATS, the Torture Victims Protection Act, provides a cause of action for US nationals as well as non-citizens specifically for torture and extrajudicial executions. 28 U.S.C. 1350 Note, 106 Stat. 73.

¹¹¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004).

¹¹² See *Kadic v. Karadzic*, 70 F. 3d 232, 241 (2d Cir. 1995); *Jane Doe I v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 8 (D.D.C. 1998); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980); *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹¹³ *Kadic*, 70 F. 3d at 239.

¹¹⁴ *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) (“Restatement”) pt. II, introductory note); see also *Sosa*, 124 S. Ct. 2739, 2766 n.20 (citing genocide as an example of such an international norm).

¹¹⁵ *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F. 3d 254 (2d Cir. 2007) (Katzmann, J., concurring) (“We have repeatedly treated the issue of whether corporations may be held liable under the ATS as indistinguishable from the question whether private individuals may be.”). The two ATS decisions to explicitly confirm that the ATS permits

The following sections address the most critical features of the ATS and relevant U.S. procedural law in order to better explain the statute's posture in U.S. law and its potential to serve as one component of a global regulatory scheme.¹¹⁶

1. Private Litigation

The complete text of the ATS reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹¹⁷ Thus, the ATS provides litigants with civil remedies for violations of international law by authorizing the federal courts to take jurisdiction over such claims and by clarifying that litigants enjoy a private right of action. While some have questioned whether the First Congress truly intended for the ATS to serve a private litigation role in the manner in which it has been subsequently interpreted by the federal courts, Congress at least tacitly reaffirmed its support for the private law method of adjudication of disputes involving alleged violations of international law by enacting a companion statute to the ATS – the Torture Victim Protection Act – in 1991.¹¹⁸

Admittedly, the sorts of offenses over which the US courts have exercised jurisdiction pursuant to the ATS – including genocide, torture, and war crimes – are not commonly thought of as falling under the umbrella of municipal tort law. Rather, they are thought of as criminal offenses. Yet this conception of internationally-recognized offenses as amenable to private dispute resolution is anything but novel in American jurisprudence. In fact, the ATS's characterization of international law violations as torts likely reflects the First Congress's familiarity with a traditional common-law jurisdictional basis known as the “transitory tort doctrine.” This doctrine is one of several “power” theories of jurisdiction embraced by common law jurisdictions beginning shortly before the drafting of the ATS in 1789, and which is based on the notion that a tortfeasor's wrongful act creates a wrongful obligation which follows the tortfeasor across national boundaries.¹¹⁹ Domestic courts are permitted to adjudicate such “transitory” claims, despite the fact that the claims have no connection to their forum, simply because they act on behalf of a sovereign that has a legitimate interest in the orderly resolution of

jurisdiction over corporations, issued in 2003 and 2009, respectively, cited to more than a dozen prior ATS cases that had involved corporate defendants but which had not rejected the potential for corporate liability under international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.* 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹¹⁶ Certainly, there are many remaining controversial and ambiguous aspects of ATS liability over corporate actors that the U.S. courts will be forced to address in the coming years. For example, the Second Circuit recently issued a decision prescribing an “intent” rather than “knowledge” standard for accomplice liability under the statute. The decision could have significant implications for many ATS cases involving corporate defendants, as many of these disputes involve allegations that the corporate defendant was an accomplice to, rather than the primary perpetrator of, the offenses at issue in the case. See *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244 (2d Cir. 2009).

¹¹⁷ 28 U.S.C. § 1350.

¹¹⁸ 28 U.S.C. 1350 Note, 106 Stat. 73. The statute provides a cause of action for US nationals as well as non-citizens specifically for torture and extrajudicial executions.

¹¹⁹ Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 63 (1981); see also Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT'L L. & BUS. 43 (2005)

disputes within its borders.¹²⁰ As Lord Mansfield noted in the 1774 case of *Mostyn v. Fabrigas*, “as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas.”¹²¹ Over the course of the 19th century, U.S. courts confirmed that they had jurisdiction over personal injury suits, wrongful death actions, and other private claims, even when they arose extraterritorially, so long as they had obtained personal jurisdiction over the defendant in a manner consistent with the requirements of the Constitution.¹²²

Since the 1950s, most of the states of the U.S. have largely curtailed their own ability to exercise their civil jurisdiction over foreign claims that lack any “nexus” to their forum through the use of “long-arm” statutes that restrict plaintiffs’ ability to serve process on defendants outside the state’s territory, with exceptions authorized only when the defendant’s action has caused negative effects in the forum state. However, the transitory tort doctrine is still permissible under the U.S. Constitution, and it is still exercised in some jurisdictions.¹²³ Thus, the ATS can be conceived of as a mechanism designed by the Founders to provide a federal forum for one small subcategory of transitory tort claims (i.e. conduct such as torture that satisfies *Sosa*’s test for actionable ATS offenses). The court in *Filartiga v. Pena-Irala*, the first modern-era ATS case, noted as much, stating that “[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.”¹²⁴

¹²⁰ See *Filartiga*, 630 F.2d at 885.

¹²¹ *Mostyn v. Fabrigas*, 98 Eng. Rep 1021, 1032 (1774). Early U.S. judicial decisions noted and concurred with Mansfield’s opinion. See *McKenna v. Fisk*, 42 U.S. 241, 248 (1843) (“It then appears from our books, that the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king’s foreign dominions...The courts in the District of Columbia have a like jurisdiction in trespass upon personal property with the courts in England and in the states of this Union, and in the absence of statutory provisions, in the trial of them must apply the same common law principles which regulate the mode of bringing such actions, the pleadings, and the proof.”).

¹²² *McKenna v. Fisk*, 42 U.S. (1 How.) 241, (personal injury suits held transitory); *Dennick v. Railroad Co.*, 103 U.S. 11, 26 (1880) (wrongful death action held transitory); *Slater v. Mexican National Railroad Co.*, 194 U.S. 120, 24 (1904) (jurisdiction over wrongful death action arising abroad).

¹²³ For example, Florida allows for suits against corporations that do business in Florida even if the torts arise elsewhere and have no connection to Florida, provided that the corporation has designated an agent to receive process within the state. See, e.g., *White v. PepsiCo, Inc.*, 568 So.2d 889 (Fla. 1990) (upholding jurisdiction over product liability claim brought by non-resident plaintiff against non-resident PepsiCo arising in Jamaica). Notable cases that have been brought pursuant to the transitory tort doctrine include a portion of a state law claim brought in the California courts as a companion to the corporate ATS case *Doe v. Unocal*. In the state court portion of their lawsuit, the Burmese plaintiffs sued the California-based energy company under traditional tort theories including wrongful death, battery, false imprisonment, intentional and negligent infliction of emotional distress, negligence per se, and conversion. Decision of Superior Court of California, County of Los Angeles, 10 June 2003, available at Earthrights International, *Doe v. Unocal*, available at <http://www.earthrights.org/legal/doe-v-unocal>. See also Sarah Joseph, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 66-71 (2004). Similarly, the litigation arising out of Union Carbide gas plant disaster in Bhopal, India was brought as a transitory tort action in New York; several claims by Ecuadorian plaintiffs against oil giant Texaco were brought in US courts as transitory actions; and a series of cases concerning several companies’ use of the pesticide known as DBCP in Central American banana plantations, Africa, and Southeast Asia have similarly been filed in US courts under the doctrine. See, e.g. *Delgado v. Shell Oil*, 890 F. Supp. 1324 (S.D. Tex. 1995). Note that U.S. courts have frequently – but not always – dismissed cases brought pursuant to the transitory tort doctrine in favor of the jurisdiction of foreign courts pursuant to the doctrine of *forum non conveniens* (discussed later in this paper).

¹²⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

The fact that the ATS is a private, rather than public, regulatory mechanism has great practical significance for would-be litigants. First, private law mechanisms like civil suits give litigants the freedom to bring complaints before courts at their discretion: there is no prosecutorial check on their ability to initiate a claim. Moreover, the fact that the ATS provides a private right of action is significant insofar as U.S. procedural and other laws are particularly supportive of private litigation.¹²⁵ The many beneficial aspects of U.S. law for private litigants include the following: U.S. law does not require the unsuccessful party in a tort suit to pay the legal costs incurred by its opponent; U.S. law allows lawyers to work on a contingency fee basis in civil cases; U.S. procedural law allows for the imposition of punitive damages in civil cases, thereby increasing the potential recovery for plaintiffs and the deterrent effect of civil judgments; U.S. procedural law permits broad discovery in civil cases, which is a significant asset to plaintiffs in cases where a great deal of information is in the defendant's control; U.S. procedural rules allow plaintiffs to consolidate their claims into class actions; and U.S. law allows for the possibility of a civil jury trial.

The United States thus offers a uniquely favorable forum for both domestic and foreign plaintiffs who can obtain personal jurisdiction over corporations under the ATS.

2. Scope of Liability

ATS cases uniformly possess one unique feature not present in the vast body of cases litigated in U.S. courts: they must be based on “violations of the law of nations.” The Supreme Court in *Sosa* interpreted this phrase to signify that the statute provides the US courts with jurisdiction over a narrow class of norms of an international character “accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms” recognized by the Founders when the ATS was enacted.¹²⁶ These include offenses against ambassadors, violations of safe conduct and piracy.¹²⁷ Moreover, the Court suggested that certain additional offenses under customary international law have been incorporated into U.S. federal common law since the Founding, and provide litigants with a “cause of action” under the ATS so long as they meet certain requirements. *Sosa* dictates that courts should “exercise caution” and require “new” ATS claims to rest on “norm[s] of international character accepted by the civilized world” and defined with a high degree of “specificity” before they can be considered “actionable.”¹²⁸ Since *Sosa*, U.S. courts have found such offenses as torture, war crimes, crimes against humanity, and genocide to meet this high standard, and have rejected plaintiffs’ arguments in favor of recognition of many other norms.¹²⁹ Thus, when U.S. courts determine whether or not a

¹²⁵ Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 14-16 (2002); see also Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms*, supra n. __ at 304.

¹²⁶ *Sosa v. Alvarez-Machain*, 542 U.S.692 (2004).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See, e.g., *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983) (rejecting claim that that New York's lottery prize disbursement system violated due process standards under international law); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (declining to recognize “cultural genocide” as a discrete violation of international law).

newly articulated claim is an actionable one under the ATS, they are formally bound only by *Sosa*'s limiting language, although that language sets a high bar.

Despite the fact that *Sosa* imposes relatively few formal obligations on U.S. courts applying the ATS, several court decisions interpreting the statute have referred to the principle of universal jurisdiction as one that might place additional limitations on the recognition of new actionable norms. For example, in his concurring opinion in *Sosa*, Justice Breyer suggested that “workable harmony” among nations would be jeopardized if courts merely limited their use of the ATS to norms that were uniformly condemned, rather than further reserving its use for norms specifically made subject to universal jurisdiction.¹³⁰ Noting that universal jurisdiction depends not only on “substantive agreement as to certain universally condemned behavior,” but also on “procedural agreement that universal jurisdiction exists to prosecute...that behavior,” Justice Breyer argued that while “substantive uniformity does not *automatically* mean that universal jurisdiction is appropriate,” in a case in which universal jurisdiction was clearly permitted, nations could adjudicate foreign conduct involving foreign parties without threatening “practical harmony” among nations.¹³¹ Thus, Justice Breyer clearly indicated his belief that, as a matter of comity, the Court should have limited the applicability of the ATS to offenses permitting universal jurisdiction.

Since the 2005 *Sosa* decision, there have been several instances in which judges considering ATS cases have referred to universal jurisdiction in a similar manner. For example, in two separate Second Circuit opinions, the dissenting judges argued against recognition of a particular norm as a valid claim under the ATS on the grounds that it was not subject to universal jurisdiction.¹³² Moreover, in one recent accountability for MNCs that engage in conduct that results in human rights violations abroad. Moreover, ATS litigation appears to be affecting MNC behavior.

As detailed in an article by Beth Stephens, since the modern era of ATS litigation began in 1980, at least 85 cases have been brought against corporate defendants, 15 of which were pending in the U.S. courts as of fall 2009. Of those cases, several have settled.¹³³ They include the *Wiwa* case; the *Unocal* case, arguably the most prominent settlement in a classic corporate ATS case;¹³⁴ a case brought by representatives of two Chinese political prisoners against Yahoo!

¹³⁰ *Id.*

¹³¹ *Id.* at 761-62.

¹³² *Khulumani v. Barclays Natn'l Bank* at 304-305 (Korman, J., dissenting) (note, however, that the norm to which Judge Korman was referring – apartheid – is actually recognized as a universal jurisdiction offense by Bassiouni); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

¹³³ Also of note is the wave of lawsuits filed against Swiss, German, and other European companies in 1996 alleging their complicity in Holocaust-era offenses. Many of the plaintiff classes brought claims under the ATS as well as on other grounds. The enormous media and political attention generated by these cases drove the parties to enter into significant settlement agreements. For example, litigation against a group of Swiss banks settled for \$1.25 billion; litigation against five European insurance companies resulted in a fund that eventually offered claimants a total of over \$300 million; and a suit against German industry resulted in the creation of a public-private fund with the German government of \$1.7 billion to compensate slave laborers. See Michael J. Bazylar, *Litigating the Holocaust*, (based on a speech delivered on April 12, 1999, at the University of Richmond School of Law) available at <http://www.1939club.com/1939%20Articles-1.htm>.

¹³⁴ *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

alleging complicity in their arbitrary detention by the Chinese security forces;¹³⁵ a large class action brought against several popular clothing companies, including The Gap, by employees of garment factories in Saipan, the capital of the Northern Mariana Islands;¹³⁶ and *Jama v. Esmor Corr. Serv.*, a case brought by a group of nine plaintiffs, primarily asylum applicants, against a private prison contractor alleging abusive conditions at a New Jersey detention facility.¹³⁷

Moreover, as of May 2009, three cases involving ATS claims had proceeded to trial. In *Estate of Rodriguez v. Drummond Co.*,¹³⁸ the estates of three executed union leaders argued that an Alabama company's management provided support to paramilitary and military units to eliminate unionization at its mine in Colombia. In July 2007, an Alabama jury ruled for Drummond. In *Jama v. Esmor Corr. Serv.*, one of the plaintiffs in the case involving asylum applicants at a New Jersey detention facility referenced above refused the settlement offered by the private prison company and sought relief for physical, sexual, and mental abuse inflicted by the company's guards while her asylum claim was pending. In November, 2007, the jury rejected the plaintiff's ATS claim but awarded her \$100,000 on a common-law tort claim against the company's management. In *Bowoto v. Chevron*, a group of Nigerian plaintiffs brought ATS claims against Chevron alleging its complicity in the Nigerian military's shooting of tribal protesters on a Chevron platform in the Niger Delta. In November, 2008, a California jury ruled in Chevron's favor.

Even those ATS cases in which the defendant ultimately prevailed at trial demonstrate that the statute has been effective, if to a limited degree, at providing access to judicial process for those claiming harm at the hands of MNCs. Moreover, those cases that resulted in settlements occasionally provided plaintiffs with non-traditional remedies. For example, while the terms of the settlement agreement in the Yahoo! case are confidential, Yahoo's CEO made a personal apology to the plaintiffs' families during a hearing before the U.S. House of Representatives Committee on Foreign Affairs.¹³⁹

Certainly, if MNCs perceive that there is a legitimate possibility that they could incur ATS liability through their interactions with certain business partners or through some aspect of their operations, this liability risk will factor into their business decisions. ATS litigation has directly driven some MNCs to modify their overseas operations, occasionally through divestment from

¹³⁵ *Xiaoning v. Yahoo! Inc.*, Civ. No. 07-02151 (N.D. Cal. Nov. 9, 2007). In this case, representatives of two Chinese political prisoners brought a claim against the internet service provider, alleging that its Hong Kong subsidiary had provided information to the Chinese Public Security Bureau that allowed the Bureau to link the men to their correspondence on the internet. The plaintiffs' representatives alleged that Yahoo's conduct amounted to aiding and abetting serious human rights abuses, including torture, forced labor, and arbitrary and prolonged detention, arising from the plaintiffs' exercise of free speech and free press rights.

¹³⁶ *See Does v. The Gap, Inc.*, No. 01-0031, 2003 WL 22997250 (D. N.Mar. I. Sept. 11, 2003). The Settlement Agreement into which the parties entered established a \$20 million Settlement Fund. However, the size of the class was so large that the parties speculated that each individual claimant would only receive between \$100 and \$300.

¹³⁷ *Jama v. Esmor Corr. Serv.*, Civ. No. 97-03093, 2008 WL 724337 (D.N.J. Dec. 7, 2007)

¹³⁸ *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003),

¹³⁹ Theresa Harris, *Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights: Wang Xiaoning v. Yahoo!*, available at <http://www.wcl.american.edu/hrbrief/15/2harris.pdf?rd=1>.

risky projects.¹⁴⁰ Most notably, the Canadian oil company Talisman sold its investment in Sudan in the wake of an ATS case brought against it by residents of Sudan claiming to be the victims of conduct constituting crimes against humanity and war crimes, as well as a divestment campaign launched against it by its shareholders.¹⁴¹

More frequently, however, ATS litigation has encouraged MNCs to undertake a more meaningful examination of their relationships with subsidiaries and business partners. In part as a response to the growing threat of ATS litigation, some MNCs have taken steps to tailor their engagement with host country partners and have insisted on certain standards of conduct that significantly lower the risk that human rights abuses of the kind that give rise to ATS liability will occur in the course of their operations. Today, prominent corporate law firms offer specific counseling services to clients seeking to minimize the potential of incurring ATS liability.¹⁴² One attorney that provides such services recommends that his clients “create a code of conduct and carefully define relationships with partners, contractors, and states.”¹⁴³ Moreover, the ATS has been cited as a driving factor that led the vast majority of defendants in ATS cases targeting the extractive industries to engage in the Voluntary Principles on Security and Human Rights, a joint government-industry “dialogue” which encourages companies to adopt a set of voluntary principles and engage in monitoring and mitigation of human rights risks posed by their employment of armed security services at their facilities.¹⁴⁴ British Petroleum, an MNC which has not been targeted in an ATS suit to date, has specifically retained counsel to monitor its compliance with the Voluntary Principles at one of its projects overseas, and embeds the principles in its contracts with security forces.¹⁴⁵

Even aside from the actual threat of liability to which the ATS gives rise, to the extent that ATS suits attract the attention of the US government and the international media, they might compel otherwise reluctant corporations to engage in more effective corporate social responsibility schemes.¹⁴⁶ As one former executive at The Gap has stated, “Any executive who says he doesn't pay attention to these suits, and the shareholder campaigns that go with them, is either lying or ignorant about his business.”¹⁴⁷

In the United States, moreover, tort claims can serve multiple functions for litigants above and beyond the payment of damages, including providing the means to conduct a full investigation of an incident and to create an official record of abuses, allowing victims and witnesses to play a significant role in the proceedings, exposing alleged misdeeds to the public eye and producing a

¹⁴⁰ Gary Clyde Hufbauer and Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245, 246 (2004) (stating that “corporate counsel have already begun to advise MNCs on avoiding such high-risk investments and operations”).

¹⁴¹ Michael D. Goldhaber, *Open Wounds: Big Oil and Big Mining face a host of allegations that they helped commit human rights abuses*, THE AMERICAN LAWYER (Oct. 1, 2008).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFAIRS (September/October 2000).

¹⁴⁷ Joshua Kurlantzick, *Globalism in the Dock: Burmese villagers sue Unocal in an L.A. courtroom*, THE AMERICAN PROSPECT (Nov. 4, 2002).

public judgment of their responsibility.¹⁴⁸ More broadly, they can provide judicial recognition of a rule of international law, giving rise to a potential deterrent effect that may prevent the recurrence of such behavior in the future or influence future government policies.¹⁴⁹

B. Challenges Posed by the ATS Regulatory Regime

1. The American approach to civil litigation

Perhaps the most daunting challenge that arises from the pursuit of a global regulatory regime for corporations through the ATS is the uniquely American approach to civil litigation. Not only has no other state enacted a civil litigation mechanism anything like the ATS to date; it is highly unlikely that more than a few countries could be expected to do so in the foreseeable future. Moreover, it is highly unlikely that the phenomenon of the ATS will be directly replicated outside the U.S., as litigation under that statute is “a product of several U.S. legal principles that do not translate easily into other legal languages.”¹⁵⁰ As a result, those who would advocate for the use of the ATS as a global regulatory tool must identify alternative mechanisms through which such regulation could be pursued outside the United States.

As of this writing, there is only one other state whose courts have entertained a civil cause of action for individuals seeking to litigate tort claims grounded in international law. In 2006, a French administrative court held the French government and the French national railway system, known by its acronym SNCF, directly liable under tort law for acts constituting crimes against humanity, and awarded the plaintiffs money damages amounting to €60,000.¹⁵¹ However, the decision has generated significant controversy in France, and it is far from certain that other French courts will similarly endorse the argument that crimes against humanity can be pled as a tort claim.¹⁵² Thus, although the possibility for replication of ATS-style actions abroad may be increasing, the United States remains the only state in which judicial jurisdiction over such claims is regularly available.

Moreover, the odds are slim that other states will adopt legislation akin to the ATS in the foreseeable future, primarily as a result of the U.S.’s uniquely favorable approach to private litigation. Indeed, it is criminal, rather than civil law that serves as the primary vehicle for adjudication in Europe and elsewhere around the world.¹⁵³ In many legal systems, the

¹⁴⁸ See Beth Stevens and Michael Ratner, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996) at 233-38; Stephens, *Translating Filartiga* at 13-14.

¹⁴⁹ *Id.*

¹⁵⁰ Beth Stephens, *Translating Filartiga* at 4-5.

¹⁵¹ *M. A. et consorts Lipietz c/ Prefet de la Haute-Garonne et Societe nationale des chemins de fer francais*, No. 0104248, Tribunal administratif de Toulouse, 6 juin 2006, available at http://www.ta-toulouse.juradm.fr/ta/toulouse/index_ta_ac.shtml. An English translation by Anne Witt, as revised by Vivian Grosswald Curran, available at <http://www.acaccia.fr/The-Judgment-Lipietz-in-English.html>; see Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363 (2008).

¹⁵² In 2007, SNCF successfully appealed the decision with respect to its liability, on the grounds that the administrative court lacked jurisdiction over it, as a public-private hybrid rather than a pure state entity. However, the French state did not appeal the decision with respect to its liability. See Curran at n. 1.

¹⁵³ Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK an der Universität Bremen, Discussion paper (2005) at 1.

distinction between criminal law and tort law is based in part on whether an act is considered “a morally reprehensible affront to the whole community, rather than only to the injured individual.”¹⁵⁴ Moreover, if a set of circumstances could theoretically give rise to both criminal and tort liability, many legal systems will view the resulting claims as interdependent.

The very structure of the criminal and civil judicial processes in continental Europe reflects its members’ philosophical and cultural objections to the use of tort law to address egregious conduct.¹⁵⁵ In France, for example, criminal law cases are perceived as a means for educating society on important topics of ethics and history.¹⁵⁶ In criminal proceedings, therefore, judges are perceived as representing the voice of the state. They formulate and convey the state’s view of the matters at hand in a case, conduct extensive investigations into the case, and “build interpretations of meanings and explanations” through the symbolic process of the trial.¹⁵⁷ The criminal trial itself involves extensive oral argument and witness testimony, as the judge endeavors to articulate a social message that goes far beyond the guilt or innocence of the specific defendant. If, at the end of a trial, the judge awards compensation to victims, the decision is seen as legitimate and having been approved directly by the state. In contrast, French civil trials are conducted almost entirely in writing, with one short oral argument featuring no witness testimony. The private litigators who prepare the written submissions and participate in the hearing enjoy no such legitimacy, and are not seen as having any responsibility or interest in addressing the contextual or ethical significance of the case at hand.¹⁵⁸

The recent groundbreaking French civil suit discussed above, which found that the French government and SNCF had committed crimes against humanity while France was under Nazi occupation during World War II, would normally seem to bode well for the prospects of an evolving global regulatory regime for corporate activity based in tort law. However, the court’s decision was received extremely critically by the French public.¹⁵⁹ An article published shortly after it was issued articulated the following objections to the suit: the amount of damages the court awarded the plaintiffs (€60,000) was high by French standards; the recipients of the damages were the original plaintiff’s widow and children, who had not personally suffered the harm at issue in the case; the case implied that monetary compensation can be assigned to human misery; the trial was too rapid and the judgment issued too hastily; the plaintiff’s lawyer, a private advocate, addressed only issues related to winning the case, and not the complex historical issues underpinning the dispute; and attributing liability to the French state and SNCF trivialized the guilt of Nazi Germany for the conduct at issue in the case.¹⁶⁰ Thus, while the decision may signify that French courts could become more willing to recognize and enforce ATS judgments from the U.S. in the future, it is highly unlikely that a tort cause of action for

¹⁵⁴ Merryman et al, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 1022 (1994) (“[i]f the judgment of the community is going to be brought to bear on a defendant because of the moral character of his action, it must be done through the processes of the criminal law.”).

¹⁵⁵ Curran at 377-378.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 375.

crimes against humanity will be imported into the French legal system in the foreseeable future.¹⁶¹

Moreover, public opinion is not the only indicator of other states' relative disdain for civil litigation; rather, many have adopted procedural rules that communicate it quite effectively. Plaintiffs seeking to bring private claims outside the U.S. often face some combination of the following procedural "disadvantages": most systems have a "loser pays" rule, in which the losing party must pay its adversary's legal costs;¹⁶² only a few legal systems award punitive damages – the rest award only purely compensatory, or even symbolic, damages;¹⁶³ many systems require plaintiffs to pay legal and court fees in advance of bringing a suit;¹⁶⁴ many systems prohibit plaintiffs from entering into contingency fee arrangements;¹⁶⁵ and many systems provide for only limited discovery, meaning that the plaintiff will not be able to obtain information available solely to the defendant.¹⁶⁶ Perhaps as a result of these disincentives, legal aid and pro bono representation are uncommon in many legal systems. In the U.K., for example, legal aid is not permitted in cases governed by foreign law.¹⁶⁷ These features of civil litigation in many states outside the U.S. make it extremely difficult for private individuals to bring claims in court, particularly against commercial opponents in situations where they have little access to the information that would be required to establish liability, and particularly where that information is dispersed across a tiered corporate structure.

The disincentives to litigation to which these rules give rise may be incredibly strong. In one illustrative example, a group of Guyanese plaintiffs brought a tort action in Canada against Cambior, a Canadian mining corporation, alleging that the MNC had dumped billions of liters of cyanide into two Guyanese rivers, injuring thousands. Although a Canadian court initially asserted jurisdiction over the case, it dismissed it on *forum non conveniens* grounds after determining that Guyana was an adequate alternative forum. Thereafter, the court ordered the organization representing the plaintiffs to pay the defendant corporation "special costs" amounting to \$50,000 (Canadian) for a variety of reasons, including the novelty and complexity of the questions of law and fact in the case and the negative effect of the litigation on the MNC's reputation.¹⁶⁸

As a result of these structural and procedural barriers to tort litigation, civil claims like those at issue in *Wiwa* and other ATS cases are virtually unheard of in many jurisdictions that theoretically possess the private law apparatus that could allow plaintiffs to bring claims sounding in tort against MNCs headquartered in the state. For example, while Germany

¹⁶¹ *Id.* at 381-82.

¹⁶² Stephens at 28-30 (citing Michael Byers, *English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 241, 244 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000))

¹⁶³ Stephens at 26. Stephens notes, however, that some systems award "moral damages," although they do not approximate U.S.-style punitive damages.

¹⁶⁴ Stephens at 28-30.

¹⁶⁵ Merryman at 1026.

¹⁶⁶ Stephens at 31.

¹⁶⁷ Oxford Pro Bono Publico, *Obstacles to Justice*, at iii.

¹⁶⁸ Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: supra n. __* at 302 (citing *Recherches Internationales Quebec c Cambior Inc.*, [1999] JQ No 1581 (Quebec Superior Court, 12 May 1999)).

certainly has a regime of tort liability, a recent report on home-state remedies for MNC human rights violations noted that it could not locate a single case in which a non-national had even lodged a claim against a German MNC regarding its conduct abroad, much less prevailed.¹⁶⁹ By phrasing their tort action as one that alleged fault on the part of Cambior's board of directors, the plaintiffs were able to obtain jurisdiction under Canadian tort laws providing for general jurisdiction based on domicile¹⁷⁰ and for specific jurisdiction over actions arising from faults committed in the forum.¹⁷¹ While the court in *Cambior* eventually dismissed the action on *forum non conveniens* grounds, the court noted that it would have retained jurisdiction had it not identified an adequate, alternative forum in Guyana to hear the case.¹⁷² This is not to suggest, however, that all countries other than the U.S. are opposed to the use of private law to address extraterritorial misconduct, or that the mere absence of mechanisms that exactly replicate the ATS in other jurisdictions necessarily dooms the global regulatory enterprise to failure. In fact, some individuals have succeeded in framing claims alleging extraterritorial corporate misconduct in several common law countries using standard tort claims. For example, plaintiffs alleging harm incurred in South Africa and Namibia have successfully pursued a handful of negligence claims against MNCs headquartered in England over the course of the past fifteen years.¹⁷³ The corporate defendants eventually settled with the plaintiffs in two of the cases, while the third was dismissed on statute of limitations grounds.¹⁷⁴

Countries other than England have proved similarly receptive to the use of tort law by private plaintiffs alleging extraterritorial corporate misconduct. In Australia, a group of Papua New Guinean plaintiffs sued an Australian company in the late 1990s for injuries resulting from pollution it had caused during its mining operations abroad.¹⁷⁵ The court found that it had

¹⁶⁹ Oxford Pro Bono Publico, *Obstacles to Justice*

¹⁷⁰ Article 3148(1) C.C.Q.

¹⁷¹ Article 3148(3) C.C.Q.

¹⁷² Scott and Wai, *Transnational Governance of Corporate Conduct*, at 302 (citing *Recherches Internationales Quebec c Cambior Inc.*, [1999] JQ No 1581 (Quebec Superior Court, 12 May 1999)).

¹⁷³ *Id.* In the mid-1990s, a group of twenty South African plaintiffs brought negligence claims against Thor Chemicals Holdings Ltd ('Thor'), and its Chairman in a case alleging that the company exposed large numbers of its workers to high levels of mercury. The civil case followed a criminal prosecution of the parent company and its chairman in South Africa, and alleged that the torts were connected with England on the basis of the parent company's direct involvement with and supervision of the local subsidiary's decision to use an intrinsically hazardous process. In 1994, a citizen of Scotland brought a claim against RTZ Corporation and RTZ Overseas Services Ltd., the ultimate parent and intermediate parent company of a subsidiary corporation engaged in uranium mining in Namibia, alleging that he had contracted cancer as a result of inhaling radioactive debris while working at the subsidiary's mine. The plaintiff sued the parent companies of the subsidiary for negligence, and the court initially retained jurisdiction over the claim, demonstrating that the English courts might potentially be available for certain extraterritorial tort claims against MNCs. *Connelly v Rio Tinto Plc.*, Queen's Bench (4 December 1998) (unreported). In 1997, five South African mine workers sued Cape Plc., an English corporation, alleging that they suffered asbestos-related injuries as result of the one of its South African mine's activities. The English courts sustained jurisdiction over the negligence action, after which 3,000 additional plaintiffs filed claims. Defendants made a motion for *forum non conveniens* that was reviewed by several courts, and which was eventually rejected by the House of Lords. *Re Cape Plc and Other Companies.*

¹⁷⁴ Although a court upheld jurisdiction in the *Thor* case, the company settled all of the claims against it before any cases could proceed to the merits. In *Lubbe v. Cape PLC*, the parties entered into a settlement that included victims' trusts to provide existing and future claimants with compensation amounting to £27 million. *Re Cape Plc and Other Companies. Connelly v. RTZ Corp.*, was eventually dismissed on the grounds that the statute of limitations had expired in Namibia.

¹⁷⁵ *Dagi v. The Broken Hill Proprietary Company Ltd.* [1997] 1 V.R. 428.

jurisdiction over the plaintiffs' negligence claims against the company, but noted that this would be true only if the claim would have given rise to civil liability had the conduct occurred in Australia and if the claim would equally give rise to civil liability in their home country as well.¹⁷⁶ Before the claim could proceed to the merits, however, the parties reached a settlement agreement. Finally, in Canada, as mentioned above, a group of Guyanese plaintiffs sued mining giant Cambior in tort for harm suffered in Guyana.¹⁷⁷

Thus, it appears that at least in theory, there are several jurisdictions with the present capacity to adjudicate certain tort claims alleging extraterritorial misconduct by MNCs. While they are significantly different from ATS claims insofar as the causes of action on which the plaintiffs must rely are municipal, rather than international, "suits founded on domestic tort law can serve similar goals...even without labeling the bases for claims as international human rights abuses."¹⁷⁸ Even if plaintiffs are required to frame their actual claims as municipal torts, "human rights also could be *indirectly* pleaded, in that, while they could be the object or purpose of the litigation, other legal categories would be invoked in order to vindicate the substance of human rights protections."¹⁷⁹ In this context, "the turn to international human rights law provides a vehicle for the introduction and consideration of alternative *policy* considerations and *value*-laden premises...the social...that help channel and structure reasoning "within" law."¹⁸⁰

However, there are other difficulties that accompany even these exceptional instances of non-US extraterritorial tort litigation. Specifically, several aspects of municipal tort law either rendered each of these cases largely ineffective from a global governance perspective, or threatened to do so before the parties settled. Perhaps the most troubling from a global governance perspective are the rules governing choice of law. Municipal tort actions in almost every country are governed by choice of law rules that often point courts to the *lex loci delicti*, the law of the place where the injury was sustained, as the source of the rule to be applied by the court. This can have grave consequences in some systems, like Germany's, which only allows non-nationals to bring tort claims if they can ensure that German law will apply to the dispute.¹⁸¹ Moreover, "[s]uch a requirement returns control over a plaintiff's claims to the legal system in which the abuses took place – a legal system that may be under the sway of the government responsible for the abuses and unlikely to afford redress for plaintiffs' damages."¹⁸²

In many systems, the general rule pointing to the *lex loci* can be displaced. For example, under England's Private International Law Act, courts will consider whether it is "substantially more appropriate" to apply the law of the forum or that of a state other than the *lex loci*.¹⁸³ In doing

¹⁷⁶ *Id.*

¹⁷⁷ Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms*, *supra* n. ___ at 302 (citing *Recherches Internationales Quebec c Cambior Inc.*, [1999] JQ No 1581 (Quebec Superior Court, 12 May 1999)).

¹⁷⁸ Stephens, *Translating Filartiga*, at 39.

¹⁷⁹ Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms*, *supra* n. ___ at 294.

¹⁸⁰ *Id.* at 294-95.

¹⁸¹ Oxford Pro Bono Publico at 154-55. Note that this requirement is satisfied if the plaintiff can demonstrate that German law will apply as a result of the principle of *ordre public*.

¹⁸² Stephens, *Translating Filartiga*.

¹⁸³ Private International Law (Miscellaneous Provisions) Act 1995 c.42 (PIL(MP)A), part III, §§ 12, available at http://www.opsi.gov.uk/acts/acts1995/ukpga_19950042_en_2.

so, courts are permitted to take into account “factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.”¹⁸⁴ Moreover, many states, including England, provide an additional exception to the *lex loci* rule if the foreign law to be applied violates the “public policy” or *ordre public* of the forum. However, courts may be very reluctant to apply the “public policy” exception, even in cases involving transnational conduct.¹⁸⁵ For example, the Canadian Supreme Court has made it clear that in private international law cases, the misconduct alleged must have been prohibited by the laws of the country in which it occurred for liability to attach in Canada, and although the Canadian courts are permitted to make exceptions in order to avoid injustice, such exceptions are to be extremely limited.¹⁸⁶ The Australian court in *Dagi* articulated a similar “double-actionability” rule.¹⁸⁷ This barrier has led plaintiffs to attempt to frame their tort claims as having a greater connection to the home state of the MNC than to the place where its misconduct occurred, with mixed results. For example, the court in one transnational tort case in England insisted upon applying both English and Namibian law, and upon finding that Namibian law would preclude the plaintiff’s claim against the MNC defendant on statute of limitations grounds dismissed the action in England as well.¹⁸⁸ On the other hand, in a different tort claim against an MNC in England, the court of first instance not only retained jurisdiction over the English-based MNC, but noted that since the plaintiffs’ complaint alleged that the English headquarters of the MNC played a primary role in designing its subsidiary’s strategy for operations, English, rather than South African law, would “probably” be applied to the case.¹⁸⁹

Finally, it is important to note that even in jurisdictions where private law mechanisms are unavailable or ineffective, there may be other regulatory channels through which regulation of transnational business activity could be pursued. Notably, many countries permit aggrieved individuals to make use of what is known as a *partie civile* mechanism. There are several common variations of this tool, which have been embraced by several civil law jurisdictions, including Austria, Egypt, France, Italy, Mexico, Poland, Romania, Spain, Sweden, and Venezuela.¹⁹⁰ In one variation, the victim of a crime has a right to become a party to a criminal case, to seek compensation, and even to appeal the case if it fails on the first instance;¹⁹¹ in the

¹⁸⁴ *Id.*

¹⁸⁵ Stephens, *Translating Filartiga*, at 33 (citing Anne C. McConville, *Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction’s Relationship to Ex Juris Service, Form Non Conveniens, and the Presumption of Territoriality*, in TORTURE AS TORT at 157, 157-58 (concluding that although Canadian legal principles permit civil human rights claims, Ontario courts “may be reluctant” to resolve such claims “through private law actions derived from, or bolstered by, public international law norms.”))

¹⁸⁶ *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

¹⁸⁷ *Dagi v. The Broken Hill Proprietary Co.*, [1997] 1 V.R. 428.

¹⁸⁸ *Connelly v Rio Tinto Plc*, Queen’s Bench (4 December 1998) (unreported). Note, however, that this ruling was made on the grounds of the “double actionability” rule then prevailing in English private international law, according to which the conduct complained of must have been such to give rise to a claim in the place in which it occurred as well as in England in order for a court to retain jurisdiction. While the PIL(MP)A eliminates this rule, it still calls for the general application of the *lex loci delicti*, meaning that the forum’s statute of limitations rules might still be applied in future cases.

¹⁸⁹ Oxford pro bono publico at ?

¹⁹⁰ Stephens, *Translating Filartiga* at 18.

¹⁹¹ See, e.g., Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, supra n.____ at 20-21 (citing French Code of Criminal Procedure: “All persons who, in conformity with Article 2 [of the French Penal Code], claim to have been injured by a wrong can, if they have not yet done so, move to be considered a civil party in the case. No lawyer is required to make this motion before the court. The civil party can, in support of their cause of

other, the private party can formally request a private prosecutor to file charges and then attach civil claims to any prosecution that ensues.¹⁹² These proceedings can be extremely beneficial to those affected by misconduct, particularly in systems that do not permit broad discovery and in those in which it is extremely costly to mount civil claims.¹⁹³

Unfortunately, such mechanisms have drawbacks from a global governance perspective. Most significantly, they condition judicial action on the willingness of state agents such as prosecutors to expend their limited resources on behalf of non-citizens in complex investigations that will necessarily be transnational in scope. For this reason, “weak representation of foreign interests and values inside domestic public regulatory processes” may render public regulation of transnational actors practically unattainable.¹⁹⁴ Moreover, some states, such as France, render a private party who initiates a *partie civile* prosecution liable to the defendant for the costs of its defense if the prosecution is unsuccessful.¹⁹⁵ As in the civil context, these “loser pays” provisions serve as a particularly strong deterrent for would-be complainants against MNCs, as those corporations are the most likely to have costly corporate counsel whose fees would be daunting to most private individuals.

The experience of the many jurisdictions that authorize *partie civile* mechanisms shows this to be true. In fact, there are only two known instances in which states have entertained plaintiff-initiated prosecutions related to extraterritorial MNC misconduct, both of which arose out of the same set of facts. These prosecutions were brought in Belgium and France against the French oil company Total and two of its executives. Notably, neither of the prosecutions actually proceeded to trial, with one case resulting in a settlement and the other being dismissed entirely.¹⁹⁶

Moreover, even where *partie civile* mechanisms exist, they may not necessarily be available to remedy the sorts of disputes at issue in corporate ATS cases, as many non-US systems that strongly favor criminal law over tort law do not recognize the criminal capacity of corporations as such, but rather apply criminal law only to individuals. Those systems that do not conceive of corporations as bearing criminal capacity include such major states as Germany, Russia, and India.¹⁹⁷ Certainly, criminal actions can still be pursued against individual corporate officers in such systems, but the likelihood that responsibility for MNC conduct will be established with respect to one individual is slim, and the potential for such actions to result in the provision of remedies to victims is far more limited. For instance, in Germany, although an administrative authority could, in theory, bring a criminal prosecution against individual corporate officers

action, ask for damages corresponding to the damages which they have suffered.” French Criminal Code, Art. 2: ““all who have personally suffered a damage directly caused by the crime have a right to reparation of that damage by a civil cause of action. [‘action civile’].”)

¹⁹² Stephens at 18-19.

¹⁹³ Stephens at 21.

¹⁹⁴ Wai, *Liftoff*, at 233.

¹⁹⁵ Stephens at 20.

¹⁹⁶ See *infra* (discussion of the *Unocal* litigation).

¹⁹⁷ See Oxford Pro Bono Publico at 330-344. In addition, while China does attach criminal liability to corporations, that liability does not extend to their extraterritorial conduct. Oxford Pro Bono Publico at 342-343.

regarding conduct committed extraterritorially, there is no opportunity for victims to join such an action or to obtain any compensation.¹⁹⁸

In sum, the effect of the fact that the ATS is a highly unique regulatory approach to transnational corporate conduct – insofar as it is based on private, rather than public law, and accompanied by a host of plaintiff-friendly procedural rules in the U.S. courts – is to decrease significantly the possibility that it will evolve directly into a global governance regime, with significant numbers of states in the world mimicking the ATS approach and providing private causes of action for individuals aggrieved by transnational corporate conduct. To the extent that this is true, the ATS as global regulation might be said to suffer from a serious “representativeness,” “participation,” and “publicness” deficit. However, as the above review has demonstrated, there are judicial mechanisms in a variety of other states which could be used, together with the ATS, to perform a global regulatory function. The task will necessarily involve greater articulation of rules governing the allocation of authority between courts applying different methods of dispute resolution – notably, private law based on standards derived from international law (like the ATS and the recent French civil case), private law based on municipal tort law (as in Canada, England, and Australia), criminal law based on the use of *partie civile* mechanisms, and criminal prosecutions instigated by the state. Yet several of these alternative mechanisms would seem to be less effective than the ATS regime for the purpose of global regulation. For example, the prosecutorial discretion that necessarily accompanies *partie civile* and other criminal law remedies renders that body of law less open and accessible than private law. This weak institutional supply, particularly when combined with a weak civil society or other barriers to litigation such as high filing fees or the unavailability of *pro bono* or contingency fees for legal assistance, will increase the power of “capture groups” like MNCs vis-à-vis those aggrieved by their activities.¹⁹⁹ Moreover, to the extent that other jurisdictions enact barriers to private litigation not present in the United States – in the form of filing fees, the unavailability of contingency fee arrangements, and the inability to join claims in a class action or consolidation procedure – their judicial systems will be less accessible to would-be complainants than that of the United States.

Thus, while these barriers to effective global regulation are not insurmountable, U.S. courts will need to engage in a sophisticated analysis of the remedies available to litigants in their home jurisdictions and to take these disparities into account when determining whether or not to exercise or relinquish jurisdiction in a given corporate ATS case. Moreover, as Kingsbury emphasizes, even if the U.S. courts and those of other countries are able to apply ATS-style regulation of corporations in a decentralized network, their efforts will nevertheless confront several legality deficits.²⁰⁰ Thus, domestic courts must endeavor to harmonize their efforts at least to such a degree that they can specify in advance which norms will apply and guarantee that adequate corrective and control mechanisms exist. Several strategies that U.S. courts can employ in pursuit of these objectives will be discussed in the next section of this paper.

2. Consequences of unilateral regulation by US courts

¹⁹⁸ Oxford Pro bono Publico (Germany summary in conclusion).

¹⁹⁹ Mattli and Woods, *In Whose Benefit?*, *supra* n. ___ at 41.

²⁰⁰ See Kingsbury, *The Concept of “Law” in Global Administrative Law* at 51-53.

The U.S. approach to civil litigation may pose another challenge for the potential of the ATS to function as a global regulatory mechanism: the unintended broader consequences that may result from allowing litigants to drive the evolution of the ATS and the development of global standards for corporate liability.

Curtis Bradley takes particular issue with the private-law nature of ATS litigation, arguing that it “shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives.”²⁰¹ In his view, ATS judgments, even though initiated by private individuals, constitute “official condemnation and sanction” once they are “backed up by the judicial branch of the US government.”²⁰² This is true even if the suits are ultimately dismissed, so long as they generate substantial publicity, and particularly if they “require the courts to make some assessment of foreign government conduct prior to dismissal.”²⁰³ Yet unlike government officials, plaintiffs and their lawyers have no incentive to weigh the benefits of their ATS suits against the potential costs to foreign relations that could result. Moreover, as Ramsey notes, as civil actions, ATS claims are not only free from the check of prosecutorial discretion, but also have fewer procedural protections and a lower standard of proof, increasing the possibility of “error.”²⁰⁴

Some commentators further criticize the ATS regime because of the potential costs it may impose on developing countries, and claim that it threatens to establish “de facto sanctions against states with poor environmental and human rights records.”²⁰⁵ Slaughter and Bosco argue that “[f]ew corporations will want to risk liability by working with countries that regularly violate international standards.”²⁰⁶ Moreover, the U.S. government and others have argued that the recognition of aiding and abetting liability conflicts directly with “constructive engagement” policies that attempt to increase human rights protection in developing countries or those with oppressive governments through economic development.²⁰⁷ The result of such liability, they argue, could be to prompt widespread disinvestment by MNCs in countries with poor human rights records, to reduce trade and access to credit in those countries, and to provoke disinvestment from the US by foreign MNCs.²⁰⁸ While the economic soundness of these

²⁰¹ Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 460-61 (2001).

²⁰² *Id.* at n. 12.

²⁰³ *Id.* at 472.

²⁰⁴ Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271 (2009).

²⁰⁵ Slaughter and Bosco, *Plaintiff’s Diplomacy*, *supra* n. __.

²⁰⁶ *Id.*; see also Gary Clyde Hufbauer and Nicholas K. Mitroostas, *International Implications of the Alien Tort Statute*, 7 J. INT’L ECON. L. 245, 246, 156-57 (2004) (arguing that “MNCs may curtail their investments in countries with less-than-perfect records in human and labor rights and respect for political and environmental norms.”).

²⁰⁷ See Brief for the United States as Amicus Curiae in Support of the Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Feb. 2008) (arguing that United States policy “relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries.”); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, forthcoming, *supra* n. __ at 45-46.

²⁰⁸ Hufbauer and Mitroostas, *International Implications of the Alien Tort Statute*, 7 J. INT’L ECON. L. at 246, 156-57 (arguing that “MNCs may curtail their investments in countries with less-than-perfect records in human and labor rights and respect for political and environmental norms.”).

arguments is hotly debated,²⁰⁹ it has nevertheless been echoed by the South African, British, and German governments.²¹⁰

The combination of the risks of corporate ATS litigation outlined above, and particularly the potential for friction between the United States and other countries, may indeed pose a serious threat to the viability of the statute itself. In the absence of greater coordination and engagement with foreign countries regarding the amenability of their home jurisdictions to similar litigation, it is unlikely that the U.S. courts' articulation of legal norms governing MNCs will induce other countries to spontaneously endorse their decisions. Rather, "[r]ulings by U.S. courts cannot substitute for the hard work of reaching consensus within foreign states on respect for human rights and responsible development."²¹¹ Moreover, to the extent that U.S. courts are perceived by outsiders as exploiting the U.S.'s economic power and unfairly asserting jurisdiction over MNCs that "do business" in the U.S. out of economic necessity, "it will invite non-cooperation, ill-will, and even open antagonism."²¹² Surely, such antagonism might also "harm the potential force of progressive judgments from the United States in foreign jurisdictions."²¹³

3. The "Doing Business" Justification for Personal Jurisdiction

Another weakness of the ATS as a regulatory mechanism is the fact that courts often adjudicate disputes under the statute by relying on jurisdictional principles that are generally not embraced outside the United States.

Pursuant to the principle of "doing business" or "transient" jurisdiction, U.S. courts can exercise "general jurisdiction" – or jurisdiction over any claim an individual might have with respect to corporation, on the basis that the corporation engages in "substantial activity" in the forum.²¹⁴ This is true even if the forum in which the court is located has no connection with the particular claim that the plaintiff brings against the corporation. As articulated in the Supreme Court case *International Shoe Co. v. Washington*, to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state," but also incurs corresponding obligations placed upon it by that state.²¹⁵ Over the course of the last fifty years, U.S. court have placed limits on the exercise of "doing business" jurisdiction, requiring that a defendant have, at the very least, significant contacts with the forum above and

²⁰⁹ See, e.g., *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (stating, "[t]o the extent the Executive Branch suggests that a prohibition on knowingly providing substantial assistance to violations of the law of nations would have a substantial chilling effect on doing lawful business in a pariah state, the suggestion is speculative at best.").

²¹⁰ *Id.* The South African government stated that the litigation could have a destabilizing effect" because it would "discourage much-needed growth and employment," while the UK government claimed, "[l]itigation of this nature may hinder global investment in developing economies, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries."

²¹¹ *Slaughter and Bosco, Plaintiff's Diplomacy*, *supra* n.____.

²¹² Robert Wai, *Transnational Liftoff and Juridical Touchdown*, *supra* n.____ at 248.

²¹³ *Id.*

²¹⁴ Linda J. Silberman, *The impact of jurisdictional rules and recognition practice on international business transactions: the U.S. regime*, HOUSTON J. INT'L L. (2004); see, e.g. N.Y. C.P.L.R. § 301 (New York State statute providing "doing business" standard).

²¹⁵ *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)

beyond mere physical presence in order to be subject to jurisdiction there.²¹⁶ Despite these limitations, however, “doing business” jurisdiction endures in the United States, and explicitly disclaims any requirement that a defendant’s conduct have a “nexus” with a U.S. forum in order to become the business of the U.S. courts. At present, the Supreme Court’s test for the exercise of general jurisdiction over nonresident corporations requires only that a corporation exercise “continuous and systematic” contacts with the forum²¹⁷ and that the assertion of jurisdiction comport with “traditional notions of fair play and substantial justice – that is, whether ... [the exercise of jurisdiction] is reasonable under the circumstances of a particular case.”

The U.S. Supreme Court has justified the assertion of jurisdiction by U.S. courts over nonresident foreign corporations that engage in significant business in the United States, even if the activity complained arose altogether outside the United States, as being particularly necessary given the realities of globalization. For example, Justice Brennan has stated,

As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation’s commercial activities.²¹⁸

A significant number of ATS cases brought against corporations – particularly those incorporated outside the United States – have been brought under the “doing business” principle of personal jurisdiction. For example, in the *Wiwa v. Royal Dutch Shell* case, defendants Royal Dutch Petroleum Company (“Royal Dutch”) and Shell Transport and Trading Co., P.L.C. (“Shell Transport”), incorporated in the Netherlands and the United Kingdom, were found to be subject to the general jurisdiction of the federal courts of the Second Circuit because the corporations have the following “contacts” with the forum: (a) both list their shares, either directly or indirectly, on the New York Stock Exchange;²¹⁹ (b) both own subsidiary companies that do business in the United States, including Shell Petroleum Inc. (SPI), a Delaware corporation, the 100% owner of Shell Oil Company (Shell Oil), the well-known oil and gas concern, which has extensive operations in New York and is subject to the jurisdiction of the New York courts;²²⁰ and (c) the defendants maintain an Investor Relations Office in New York City, which, while

²¹⁶ Moreover, U.S. courts may be able to obtain general jurisdiction over parent corporations of an MNC if their subsidiaries engage in conduct significant enough to pass the “doing business” test, provided that the subsidiary and the parent corporation are sufficiently interrelated to make the subsidiary an “agent” or “alter ego” of the parent corporation. Silberman, *The impact of jurisdictional rules*; see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (citing *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967)). Note that attributing a subsidiary’s contacts to a parent corporation for the purpose of establishing personal jurisdiction is not the same thing as attributing liability to a parent corporation for a subsidiary’s actual conduct. Even if ATS plaintiffs secure personal jurisdiction over a parent corporation, they will still be required to prove that the parent incurred legal responsibility for the subsidiary’s behavior at a later point in the case in order to prevail. See *Doe v. Unocal*.

²¹⁷ Silberman, *The impact of jurisdictional rules*, (“courts in the United States have required more than just “some activity” in order to satisfy the common law standard for “doing business” jurisdiction; the level of activity must be continuous, ongoing, and pervasive”) (citing *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 565 N.E.2d 488, 490 (N.Y. 1990)).

²¹⁸ *Id.* at 423 (Brennan, J., dissenting).

²¹⁹ *Id.* at 93.

²²⁰ *Id.*

nominally a part of Shell Oil, was exclusively engaged in facilitating the relations of the defendant parent corporations with the investment community, and which was reimbursed by the parent corporations for all its expenses, amounting to around \$500,000 a year.²²¹ Moreover, U.S. courts determined that it would be “reasonable” to exercise jurisdiction over the defendants in New York because:

The defendants control a vast, wealthy, and far-flung business empire which operates in most parts of the globe. They have a physical presence in the forum state, have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions, have a four-decade long relationship with one of the nation's leading law firms, and are the parent companies of one of America's largest corporations, which has a very significant presence in New York. New York City, furthermore, where the trial would be held, is a major world capital which offers central location, easy access, and extensive facilities of all kinds.²²²

As a result of “doing business” jurisdiction, ATS plaintiffs have been able to bring several non-U.S. corporations before the US courts to answer claims that they engaged in conduct prohibited under international law, even when that conduct occurred entirely abroad. These non-US MNCs include (but are not limited to) Talisman Energy Corp, a Canadian-based energy company; Daimler-Chrysler, a German-based auto manufacturer; Rio Tinto, a U.K.-based mining conglomerate; Arab Bank, a Jordanian financial institution, and Shell, based in the United Kingdom and the Netherlands.²²³ The offenses of which they are accused arose not in the United States, but rather in countries such as Sudan, South Africa, Papua New Guinea, Israel, and Nigeria.

On the other hand, many foreign jurisdictions have adopted a dramatically different – and much more limited – perspective on jurisdiction than that found in the United States. For example, Canada conditions extraterritorial jurisdiction on the existence of a “real and substantial connection” with the forum.²²⁴ In China, corporations can only be sued in actions regarding their extraterritorial conduct if the parties consent to the exercise of such jurisdiction *and* can demonstrate that there is a connection between the dispute and China.²²⁵ In Europe, three principles that particularly animate jurisdictional law include (1) the default rule, derived from the Roman *jus commune*, of *actor sequitur forum rei si* (plaintiffs must follow the defendant to his domicile);²²⁶ (2) the principle that jurisdiction always should be premised on a strong connection between the forum and the controversy;²²⁷ and (3) the notion that for each suit there is one forum with the strongest connection to the cause of action.²²⁸ Clearly, all three of these principles would seem to cut strongly against the ATS-type litigation practiced in the United States, at least

²²¹ *Id.*

²²² *Wiwa*, 226 F.3d at 99.

²²³ *See Presbyterian Church of Sudan v. Talisman* (2d Cir.); *Sarei v. Rio Tinto* (9th Cir.); *Khulumani v. Barclays Nat'l Bank* (2d Cir) (Daimler-Chrysler is a co-defendant); *Almog v. Arab Bank* (SDNY).

²²⁴ Barnali Choudhury, BEYOND THE ALIEN TORT CLAIMS ACT: ALTERNATIVE APPROACHES TO ATTRIBUTING LIABILITY TO CORPORATIONS FOR EXTRATERRITORIAL ABUSES, 26 Nw. J. Int'l L. & Bus. 43 (2005) at text at fn. 52; see also *Bouzari v. Iran*, [2004] 71 O.R.3d 675 P 3.

²²⁵ Oxford Pro Bono Publico at 342-43.

²²⁶ Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RCADI 9, 81 (1994).

²²⁷ Dubinsky at 234-35.

²²⁸ Dubinsky at 235.

insofar as the U.S. courts have assumed jurisdiction over claims against foreign multinational corporations in disputes with no other nexus to the U.S.

One particularly noteworthy manifestation of these differing approaches to jurisdiction is the Brussels Convention on the Recognition and Enforcement of Judgments in Europe, which has been incorporated into EU-level regulation and now governs issues of procedure in transnational private litigation in all EU member states.²²⁹ The broad goals underlying the Brussels regime are (a) curtailing the exercise of exorbitant jurisdiction; (b) channeling litigation toward its natural forum; and (c) enhancing legal certainty.²³⁰ The Brussels regime aims to accomplish these goals in a number of ways that are relevant to the enterprise of using tort litigation as a means to regulate the extraterritorial conduct of MNCs. First, the Convention dictates that the home forum of a multinational corporation is the only jurisdiction permitted to exercise “general” jurisdiction over claims relating to the corporation, and goes so far as to *require* the courts of the MNC’s home forum to adjudicate such claims.²³¹ Second, the Convention bars courts in any member state from relying on a list of “exorbitant” jurisdictional bases to assert jurisdiction over a defendant domiciled anywhere within the EU.²³² These “exorbitant” bases include “doing business jurisdiction.” Third, the Convention establishes a “first to file” rule, meaning that once a claim has been brought, litigants cannot have it moved to another forum, on grounds of *forum non conveniens* or otherwise. Fourth, the Convention also prohibits states from enforcing judgments rendered against EU domiciliaries by Member States on the basis of such “exorbitant” bases of jurisdiction. The effect of these provisions is to utterly preclude EU Member States from asserting jurisdiction over tort claims against MNCs domiciled elsewhere in Europe on the basis of their extraterritorial activity, and to prohibit all other Member States from enforcing any resulting judgment if they do.

Certainly, the Brussels regime does not require member states to abandon their particular jurisdictional traditions, as the regime only applies in matters before European courts and involving defendants domiciled in member states. Indeed, England and Ireland still authorize “doing business” jurisdiction²³³ and Sweden allows jurisdiction based on ownership of property in the forum, even if it is not the basis of the litigation.²³⁴ However, as efforts are increasingly being made to promote a global procedural harmonization movement, particularly through the Hague Conference on Private International Law, “EU countries...[see] the Convention as the

²²⁹ Council Regulation 44/2001, 2001 O.J. (L 12) 2; see Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211 (2005).

²³⁰ Dubinsky at 330-31.

²³¹ Brussels Convention, art. 25. While plaintiffs may sue a subsidiary or branch of an MNC in the country where it is located, they can only do so with regard to disputes related to the subsidiary’s operations. See Dubinsky at 238.

²³² Brussels Convention, art. 3. Member States can, however, apply exorbitant bases of jurisdiction with respect to defendants domiciled outside the EU, as well as in purely domestic suits.

²³³ Linda Silberman *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 322, 340 (2002-2003) (citing Dicey & Morris, CONFLICT OF LAWS, at 296-300; *South India Shipping Corp. Ltd. v. Export-Import Bank of Korea*, [1985] 1 W.L.R. 585, 592 (C.A.)); *Saab v. Saudi Am. Bank*, [1998] W.L.R. 937 (Q.B.) (in which a foreign bank was held subject to suit in England where it was found to have an “established place of business” in England. The Court of Appeals explained that to exercise jurisdiction in such a case was to put such a foreign company on the same footing as an English company in making it subject to suit.)).

²³⁴ Stephens, *Translating Filartiga* at 23.

presumptive starting point for any effort to expand judicial cooperation and procedural harmonization globally.”²³⁵

The Brussels regime clearly reflects several of the principles that have motivated strong opposition from many states to the concept of “doing business” jurisdiction. First, while the “doing business” approach is consistent with the general American philosophy to judicial jurisdiction, which emphasizes the connection between the forum and the defendant, it is inconsistent with the philosophical approach embraced by many European countries, and particularly those following the civil law tradition.²³⁶ These countries’ approach to jurisdiction emphasizes the connection between the forum and the dispute, rather than that between the forum and the defendant. Thus, as “doing business” jurisdiction requires no “nexus” between the forum and the dispute, they perceive it as an exorbitant exercise of state power and as unfair to litigants.²³⁷ Second, if states permit the exercise of “doing business” jurisdiction, they necessarily open the door for concurrent jurisdiction, which many European states have sought to discourage, on the grounds that concurrent jurisdiction provides opportunities for plaintiffs to engage in forum shopping on the basis of different procedural rules or substantive laws. Many European states regard forum shopping as a threat to the EU’s attempt to create a level economic playing field, and see it as a potential source of friction between states that could result if some were to become “magnets” for plaintiffs and gain a disproportionate effect on legal relations in the EU.²³⁸ Finally, U.S.-style “doing business” jurisdiction offends another value inherent in many systems, such as Austria, Germany, and Switzerland, even before the Convention: the principle of legal certainty. As Linda Silberman notes, “[t]he most difficult problem for foreign defendants in dealing with the existing regime of U.S. jurisdictional standards – whether the exercise is that of general or specific jurisdiction – is the inability to extrapolate clear rules and the resulting lack of predictability in knowing how to structure affairs or to make decisions with respect to litigation strategy.”²³⁹ Thus, “doing business” jurisdiction, in which the appropriateness of a forum is determined by a set of relationships between the defendant and the forum, stands in obvious contrast to the approach under the Brussels Convention, where one contact (like the domicile of an MNC) is determinative for jurisdiction over an entire class of cases.²⁴⁰

²³⁵ Dubinsky at 36; *see also* Mathias Reinmann, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 102-105 (1995) (comparing European multilateralism with US unilateralism).

²³⁶ Silberman, *Comparative Jurisdiction in the International Context*, *supra* n.____ at 330.

²³⁷ *Id.* At 322-42. According to Silberman, civil law regimes object to general “doing business” jurisdiction because (a) they tend to discourage opportunities for forum shopping at the transnational level; (b) they prefer a regime based on formal rules rather than discretion, and the test for whether doing business jurisdiction is appropriate in the US is based on vague standards like “minimum contacts” and “reasonableness,”; and (c) they object to the exercise of jurisdiction when the defendant has a relatively attenuated relationship with a given forum.

²³⁸ Dubinsky at 237.

²³⁹ Linda J. Silberman, *The impact of jurisdictional rules and recognition practice on international business transactions: the U.S. regime*, HOUSTON J. INT’L L. 327 (2004).

²⁴⁰ During the recent negotiations between the United States and Europe at the Hague Conference on Private International Law, the European countries continued to insist that “doing business” jurisdiction be included in the list of “exorbitant” bases of jurisdiction on the basis of which states parties to the Convention would be obligated to refuse to enforce other states parties’ judgments. While the US continued to insist that this aspect of the Convention be altered – a fact which contributed to the failure of the conference to result in an international convention – it is clear that the issue is still a contentious one between member states of the EU and the United States. *See* Silberman, *The impact of jurisdictional rules and recognition practice on international business transactions*, *supra* n.____.

Despite this general reluctance on the part of other states to endorse U.S.-style “doing business” jurisdiction, there have been a few situations in which courts outside the U.S. have relaxed their opposition to “doing business” jurisdiction in the interest of providing substantial justice to victims of grave human rights abuses. For example, in the *Bouzari v. Iran* case in Canada, the Ontario Supreme Court indicated that the “real and substantial connection” requirement for civil jurisdiction under Canadian law could be modified in cases of torture, stating that as the test is driven by notions of order and fairness, it can be modified to meet the “special challenges” of a case.²⁴¹ Moreover, in 1985, French authorities exercised jurisdiction over a non-national of France accused of sending French citizens to Nazi concentration camps in World War II on the basis of his physical presence in France alone. The French court justified its action on the grounds that “the crimes against humanity” of which he was accused did “not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.”²⁴² Finally, in 1997, one European court specifically altered its tradition position on enforcement of foreign judgments in order to give recognition to a U.S. judgment in an ATS case against Ferdinand Marcos. While the Swiss courts normally recognize foreign judgments only pursuant to mutual recognition treaties – into which the U.S. and Switzerland had not entered – the Swiss Federal Supreme Court held that “that the nature of the rights at stake – rights that were the subject of human rights treaties, customary law, and *jus cogens* norms – dictated that Swiss courts be willing in principle to recognize at least some aspects of a U.S. judgment, even in the absence of a treaty.”²⁴³

Additionally, there is one parallel trend emerging in Europe and elsewhere suggesting that their focus on finding the “natural forum” of a case and identifying a nexus between defendants and fora may be less than absolute. Over the course of the last twenty years, a number of states have specifically enacted legislation providing for the exercise of universal jurisdiction over internationally-recognized crimes, including Australia, the United Kingdom,²⁴⁴ Spain,²⁴⁵ France,²⁴⁶ Denmark,²⁴⁷ Canada,²⁴⁸ and South Africa. This trend can only be expected to continue following the entry into force of the Rome Statute establishing the International

²⁴¹ Choudhury, *Beyond the Alien Tort Claims Act*, *supra* n. ___. Note, however, that the case was dismissed on sovereign immunity grounds nonetheless. *Bouzari*, [2004] 71 O.R.3d at 675.

²⁴² *Federation nationale des deportes et intenes resisitants et patriots v. Barbie*, Cass. Crim., Dec. 20, 1985, J.C.P. 1986, II G, No. 20, 655 (translated in 78 I.L.R. 125, 128); *cf.* Dubinsky at 261.

²⁴³ Dubinsky at 284 (discussing *In re Federal Office for Police Matters*, Judgment by the Swiss Federal Supreme Court, Case 1A.87/1997/err, paras. 6(c)(dd)-(hh) (Dec. 10, 1997). Dubinsky also notes that “ruling was instrumental in enabling the plaintiff class to negotiate a \$150 million settlement with the Marcos estate.” *Id.*

²⁴⁴ Criminal Justice Act 1988, section 134, available at http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880033_en_1.htm (providing for universal jurisdiction over torture).

²⁴⁵ Mugambi Jouet, *Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT’L & COMP. L. 495, 504-505 (2007) (citing Article 23.4 of Spain’s Law on Judicial Power) (providing for universal jurisdiction over genocide and terrorism).

²⁴⁶ Code of Criminal Procedure (Code de procédure pénale) 1957, as amended by the Act of December 1992, arts. 112-2 and 689-2 available at http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm (providing for universal jurisdiction over torture, Grave Breaches of the Geneva Conventions, and crimes against humanity).

²⁴⁷ Penal Code (*Straffeloven*) 1930, section 8 (5) (providing for universal jurisdiction over torture and Grave Breaches of the Geneva Conventions).

²⁴⁸ Canada provides for universal jurisdiction over genocide, crimes against humanity, and war crimes.

Criminal Court.²⁴⁹ Moreover, a significant number of states, in Europe and elsewhere, have entered into a series of “second-generation” treaties like the Hague and Montreal Conventions, which authorize domestic courts to exercise jurisdiction over perpetrators of terrorism, even in the absence of a connection between their conduct and the forum.²⁵⁰ Moreover, states have increasingly acted on these statutes and exercised universal jurisdiction over foreign nationals. At least Austria, Belgium, Denmark, France, Germany, Israel, Senegal, Spain, and Switzerland have either prosecuted individuals or requested their extradition in reliance on the principle of universal jurisdiction.²⁵¹ Moreover, in March 2003, the European Court of Human Rights upheld France’s exercise of universal jurisdiction in a criminal case brought by two human rights NGOs pursuant to the *partie civile* mechanism against a Mauritanian defendant accused of torturing of numerous individuals in Mauritania in 1990 and 1991.²⁵²

Under the doctrine of universal jurisdiction, states are permitted by international law to apply their laws to punish a limited class of offenses, despite the fact that the offense is in no way linked with the territory or nationals of the state.²⁵³ The Restatement (Third) of Foreign Relations Law of the United States defines universal jurisdiction as applying to “certain offenses recognized by the community of nations as of universal concern,” and lists piracy, slave trade, attacks on or hijacking of aircraft, genocide, and war crimes as examples of such offenses.²⁵⁴

Today, the premise according to which states justify their exercise of universal jurisdiction is that it is permissible for any state to exercise its coercive power to punish those who engage in unquestionably morally reprehensible conduct that jeopardizes international peace and security, regardless of the context in which that conduct occurred. The traditional conception of universal jurisdiction, developed with an eye to combating first piracy, and later slave traders, applied when: (1) no other state could exercise jurisdiction on the basis of the traditional doctrines; (2) no other state had a direct interest; and (3) the international community had an interest in prohibiting the conduct at issue.²⁵⁵ However, a second rationale for universal jurisdiction has emerged in the modern era: states have formally denounced certain conduct (*jus cogens* offenses) as lying outside the bounds of state behavior and have recognized that “to grant impunity to those who have committed grave human rights violations is to facilitate the commission of atrocities elsewhere.”²⁵⁶ Thus, today, even when a state has the *ability* to exercise jurisdiction on the basis of a traditional jurisdictional doctrine, unless it is *willing* to do so, another state can exercise universal jurisdiction as a result of the shared international interest in deterring such conduct. The basis for a state’s exercise of universal jurisdiction is “exclusively the nature of the crime and the purpose is exclusively to enhance world order by ensuring accountability for the

²⁴⁹ Dubinsky at 257.

²⁵⁰ Dubinsky at 256-257.

²⁵¹ Dubinsky at 276, 281.

²⁵² *Dah Ould v. France*. Requête no 13113/03. Council of Europe: European Court of Human Rights. 17 March 2009. *France*. Application No. 13113/03; see also <http://intlawgrls.blogspot.com/2009/05/ecthr-criminal-universal-jurisdiction.html>. Notably, the ECHR inquired into whether France’s exercise of jurisdiction met the complementarity requirements of Article 17 of the International Criminal Court in the course of its decision.

²⁵³ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. A (1987).

²⁵⁴ *Id.* § 404 (1987). Note that the list is non-exclusive.

²⁵⁵ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 96 (2001).

²⁵⁶ Dubinsky at 275-76.

perpetration of certain crimes.”²⁵⁷ In sum, “when available jurisdictional means are ineffective, universal jurisdiction should apply.”²⁵⁸

Certainly, the impact of states’ newfound embrace of universal jurisdiction over a few international law offenses on the prospects for transnational governance over MNCs should not be overstated. Notably, all of the legislation providing for universal jurisdiction has authorized only criminal prosecutions, although individuals have filed *partie civile* claims that led to two universal jurisdiction prosecutions in France.²⁵⁹ Moreover, many states have taken a very restrictive approach to the incorporation of universal jurisdiction, authorizing it for only a very limited category of offenses including genocide, Grave Breaches of the Geneva Conventions, crimes against humanity, and genocide. Finally, these statutes do not provide for jurisdiction over corporations, and some governments, like Canada’s, have explicitly stated that they are “uncertain” as to whether international crimes “can, as a matter of international law, be applied to corporations.”²⁶⁰ However, it does appear that, in contradiction to their traditional emphasis on the concept of the “natural forum” and a “nexus” between a forum and a legal claim, “for grave human rights offenses, many states grant their courts jurisdiction over alleged perpetrators in the absence of any of the connecting factors that would be required in other cases”²⁶¹ and subscribe the notion that “for some offenses, more fora are better than fewer.”²⁶²

While states’ support for the concept of universal jurisdiction may resolve some of the controversy surrounding the use of ATS litigation as global regulation, it does not do so completely. This is the case in part because universal jurisdiction has been traditionally defined in the vocabulary of criminal, rather than civil, law. However, the U.S. Restatement suggests that although the practice of recognizing universal civil jurisdiction is less common among states than that of recognizing universal criminal jurisdiction, it is nevertheless a legitimate exercise of state power.²⁶³ As international law rarely provides the means for its own enforcement, it would seem reasonable for states to be permitted to apply a variety of remedies in punishing conduct amounting to a universal jurisdiction offense.²⁶⁴ Additionally, some states that have enacted universal criminal jurisdiction allow victims to bring civil suits alongside prosecutions; moreover, the ICC, while a criminal tribunal, is authorized to provide for victim compensation.²⁶⁵ As Justice Breyer noted in his concurring opinion in *Sosa*, “consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more

²⁵⁷ Bassiouni at 88-89.

²⁵⁸ *Id.*

²⁵⁹ These cases are *In Re Munyeshyaka*, in which a Rwandan national was prosecuted in French courts for crimes against humanity and genocide; and *Prosecutor v. Javor*, in which the accused was charged with torture during the Yugoslavian civil war. Both cases resulted in controversial judgments, but an analysis into the idiosyncrasies of France’s implementation of universal jurisdiction into its domestic law is beyond the scope of this paper.

²⁶⁰ Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, Mining In Developing Countries – Corporate Social Responsibility; see Oxford Pro Bono Publico at 336.

²⁶¹ Dubinsky at 279.

²⁶² Dubinsky at 273-274.

²⁶³ See RESTATEMENT at § 404, comment *b* (“In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis...”).

²⁶⁴ See Stephens, *Translating Filartiga*, at 53.

²⁶⁵ Dubinsky at 271.

threatening,” and “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.”²⁶⁶

While the growing acceptance of universal jurisdiction is a promising development for those who would seek to rely on it as a justification for global regulation of corporate conduct, most countries appear have embraced it in only a limited sense to date. Indeed, states have proven generally reluctant to exercise universal jurisdiction, whether because they wish to avoid negative foreign policy repercussions, or because cases based on universal jurisdiction require a greater amount of resources, as evidence and witnesses are often located outside the forum.²⁶⁷ In one recent ATS case involving a Canadian oil company’s operations in Sudan, the government of Canada submitted a diplomatic note to the U.S. executive branch, which was then transmitted to the court in a Statement of Interest from the U.S. Department of State. In its letter, Canada objected to the U.S. courts’ exercise of jurisdiction to “activities of Canadian corporations that take place entirely outside the U.S.”²⁶⁸ Moreover, following one major decision in a corporate ATS decision involving several foreign corporate defendants, several states in which the defendants were domiciled sent diplomatic communications to the U.S. Executive Branch protesting the court’s decision as being contrary to international law. In all, three governments asserted that the court’s broad assertion of extraterritorial jurisdiction threatened to interfere with national sovereignty and damage foreign relations.²⁶⁹ The Government of Switzerland’s objection to the extraterritorial application of the ATS against foreign defendants was particularly scathing. In its Aide Memoire, the Swiss government insisted that “a broad assertion of jurisdiction to provide civil remedies for violations perpetrated by foreign corporations against aliens in foreign places is inconsistent with international law,” because “[i]nternational law does not recognize the principle of universal civil jurisdiction over the foreign conduct of defendants not affecting the forum State, unless the States involved have expressly consented to it.”²⁷⁰

4. U.S. law and foreign state-owned companies

Interestingly, although the ATS has been used to provide jurisdiction over foreign-incorporated MNCs that do significant business in the United States, as a result of inconsistencies between the bases for jurisdiction available to plaintiffs seeking to bring claims against privately-owned corporations and those available for claims against state-owned corporations before the U.S. courts, the ATS can only be brought to bear against foreign state-owned corporations under very

²⁶⁶ *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring).

²⁶⁷ Ratner, *Corporations and Human Rights* at fn. 371.

²⁶⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 344 (S.D.N.Y. 2003).

²⁶⁹ Brief for the United States as Amicus Curiae in Support of the Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Feb. 2008); Appendix B: Communication from Dominick Chilcott, Deputy Head of Mission at the British Embassy in Washington, D.C. (“broad assertions of extraterritorial jurisdiction...can interfere with national sovereignty...and risks damaging international relations with several affected foreign countries including close allies of the United States”); Appendix C: Aide Memoire from the Government of Switzerland, December 2007 (“Such an assertion of extraterritorial jurisdiction interferes with the sovereignty of foreign nations”); Appendix D: Diplomatic Note No.126/2007 from the Government of the Federal Republic of Germany and Her Britannic Majesty’s Government, 13 December 2007 (same as text from Appendix B).

²⁷⁰ Brief for the United States as Amicus Curiae in Support of the Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Feb. 2008), Appendix C: Aide Memoire from the Government of Switzerland, December 2007.

limited conditions. These discrepancies result from the statute that governs foreign sovereign immunity law in the U.S.: the Foreign Sovereign Immunities Act (FSIA).²⁷¹ This statute provides the U.S. courts with jurisdiction to resolve civil suits against foreign states or “instrumentalities” and articulates when foreign states and corporations are and are not entitled to foreign sovereign immunity.

The FSIA codifies what is known as the “restrictive” view of immunity, which stands in contrast to the classical doctrine of “absolute” foreign sovereign immunity. Under “absolute” foreign sovereign immunity, states granted immunity to other sovereign entities and refused to hear claims against them in their courts pursuant to the justification that states were perfectly equal and thus could not sit in judgment of one another.²⁷² However, beginning in the mid-19th century in Europe, states became increasingly concerned with individual rights and also recognized that governments had begun to engage in complex trading activities that had previously been performed only by private individuals. In recognition of these trends, states began denying foreign sovereign immunity in situations where states or their instrumentalities engaged in “private” or “commercial” acts, as opposed to “public” acts.²⁷³ By 1950 most countries which were neither Socialist nor part of the common law tradition had adopted this “restrictive” theory of sovereign immunity, which held that when sovereigns do not act in their sovereign capacity, but rather act in a commercial capacity, they may be subjected to judicial processes like an ordinary individual.²⁷⁴

In the late 1960s, after several decades of inconsistent judicial practice on the question of sovereign immunity, the U.S. Departments of State and Justice joined in drafting the FSIA, a federal statute that would codify the “restrictive” theory of foreign sovereign immunity in U.S. law.²⁷⁵ Under the FSIA, once a corporation demonstrates that it is an “agency or

²⁷¹ Pub. L. No 94-528, 90 Stat. 2892, codified at 28 USC §§1330, 1332(a), 1391(f), 1441(d), 1602-1611; *see Unocal I*, 963 F. Supp. 880 at 886.

²⁷² A. Appadorae, *The Substance of Politics*, 6-7 (1968) (citing Vattel, “since men are by nature equal and their individual rights and obligations the same...nations, which are composed of men...are by nature equal and hold from nature the same obligations and the same rights; strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom. A nation is therefore free to act as it pleases, so far as its acts do not affect the perfect rights of another nation, and so far as the nation is under merely obligations without any perfect external obligation. If it abuses its liberty it acts wrongfully; but other nations cannot complain since they have no right to dictate to it. Since nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfill its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among nations in the conduct of their affairs and in pursuit of their policies. The intrinsic justice of their conduct is another matter which is not for others to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights.”).

²⁷³ Bankas at 9-10.

²⁷⁴ Delapenna at 6; Badr at 41. According to one U.S. court, “The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.” *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

²⁷⁵ Delapenna at 7, S. 566, H.R. 3493, 93d Cong., 1st Sess. (1973).

instrumentality” of a foreign state, it is entitled to a presumption of immunity.²⁷⁶ The corporation can only be subjected to the jurisdiction of the U.S. courts if the plaintiff can prove that the corporation’s conduct falls within one of a limited number of exceptions to immunity. The most relevant of these exceptions in the ATS context, which are codified at § 1605 of the FSIA, is the “commercial activities” exception – the portion of the FSIA that incorporates the restrictive theory of sovereign immunity, at § 1605(a)(2). This article lays out three possible scenarios in which a state or state-owned corporation can incur liability for injuries arising out of its commercial activities.²⁷⁷ Significantly, all three scenarios require some “nexus” to the United States. They apply if the plaintiff’s action is based upon:

- a commercial activity *carried on in the United States* by a foreign state;
- an act *performed in the United States* in connection with a commercial activity of the foreign state elsewhere; or
- an act that takes place outside the territory of the United States in connection with a commercial activity of the foreign state and which *causes a direct effect in the United States*.²⁷⁸

Notably, these bases for obtaining jurisdiction in the U.S. courts over state-owned corporations for inflicting injuries against individuals abroad are much more limited than “doing business” jurisdiction. Even if a state-owned corporation’s activities would cause it to satisfy the “systematic and continuous contacts” requirement for the exercise of “doing business” jurisdiction, the state-owned corporation would still be immune from jurisdiction in the U.S. unless the same commercial activity which led to the plaintiff’s complaint either occurred in or caused a “direct effect” in the U.S. The resulting paradox to which the FSIA’s “nexus requirement” gives rise is that while U.S. courts are permitted to hear ATS claims involving conduct committed abroad with little or no connection to the United States brought against foreign corporations – like Shell, Talisman, Rio Tinto, Barclays Bank, and Daimler Chrysler – that “do business” in the United States, those same courts are generally prohibited from exercising jurisdiction over state-owned corporations that engage in the same conduct under the same circumstances.

This disparity is not insignificant. For example, as of 2005, state-owned oil corporations reportedly controlled over 70 percent of the world’s oil reserves, over half of its gas reserves, and half of global oil and gas production.²⁷⁹ This represents a major change from prior decades, in which privately-owned transnational oil corporations enjoyed a significant advantage over their

²⁷⁶ The definition of “agency or instrumentality” in section 1603(b) requires separate judicial personality, ownership or management by the state, and establishment under the laws of the state whose organ it is.

²⁷⁷ Subsequent practice under the Act has established that plaintiffs suing a state-owned corporation under the commercial activities exception can sue both for contract claims arising out of an entity’s activities and for torts arising out commercial acts in which the entity is engaged. Delapenna at 151-52 (noting that the separate “tort exception” in FSIA, 28 U.S.C. § 1605(a)(5), begins by noting that it covers certain torts “not otherwise encompassed in [the commercial activities exception].”) Further, the relationship between plaintiff and defendant need not be commercial in order for harm committed by the defendant to fall within the commercial activities exception. *See* Delapenna at 148; *In re Rio Grande Transport, Inc.*, 516 F. Sup. 1155, 1162 (SDNY 1981); *China Nat’l Chem. Corp. v. M/V Lago Hualaihue*, 504 F.Supp. 684, 689 (D. Md. 1981).

²⁷⁸ *See* 28 U.S.C. § 1650(a)(2).

²⁷⁹ Teymur Huseyinov, *Oil Wars: US Companies against China, Russia and India*, Global Politician, Dec. 15, 2005, available at <http://www.globalpolitician.com/21480-oil>.

state-owned counterparts.²⁸⁰ In recent years, state-owned oil corporations from China, Russia, India, Brazil, Malaysia, Mexico, and Venezuela, to name a few, have expanded their operations considerably, and often beyond the territorial borders of their sovereign owners.²⁸¹ Moreover, state-owned corporations have risen to prominence in sectors other than oil and gas.²⁸²

Economists have noted that transnational corporations from developing countries – led by large state-owned entities – are increasingly representing a major source of outward investment flows to developing and developed countries alike.²⁸³ Thus, state-owned corporations like CNPC, China’s state-owned oil company, are, in the words of British Petroleum’s CEO, “the real competitors for the future” for privately-owned companies.²⁸⁴ This increasing competition between privately-owned and state-owned corporations for investment around the world makes the inability of the ATS to reach even those state-owned actors that do business in the United States particularly troubling.

Ironically, although states in Europe and elsewhere have adopted a much more limited approach to jurisdiction than the United States, their approach to foreign sovereign immunity – at least for state-owned corporations – declines to award those entities immunity much more frequently than the U.S. scheme. Most jurisdictions in Europe and worldwide follow the “separate entity rule,” according to which separately-incorporated state-owned companies must affirmatively demonstrate that they perform a “public” or “sovereign” function in order to be entitled to immunity.²⁸⁵ Today, the courts of the UK, Switzerland, Germany, France, and Belgium, to name a few, begin inquiries into the immunity of state-owned corporations with a presumption that since the entity at issue is a corporation, it was performing a commercial function at the time the dispute arose and will not enjoy immunity.²⁸⁶ The courts of Italy and Holland disregard the ownership status of state-owned corporations and look strictly to the nature of the activity at issue, providing immunity for public or sovereign activities and denying immunity for private or commercial activities.²⁸⁷ All of these states deny immunity to state-owned corporations accused

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Over the course of the last several years, Venezuela’s government targeted not only private oil companies, but also the state’s main telecoms company, electricity company, and even cement and steel manufacturers for nationalization. Venezuela’s neighbors, particularly Bolivia and Ecuador, have expressed a similar desire to regain control over the major industries in their countries. James Ingham, *Nationalisation sweeps Venezuela*, BBC NEWS, May 15, 2007, available at <http://news.bbc.co.uk/2/hi/business/6646335.stm>. Despite China’s decision to restructure many of its major industries and to reduce the total number of its state-owned companies, in recent years, the government has made it clear that such industries as electricity, power, petroleum/petrochemical, telecommunications, coal, and civil aviation and shipping industries will certainly remain state-controlled. Lan Xinzhen, *Trimming the Fat Upcoming mergers and restructuring will reduce the number of central SOEs by 55*, BEIJING REVIEW, Oct. 23, 2007, available at http://www.bjreview.com.cn/quotes/txt/2007-10/23/content_84114_2.htm.

²⁸³ See, e.g. Lisa Sachs and Karl P. Sauvant, *BITs, DDTs, and FDI Flows: an overview*, in Karl P. Sauvant and Lisa Sachs (eds.), *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS* (2009) (citing UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries, and Development* (2007) at 256).

²⁸⁴ *Id.*

²⁸⁵ See generally, William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 538 (1991).

²⁸⁶ *Id.* at 554-64.

²⁸⁷ *Id.* at 583.

of committing torts (whether or not they amount to international crimes) in the course of their commercial activities.

Of course, none of the states above recognize general “doing business” jurisdiction with respect to state-owned corporations. The European Convention on State Immunity, for example, requires very substantial links between an individual’s grievance and the forum state,²⁸⁸ and the English State Immunity Act requires a territorial nexus to exist in order for plaintiffs to serve process outside the jurisdiction.²⁸⁹ The fact remains, however, that pursuant to EU law, courts can assert jurisdiction over all “necessary parties” to litigation where one of the defendants is domiciled in the forum, regardless of whether such an exercise of jurisdiction would satisfy a “reasonableness” test like that applied by U.S. courts. Moreover, European courts initially presume that state-owned corporations are not entitled to immunity, making it generally likely that litigation against them will proceed.²⁹⁰ European courts are thus not unlikely to encounter litigation against foreign state-owned companies and to exercise jurisdiction over them when they do.

Two particularly poignant examples of the resulting disparity in liability, as it is manifested in the U.S. and European contexts, can be seen in the *Unocal* and *Talisman* ATS litigation. In the *Unocal* case, a group of Burmese citizens from the Tenasserim region of Burma brought an ATS suit against Unocal, a California-based oil company, two other oil companies – Total, incorporated in France, and the Myanma Oil and Gas Enterprise (MOGE), Burma’s state-owned oil company – and the government of Burma, all of which had entered into an agreement to build a natural gas pipeline to transport oil extracted from the Andaman Sea to Thailand.²⁹¹ The plaintiffs alleged that the Burmese military was committing gross violations of human rights in the course of providing “security” for the pipeline project,²⁹² including rape, torture, forced labor, and other violations of customary international law,²⁹³ and that the management of all three oil companies was aware of the misconduct and had nevertheless permitted it to continue.

The ATS plaintiffs lost jurisdiction over Total for lack of personal jurisdiction soon after filing their claim in the US courts.²⁹⁴ However, other Burmese plaintiffs subsequently filed *partie civile* applications against individual officials of Total in France and against individual officials as well as the company itself in Belgium.²⁹⁵ Although the Belgian courts dismissed the *partie civile* action,²⁹⁶ Total entered into a settlement with the French complainants in 2005, agreeing to pay them each €10,000 and to establish a €5.2 million fund that would distribute the same amount to any Burmese national subjected to forced labor in the 13 villages affected by the

²⁸⁸ See e.g. Arts 4(1), 5(1), 6(1), 7(1), 8, 11, 12, and 14; Lowenfeld at 744 n. 13.

²⁸⁹ See Lowenfeld at 744 (discussing Order 11, which governs service of process outside the territory of the UK and its relationship to the English State Immunity Act).

²⁹⁰ EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Commercial Matters Arts. 6.1-6.2.

²⁹¹ *Id.* at 883.

²⁹² *Unocal I*, 963 F. Supp. 880, 883 (C.D. Cal. 1997). The case was filed as *Doe v Unocal* cv-96-6959 RAP.

²⁹³ *Id.*

²⁹⁴ *Doe I v. Unocal Corp.*, 67 F. Supp. 2d 1140 (C.D. Cal. 1999).

²⁹⁵ The Burma Campaign UK, *Total Oil: Fuelling the Oppression in Burma*, (July 26, 2005), available at http://www.burmacampaign.org.uk/total_report.html#lawsuits.

²⁹⁶ See *Belgium drops Myanmar human rights case against Total*, AFP (March 5, 2008), available at <http://afp.google.com/article/ALeqM5g03FLW0Ks50sU4WgQuGU-Gay-P-w>.

pipeline project in exchange for their withdrawal of the criminal complaint. Moreover, the subsequent ATS case against Unocal endured for eight years, proceeding to the Ninth Circuit Court of Appeals for an *en banc* review before Unocal entered into a settlement agreement with the plaintiffs. Although the terms of Unocal's settlement agreement are confidential, it has been reported that it amounted to at least \$30 million and included provisions for a community fund intended to benefit the villages affected by the pipeline project.²⁹⁷

Yet while the lawsuits under U.S., French, and Belgian law were particularly damaging to Unocal, and at least somewhat so to Total, they had no immediate effect on either MOGE or the Burmese government itself. Rather, in 1997, the lower court in the *Unocal* case in the U.S. found that both entities – the sovereign government and the state-owned oil company – were entitled to immunity under the FSIA,²⁹⁸ despite the fact that the abuses committed by SLORC and facilitated by MOGE constituted acts performed in connection with a commercial activity,²⁹⁹ because they occurred in Burma and had no immediate impact in the United States.³⁰⁰

Thus, while resort to domestic courts resulted in at least some reparations for those victims that brought the ATS claims and French criminal charges (and the members of their communities as a result of their unique settlement agreements), the deterrent effects of the litigation fell largely on Unocal, and partially on Total, which likely would have suffered an even greater financial impact in the U.S. had the federal courts been able to assert personal jurisdiction over the company. The ATS litigation in the U.S. and subsequent criminal investigations in France and Belgium, however, had little to no effect on MOGE. In fact, less than two weeks after paying out the settlement, Unocal was acquired by the oil giant ChevronTexaco,³⁰¹ which continued doing business as normal with MOGE on the Yadana pipeline. Today, the pipeline remains the single largest source of income for the repressive Burmese military.³⁰² The consortium has been joined by the Thai state-owned company PTT Exploration and Production Public Company Limited (PTTEP), and rights activists have accused Chevron of complicity in the same abuses in which Unocal was previously implicated.³⁰³ Moreover, while France subsequently enacted a law prohibiting all new investment by French companies in Burma (pursuant to EU-level sanctions against the country's repressive regime), the law did not require Total to withdraw from the

²⁹⁷ Daphne Eviatar, *A Big Win for Human Rights: Unocal's Settlement with Burmese villagers may spur better corporate conduct*, THE NATION, May 9, 2005, available at http://www.thirdworldtraveler.com/Oil_watch/Unocal_Lawsuit_Burma.html. It has been reported that Unocal also paid over \$15 million in fees to its lawyers.

²⁹⁸ *Unocal I*, 963 F. Supp. 880 at 886.

²⁹⁹ While the District Court struggled with this definition, the Court of Appeals, while reaffirming dismissal of claims against SLORC and MOGE on sovereign immunity grounds, emphatically affirmed that the parties' actions would have fallen within the "commercial activity" exception had they had the required nexus to the United States. *Unocal II*, 395 F.3d at 957-58.

³⁰⁰ *Id.*

³⁰¹ Eviatar, *A Big Win for Human Rights*. Some sources have speculated that ChevronTexaco required Unocal to settle its claims as a precondition to the merger, as it already faced ATS claims of its own. *Id.* (citing Elliot Schrage).

³⁰² See EarthRights International, *Chevron and the Yadana Pipeline*, available at http://www.earthrights.org/campaignfeature/yadana_pipeline.html.

³⁰³ Solomon, *Chevron's involvement connected to HR abuses in Burma: ERI*, MIZZIMA, April 29, 2008, available at <http://www.mizzima.com/component/content/article/392-chevrans-involvement-connected-to-hr-abuses-in-burma-eri.html>.

country. Recently, Total's Vice President Jean-Francois Lassalle defended the company's decision to remain involved in the project, stating that its withdrawal would only lead "to [its] replacement by other operators."³⁰⁴ Other European-level officials similarly expressed reluctance to withdraw from business in Burma, noting that when Britain withdrew its holdings in Burma's oil industry, those holdings were quickly acquired by Petronas, Malaysia's state-owned oil company.³⁰⁵ In sum, although the ATS litigation in the *Unocal* case may have had some deterrent effect on privately-owned companies, that deterrence did not extend to state-owned corporations. The ATS litigation, at least in combination with the FSIA, appears to have been insufficient to discourage repetition of the same rights abuses in Burma that gave rise to the plaintiffs' original suit.

A similar phenomenon occurred in the *Talisman* ATS litigation. In 2001, a group of individuals from southern Sudan and the Presbyterian Church of Sudan filed an ATS claim against Talisman Energy Company, a privately owned company based in Canada, claiming that the company should be held vicariously liable for the genocide, war crimes, and crimes against humanity perpetrated by the government of Sudan against the non-Muslim inhabitants of southern Sudan. Specifically, the plaintiffs claimed that the government of Sudan had used Talisman's facilities as a staging area for combat operations and bombing runs in Southern Sudan, allegedly pursuant to an agreement into which Talisman – as a member of an oil exploration consortium – had entered with the Sudanese government, according to which the Sudanese Army agreed to provide security for the consortium's oil operations. Talisman possessed a 25% stake in the rights to the oil pipeline in parts of the consortium's oil concession, and the rest was controlled by the other consortium members – China National Petroleum Company (CNPC), wholly owned by the government of China; Petronas Carigali, wholly owned by the government of Malaysia; and Sudapet, wholly owned by the Republic of Sudan.³⁰⁶ The plaintiffs alleged that Talisman had known in advance that the government of Sudan was known to recruit militias controlled by local warlords for protecting the oil concession and that the general strategy that the government intended to pursue in protecting the concession was to create a "zone of protection" for the oil companies by displacing civilian populations.³⁰⁷

In a 2003 decision, a U.S. court found that it could exercise general "doing business" jurisdiction with respect to Talisman,³⁰⁸ largely because the company had listed its stock on the New York Stock Exchange and operated a wholly-owned subsidiary (Fortuna) that conducted significant operations in New York.³⁰⁹ It further rejected Talisman's claims that both the Sudan and Canada were more appropriate fora for resolution of the case and that the plaintiffs' ATS claims

³⁰⁴ David Cronin, *France's Total mired in Myanmar*, ASIA TIMES, (Oct. 4, 2007), available at http://www.atimes.com/atimes/Southeast_Asia/IJ04Ae01.html.

³⁰⁵ *Id.*

³⁰⁶ *Presbyterian Church of Sudan v. Talisman*, 01 Civ. 9882, (Opinion and Order on Summary Judgment and Motion to Amend Complaint) at 15-18 (SDNY, Sept. 12, 2006), available at <http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/06-03562.PDF/>. The companies' ownership shares in the project in the consortium were as follows: CNPC: 40%, Petronas: 30%, Talisman: 25%; Sudapet, 5%.

³⁰⁷ Plaintiffs' brief at 25-26

³⁰⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y. 2003).

³⁰⁹ *Id.* at 330 (noting that the plaintiffs had contended that "Talisman's officers and directors dominate the Fortuna board, that Fortuna has no separate financial standing, that Fortuna and Talisman share the same address, and that Talisman posts corporate bonds for Fortuna.").

should be dismissed on *forum non conveniens* grounds. While the case made its way through the U.S. courts, in late 2002, under significant pressure from human rights groups and others, Talisman sold its interest in the consortium to the state-owned Oil and Natural Gas Company (ONGC) Videsh of India, leaving the entire consortium under the control of state-owned oil companies.³¹⁰ Likely as a result of the *Unocal* plaintiffs' failed attempt to circumvent the FSIA's "nexus" requirement, the *Talisman* plaintiffs never even attempted to hold CNPC, Petronas, or Sudapet liable for their roles in facilitating the Sudanese government's abuses against segments of its civilian population in any jurisdiction.³¹¹ Even if those companies had been doing business in the United States at the time the class action was filed, as a result of the FSIA, they could not have been held liable in U.S. courts. While the Second Circuit Court of Appeals recently dismissed the ATS case against Talisman on the grounds that the plaintiffs had not alleged sufficient facts to satisfy the international law standard for accomplice liability, the history of the litigation demonstrates that in future instances in which ATS claims against resource extraction firms arise, the potential ability of the statute to address the corporate conduct at issue may be seriously limited as a result of the FSIA.

5. US Courts' Approaches to Adjudicative Jurisdiction

U.S. courts exercise a number of "doctrines of abstention" which they can use as a justification for dismissing civil suits even where they possess personal and subject matter jurisdiction over a given defendant and controversy, either because another forum has a stronger interest in the dispute at issue or because prudential factors suggest that the court should decline to adjudicate the dispute. These doctrines, the terms and applicability of which vary by judicial Circuit, include *forum non conveniens*, "international comity," "judicial abstention," and "exhaustion of local remedies." In some cases, U.S. courts have utilized these doctrines in order to allocate jurisdiction over transnational tort claims in a seemingly effective manner, ensuring that the forum that is "most interested" in the outcome of the dispute is permitted to resolve it, so long as that forum can also be expected to respect and protect the rights of the litigants. The history of one set of cases dismissed from the U.S. courts on grounds of *forum non conveniens* – involving both tort and ATS claims – demonstrates how this "management" might be facilitated in the future through greater judicial sensitivity to issues like legitimacy and publicness that underlie global regulation.

In 1993 and 1994, classes comprising a total of 55,000 plaintiffs from Ecuador and Peru, respectively, filed suits against U.S. oil giant Texaco (now part of Chevron) in U.S. courts, alleging that Texaco had polluted the rain forests and rivers in Ecuador, much of which had been carried downstream to Peru. Texaco had operated in Ecuador for nearly 40-year period, beginning in 1965, operating through of fourth-level subsidiary, and for much of that period, in a consortium with PetroEcuador, Ecuador's state-owned oil agency. Ultimately, the Second Circuit employed the *forum non conveniens* doctrine to determine that Ecuador was both an

³¹⁰ Human Rights Watch, *Sudan: Oil Companies Complicit in Rights Abuses* (November 25, 2003), available at <http://www.indiaresource.org/news/2003/1009.html>.

³¹¹ While it is questionable whether the *Talisman* plaintiffs would have been able to obtain personal jurisdiction over any of the state-owned companies at issue at the time the suit was filed, the possibility that such state-owned companies would begin doing business in the United States has increased significantly in recent years. In 2005, for example, state-owned China National Offshore Oil Company (CNOOC) mounted an eventually unsuccessful bid to acquire Unocal, before it merged with ChevronTexaco instead.

“adequate” and “available” alternative forum to hear the dispute, concluding that the Ecuadorian courts were receptive to tort claims and in fact had found Texaco’s subsidiary and PetroEcuador liable in tort for similar claims in the past,³¹² that Ecuador had judicial procedures that would allow the litigants to their actions together in a single lawsuit and would reduce court filing fees for indigent persons,³¹³ and that Ecuador’s courts were not so corrupt as to render it an unsuitable alternative forum.³¹⁴ The court further noted that all of the plaintiffs and class members were citizens and residents of Ecuador or Peru, all of the relevant evidence appeared to be there as well, that a New York court would face translation difficulties if the case were litigated in the United States, and that if the case were litigated in Ecuador, the court could determine the potential liability of both the government of Ecuador and the state-owned oil company PetroEcuador, whereas those parties would be immune from the jurisdiction of the U.S. courts.³¹⁵ Finally, in dismissing the case to Ecuador’s courts, the U.S. court required Texaco to consent to a number of requirements, emphasizing that if the lawsuit was rejected by the Ecuadorian courts because of Texaco’s failure to adhere to them, it would reinstate the case in the U.S. courts. Specifically, the court required Texaco to consent to the jurisdiction of the Ecuadorian (and Peruvian) courts, to promise to waive certain statutes of limitations-related defenses, and to allow the plaintiffs to utilize the discovery documents they had obtained in the U.S. in subsequent proceedings.³¹⁶ Today, although the litigation in Ecuador continues and has been by no means uncontroversial or swift,³¹⁷ it seems clear that in this instance, U.S. courts

³¹² *Id.* at 477-478.

³¹³ *Id.*, (citing *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir.1993) (“[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate.”)).

³¹⁴ Specifically, Judge Rakoff made the following findings: 1) no evidence of impropriety by Texaco or any past member of the Consortium in any prior judicial proceeding in Ecuador; 2) there are presently pending in Ecuador's courts numerous cases against multinational corporations without any evidence of corruption; 3) Ecuador has recently taken significant steps to further the independence of its judiciary; 4) the State Department's general description of Ecuador's judiciary as politicized applies primarily to cases of confrontations between the police and political protestors; 5) numerous U.S. courts have found Ecuador adequate for the resolution of civil disputes involving U.S. companies; and 6) because these cases will be the subject of close public and political scrutiny, as confirmed by the Republic's involvement in the litigation, there is little chance of undue influence being applied. *See Aguinda*, 142 F.Supp.2d at 544-46.

³¹⁵ *Id.* citing *Piper Aircraft*, 454 U.S. at 259, 102 S.Ct. 252 (noting that “inability to implead potential third-party defendants” supports holding trial in Scotland).

³¹⁶ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001). The court also noted that the case would be reconsidered should an Ecuadorian court issue a final judgment dismissing the case because it had been first filed in the United States. *See id.* at 538-52

³¹⁷ in 2003, the plaintiffs refilled their suit in against Chevron (which had acquired Texaco) in Ecuador. Within a year, court-ordered inspections of the contaminated sites had begun. In early 2008, the court-appointed independent expert announced that his findings indicated that Chevron could potentially face liability ranging between \$7 and \$16 billion. In response, Chevron attorneys have made it clear that they will contest the enforceability of any judgment in the plaintiffs’ favor rendered by the Ecuadorian court. Said one Chevron attorney, “the judgment will not be enforceable outside Ecuador. No court that adheres to due process, adheres to the rule of law and looks at this judgment to determine whether it was based on legitimate evidence, will enforce it.” Chevron attorneys have also indicated that they anticipate seeking international arbitration against Ecuador in the event of a negative ruling by the courts. *Chevron Plays 'Victim' To Deflect Media Coverage of Goldman Award for Ecuadorian Activists*, SOURCEWATCH, available at

http://www.sourcewatch.org/index.php?title=Chevron_Plays_%27Victim%27_To_Deflect_Goldman_Award_for_Ecuadorian_Activists. A recent documentary on the case alleges that Chevron has hired lobbyists to pressure Congress to cancel trade benefits with Ecuador in retaliation for allowing the case to proceed. *See* <http://amazonwatch.org/documents/crude-press-kit/sundance-q-and-a.pdf>.

were able to allocate responsibility for resolving one ATS dispute to the courts of a foreign country in a manner that assured that the case would be litigated in that alternative forum.

However, although *forum non conveniens* and other doctrines theoretically enable U.S. courts to determine when it would be appropriate to decline to exercise their jurisdiction over ATS cases, the courts appear to be in disagreement regarding several aspects of those tests, and particularly over aspects of the doctrine of *forum non conveniens*. *Forum non conveniens* is a common law doctrine that “permits a court to decline the exercise of judicial jurisdiction if the court finds that an alternative forum would be substantially more convenient or appropriate.”³¹⁸ As illustrated above, U.S. courts apply a multi-part test to determine whether or not an alternative forum would be more appropriate and whether it would be reasonable to require the parties to move their dispute to that forum’s courts.³¹⁹ Part one of the standard test examines whether or not there is an “available and adequate” alternative forum to adjudicate the dispute, and if there is, part two examines whether a variety of “private interest” and “public interest” factors “tilt strongly in the direction of the foreign forum.” To this day, U.S. courts remain in dispute over almost every aspect of the *forum non conveniens* inquiry, all of which have significant implications for corporate ATS litigation.

The first step in a *forum non conveniens* inquiry is whether there is an alternative forum that is “available” and “adequate” to resolve the dispute. The U.S. Supreme Court has declared that the mere fact that the defendant is amenable to process in another jurisdiction does not automatically indicate that the alternative jurisdiction satisfies this test – rather, “[a] motion to relegate a plaintiff to a foreign forum will be denied if the plaintiff shows that foreign law is inadequate, or that conditions in the foreign forum plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.”³²⁰ Circumstances in which a court will find a foreign forum “inadequate” include where the forum is demonstrably biased or where there are “formidable” administrative or other idiosyncrasies that would diminish claimants’ ability to litigate their case.³²¹

In applying this first step of the *forum non conveniens* test, U.S. courts have particularly disagreed over whether the absence of “beneficial litigation procedures,” such as the availability of class action mechanisms, renders an alternative forum inadequate.³²² Moreover, at least one U.S. court has suggested that in the context of ATS claims, the fact that a foreign jurisdiction would characterize a plaintiff’s claims as common law torts rather than as offenses under international law might render the foreign forum “inadequate,” as domestic causes of action “do

³¹⁸ Linda J. Silberman, *The impact of jurisdictional rules*, at ? n. 24.

³¹⁹ [Wiwa](#), 226 F.3d at 100.

³²⁰ [Cabiri v. Assasie-Gyimah](#), 921 F.Supp. 1189, 1199 (S.D.N.Y.1996) (quoting [Rasoulzadeh v. Associated Press](#), 574 F.Supp. 854 (S.D.N.Y.1983), *aff’d*, 767 F.2d 908 (2d Cir.1985)).

³²¹ See [Aguinda v. Texaco, Inc.](#), 303 F.3d 470, 478 (2d Cir. 2002) (finding that 60-day filing limit for claims in Ecuador was a “formidable” obstacle where plaintiffs would need to bring over 55,000 claims within that time period and requiring the defendant to waive defenses based on this filing deadline in order for dismissal to be granted).

³²² See [Blanco v. Banco Industrial de Venezuela, S.A.](#), 997 F.2d 974, 982 (2d Cir.1993) (“[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate.”).

not reflect the gravity of the alleged offenses, and in particular, the universally-condemned nature of [the] acts” amenable to jurisdiction under the ATS.³²³

Provided that the defendant has established that there is an “available alternative forum” outside the United States that can hear the claim, U.S. courts will engage in a balancing test of “a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.”³²⁴ Only if the balancing test “tilts strongly” in favor of dismissal will the courts dismiss a case in favor of a foreign forum. When evaluating “private interest” factors, courts have considered some of the practical difficulties that may not render a forum “inadequate” in the first prong of the *forum non conveniens* test, but which nevertheless impede on a plaintiff’s inability to litigate its claims, such as prohibitively high filing fees in the foreign court³²⁵ and the unavailability of *pro bono* counsel in the alternative forum.³²⁶ However, U.S. courts have disagreed about this aspect of the *foreign non conveniens* inquiry in several important respects. When evaluating “private interest” factors, courts have disagreed as to whether or not a plaintiff’s choice of forum should be given more deference if the defendant is a U.S. corporation, and has thus been sued in its “home forum.”³²⁷ When evaluating “public interest” factors, courts have differed over whether a “strong United States interest in vindicating international human rights violations,” which will tend to lead the U.S. to be deemed the preferred forum, is triggered by allegations of human rights abuse in the broad sense of the term or whether the public interest is only triggered by claims of offenses amounting to *jus cogens* or previously recognized as actionable under the ATS.³²⁸

Some of the implications of these differences in opinion are demonstrated by the *forum non conveniens* inquiry undertaken by one U.S. court in the *Talisman* litigation. In that case, a U.S. judge declined to go so far as to find the courts of Canada “inadequate” to adjudicate an ATS case between current and former citizens of Sudan and a Canadian oil company, but nevertheless determined that the balance of private and public interest factors rendered the U.S. courts more appropriate for adjudication of the case. However, the judge went to great lengths to note his concerns with the adequacy and availability of Canada’s courts to hear the ATS case. In particular, he noted that as Canada had no specific legislation providing a private right of action for individuals seeking remedies for violations of international law, its courts would treat the ATS action as a run-of-the-mill tort claim. Thus, the courts would apply the *lex loci delicti*, i.e. the law of Sudan, as the default rule, despite the fact that the law of Sudan is *Shari’a* law, under which the plaintiffs, as non-Muslims, would have enjoyed “greatly reduced rights.” The judge further noted that while Canada does have a doctrine allowing for the application of domestic law in situations where it would be necessary to avoid injustice, that doctrine is rarely applied by

³²³ *Presbyterian Church of Sudan v. Talisman Energy Co.*, 244 F.Supp.2d 289, 337 (S.D.N.Y. 2003).

³²⁴ [Wiwa](#), 226 F.3d at 100; see also [Iragorri](#), 274 F.3d at 73.

³²⁵ *Aguinda*, 303 F.3d at 479.

³²⁶ *Talisman.*, 244 F.Supp.2d at 341.

³²⁷ *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003). The court expressed skepticism that plaintiffs would actually attempt to promote their opponents’ convenience, and suggested that suit in the defendant’s home forum was more likely to be motivated by trial strategy. See also Silberman, *The impact of jurisdictional rules* at ??.

³²⁸ See, e.g., *Talisman*, 244 F.Supp.2d at 339 (distinguishing case at bar, in which plaintiffs alleged genocide, torture, war crimes, and enslavement, from other ATS claims alleging environmental damage, which has not been found actionable under the ATS at present, on *forum non conveniens* grounds).

the courts.³²⁹ Moreover, the judge questioned whether, even if Canadian, rather than Sudanese, tort law was applied, such treatment would “fail[] to recognize the gravity of the plaintiffs’ allegations.”³³⁰ Finally, he noted that Canada lacks a “well-developed class action procedure.”³³¹ In the end, however, the judge retained jurisdiction in the U.S. courts not because Canada was an “inadequate” forum, but because three of the plaintiffs were United States residents, as the United States had a strong interest in vindicating international human rights violations (particularly when they amount to violations of *jus cogens*), as New York was not a particularly inconvenient forum for the company, and as the plaintiffs had already obtained *pro bono* representation, facts which he considered to tilt the “balancing test” of private and public interest factors in favor of the U.S. courts.³³² While all of these considerations are relevant to the question of whether and when U.S. courts should dismiss ATS cases in favor of foreign jurisdictions, the seemingly *ad hoc* manner in which the *forum non conveniens* inquiry was conducted in *Talisman* and other cases raises serious questions as to the predictability of U.S. courts’ decisions.

Moreover, the *forum non conveniens* test applied by courts in the United States differs in some important respects from the test other states’ domestic courts employ when making the same inquiry. Like U.S. courts, the courts of many common law jurisdictions are permitted, with some exceptions, to dismiss actions brought against MNCs regarding extraterritorial conduct if an adequate alternative forum with a stronger connection to the case is available. For example, the doctrine is recognized in Australia, Canada, and England. However, Australia’s application of the test is rather “plaintiff-deferential.”³³³ In Canada, on the other hand, plaintiffs must meet a very high burden in order to establish that the courts of other states with an interest in resolving the dispute are “inadequate” to hear the claim. In the *Cambior* litigation involving mining-related pollution in Guyana, for example, Robert Wai and Craig Scott suggest that “[i]n assessing the Guyanese judiciary, the Quebec judge demonstrated a virtually non-rebuttable deference to the foreign judiciaries of democratic countries, seeming to consider the existence of a functioning judiciary and the existence on paper of the right to sue for the alleged harms to be sufficient.”³³⁴ Moreover, although the judge in the *Cambior* case conditioned his dismissal of the case on the grounds that Cambior refrain from invoking *forum non conveniens* in the Guyanese courts in any related action, he did not actually require Cambior to submit to the jurisdiction of the courts.³³⁵ Somewhat predictably, the plaintiffs’ case was dismissed (on two separate occasions) once they subsequently filed it in Guyana.³³⁶

³²⁹ *Id.* at 337 (citing *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at ¶ 50).

³³⁰ *Id.* at 337.

³³¹ *Id.* at fn. 39.

³³² *Id.* (“While it might be more convenient for Talisman to litigate this case in its home forum, this inconvenience is substantially outweighed by the much greater inconvenience plaintiffs would face if they were forced to litigate this action in Canada.”).

³³³ Choudhury, *Beyond the Alien Tort Claims Act*, at text near fn. 67.

³³⁴ Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms*, *supra* n. __ at 301.

³³⁵ *Id.* at 302.

³³⁶ Kelly Patterson, *Noted Canadians back U.S. case against Talisman; Group asks court to reject Canada's bid to halt lawsuit*, THE OTTAWA CITIZEN (12 June 2007), page A6:

Finally, in the U.K., courts apply the test for *forum non conveniens* by first determining the dispute's "natural forum," or the place that has the most "real and substantial connection" to the case, with relevant factors including the residence of the parties, the governing law in the case, and the relative convenience of the available fora. While the courts are permitted to decline to dismiss the case if there are reasons of "justice" that require the courts to retain the case, the test is more limited than that employed in the U.S. courts, as the U.K. courts are not permitted to explicitly consider other factors like public interest or public policy in making their decision.³³⁷ *Forum non conveniens* played a major role in several English cases, and particularly the scope of the "substantial justice" exception. For example, in two cases the English courts refused to dismiss actions against MNCs to the courts of Namibia and South Africa, respectively, on the grounds that the plaintiffs would not be able to obtain legal aid or contingency fee arrangements in the alternative fora (whereas they would have that opportunity in the U.K.), rendering it impossible for them to obtain "substantial justice" elsewhere, particularly given the complexity of the claim they hoped to litigate.³³⁸ However, the courts did not similarly find that the absence of class action mechanisms in the alternative forum would render it unsuitable.³³⁹

Interestingly, EC law, and particularly the Brussels Regulation, has diminished the applicability of the doctrine of *forum non conveniens* in certain cases involving extraterritorial MNC conduct. In a recent case, *Owusu v. Jackson*, the European Court of Justice determined when EC-member courts are required by the Brussels Regulation to exercise jurisdiction over a claim, they are prohibited from dismissing it on *forum non conveniens* grounds.³⁴⁰ One situation in which the courts' jurisdiction is mandatory is where claims in tort are brought against a corporation in its domicile.³⁴¹ In fact, under the *Owusu v. Jackson* precedent, whenever tort claims with an international element are brought against EC-based corporations in their home states (including the U.K.), the doctrine of *forum non conveniens* will no longer serve as an obstacle to claims.³⁴²

Thus, while U.S. courts have the potential to exercise a number of abstention doctrines in order to decline to exercise their jurisdiction in situations in which plaintiffs bring claims involving transnational business activity, thus far they have often done so in an inconsistent and muddled manner, one which undermines the predictability of corporate ATS litigation for both plaintiffs and defendants. Moreover, in applying doctrines such as *forum non conveniens* to dismiss claims, U.S. courts have manifested both parochialism – retaining jurisdiction over cases that might well belong in other courts – and, more frequently, extreme reluctance to adjudicate ATS claims in certain situations – in a manner that threatens to undermine the potential of the ATS regime to evolve into a regulatory scheme for transnational business activity.

³³⁷ Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, *supra* n. ___ at 16.

³³⁸ *Connelly v RTZ Corporation*, [1996] Q.B. ??; *Lubbe and Others v Cape Plc* 273; 282.

³³⁹ *Lubbe v. Cape plc*. [2000] 1 W.L.R. 1545 (H.L.) (absence of group action in South Africa does not preclude *forum non conveniens* dismissal).

³⁴⁰ *Owusu v Jackson*, Case C-281/02 [2005] ECR I-1383, [2005] QB 801 (ECJ) at para. 46 ("the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.").

³⁴¹ See Brussels Convention, Art. 2.

³⁴² See Oxford Pro Bono Publico at 281; see also *Owusu* at para. 46.

IV. MANAGING CORPORATE ATS LITIGATION: EXTERNAL AND INTERNAL MODIFICATIONS TO THE ATS APPROACH

A. Introduction

As the preceding discussion has demonstrated, on several occasions thus far, ATS litigation has been successful at providing remedies to affected victims, ensuring at least some degree of accountability for MNCs that violate human rights abroad, and affecting MNC behavior in a positive manner. The ATS has driven some MNCs to modify their overseas operations, occasionally through divestment from risky projects, but more frequently through a more meaningful examination of their relationships with subsidiaries and business partners. Further, ATS litigation has given rise to a rich body of judicial examination of the content of customary international law and its application to business actors, and has led U.S. judges to engage in a transnational legal dialogue to a significantly greater degree than in most other fields of domestic law. Moreover, some aspects of U.S. court adjudication of ATS litigation would suggest that the approach is an appropriate one that is likely to be effective from a regulatory perspective: for example, it makes use of existing, not-discredited domestic institutions; it is undertaken in the form of private litigation, a means of regulation that is particularly resilient to capture by MNCs and which makes use of institutions that are accessible, open, and which provide reasoned opinions; and the U.S. courts derive the primary (and increasingly, secondary) standards of liability that they apply to corporate defendants from international, rather than purely domestic, law, increasing the legitimacy of their regulatory efforts.

However, it is also clear that the approach to global regulation taken by the U.S. courts (at the urging of private litigants) under the ATS is aggressively unilateral in many respects. U.S. courts adjudicating ATS cases, and particularly those involving non-U.S. corporations, assert jurisdiction over disputes that have little, if any, connection to the U.S. Although they purport to derive the primary norms they apply to extraterritorial conduct from international law, because ATS actions are fundamentally tort actions, U.S. courts apply a not-insignificant amount of U.S. law and procedure to non-U.S. parties in adjudicating these actions. Moreover, U.S. courts wrestle with competing impulses: first, the sense that such cases are not “their business,” and second, the sense that equity demands that litigants alleging egregious human rights abuse must be given a forum - even if it is not the ideal forum - in which they might receive some degree of justice. The result is the inconsistent and unpredictable application of abstention doctrines, resulting in significant uncertainty for potential plaintiffs and defendants alike. Many perceive the resulting corporate ATS scheme as one that “put[s] equity ahead of restraint.”³⁴³ One potential consequence of such a unilateral approach to global regulation is that domestic courts could be driven to exercise concurrent jurisdiction in an “extreme” manner that could jeopardize the stability of international relations and international commerce if not managed properly.³⁴⁴ Objections to particularly controversial ATS cases made by home states of foreign MNCs in recent years demonstrate the regime’s potential to create instability.

³⁴³ Dubinsky at 302-303.

³⁴⁴ See *id.*, at 281-282 (quoting the ICJ’s discussion of universal jurisdiction in *Belgium v. Congo*: “one of the challenges of present-day international law is to provide for the stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights.”)

Moreover, it is similarly evident that the U.S. approach to litigating corporate ATS cases is exceptional. As a recent study notes, no other state has enacted specialized legislation permitting adjudication of extraterritorial corporate human rights abuse, framed as offenses under international law, and providing non-citizens with a cause of action against MNCs for their commission of such offenses.³⁴⁵ States have adopted sharply diverging approaches to regulating and adjudicating extraterritorial misconduct by MNCs and providing – or denying – remedies to those adversely affected by that misconduct.³⁴⁶ Moreover, while almost all states theoretically provide avenues for non-nationals to adjudicate claims against local MNC in their home jurisdiction, in practice, procedural and substantive impediments have denied them the practical opportunity to do so in a number of cases. It is true that in recent years, litigants have had slightly greater success in fitting extraterritorial human rights claims into the language and strictures of domestic civil and criminal law in a few jurisdictions, but active regulation of transnational corporate activity by domestic courts outside the US is still relatively rare.

This examination of corporate ATS litigation and its prospects as a tool of global regulation concludes that the ATS does have the demonstrated potential to give rise to effective and legitimate global regulation in a bottom-up (i.e. state-by-state) manner. However, it also demonstrates the serious challenges that ATS litigation poses from a regulatory perspective, and makes clear that such litigation will not give rise to effective or legitimate global regulation unless some changes are made.

From a legitimacy perspective, U.S. courts to date have made little mention of the broader obligations – derived from international law – that stem from their adjudication of ATS cases involving non-US corporations. In such cases, ATS litigation would seem to suffer from the “publicness” mismatch identified by Kingsbury, wherein a regulating entity appears to possess some hallmarks of legitimacy but nevertheless is not constituted by the “public” that its decisions actually affect.³⁴⁷ ATS litigation would also appear to suffer from the legitimacy defect identified by Weiler, in which the U.S. courts engage in governance without demos and thereby must endeavor to find other legitimating devices to justify their claim that corporations engaging in transnational activity worldwide should obey their determinations on what business activities are legitimate or illegitimate.³⁴⁸ From an effectiveness perspective, certain aspects of ATS litigation – for example, the apparent confusion with which some U.S. courts approach *forum non conveniens* and other abstention doctrines, the differing standards of civil liability faced by privately-owned and state-owned foreign corporations before the U.S. courts, and the different approaches to personal jurisdiction adopted by the U.S. as compared to much of the rest of the world – threaten to undermine the potential of ATS litigation to evolve into a regulatory scheme that applies to all relevant actors that engage in business activity and even to undermine the potential that ATS judgments will be enforced by courts outside the U.S.

The remainder of this paper, then, begins to tackle some of the primary challenges identified in the use of the ATS as a global regulatory mechanism. It posits that U.S. courts can and should take several steps to improve the effectiveness and legitimacy of corporate ATS litigation in

³⁴⁵ Oxford Pro Bono Publico at i.

³⁴⁶ Oxford Pro Bono Publico at i

³⁴⁷ Kingsbury, *The Concept of “Law” in Global Administrative Law*, at 56.

³⁴⁸ Weiler, *The Geology of International Law* at 548.

future cases. First, U.S. courts should seek to enhance their legitimacy as global regulators by “embrac[ing] international normativity” but “treating it with considerable reserve” and declining to celebrate its benefits “when it is gained by a disenfranchisement of people and peoples.”³⁴⁹ They can pursue this task in deriving the primary and secondary standards of conduct that they apply to corporations only from international law, and only where those standards are very well-established. Secondly, U.S. courts should endeavor to “treat like cases alike” in accordance with the principles of consistency and fairness, recognizing that insofar as they seek to determine duties derived from human rights obligations, they trigger the applicability of rule-of-law obligations.³⁵⁰ This is true not only where U.S. and non-U.S. privately-owned corporations are concerned, but where state-owned corporations are concerned as well. Finally, U.S. courts must endeavor to clarify and harmonize their rules regarding the exercise or relinquishment of jurisdiction in corporate ATS cases, particularly under the doctrine of *forum non conveniens*, remaining mindful of the fact that regulation of transnational corporate activity will be more legitimate where the “public” that creates the domestic tribunal is the same as the “public” affected by the court’s pronouncement, and that the decentralized network of domestic courts resolving such cases will have a stronger claim to legality to the degree that potential corporate defendants can predict in advance which norms will be applied to their behavior (domestic or international) and which decisionmaker(s) will have the authority to decide whether or not they have complied with those norms. Thus, U.S. courts should encourage – or at least not impede – the adjudication of such disputes in other fora, even if in slightly different forms (criminal actions, *partie civile* mechanisms, or private litigation under “pure” domestic tort law), but only so long as those fora operate according to the rule of law and which generally provide plaintiffs with access to an effective remedy as that term is understood under international law.

B. Recognizing International Law Limitations on ATS Jurisdiction

As discussed above, the legitimacy of the ATS as a global regulatory mechanism would appear to be significantly related to the degree to which adjudication of ATS claims is consistent with international law governing jurisdiction. What international law requires, in turn, depends on whether one perceives ATS litigation to be (a) a relatively pure application of international law to the conduct of litigants by the U.S. courts or (b) an application of U.S. law – albeit derived from international law – to litigants.

If the answer is (a), and the ATS is a relatively pure application of international law, then ATS litigation is consistent with the transitory tort doctrine described briefly above. A court can adjudicate private law claims pursuant to that doctrine consistently with international law if (a) the conduct of which the defendant is accused is prohibited in the place where it was committed; (b) the court applies either international law or the governing law of the place in which the defendant’s tortious conduct was inflicted, rather forum law, to the claim;³⁵¹ and (c) the court satisfies international requirements for adjudicative jurisdiction in asserting personal jurisdiction

³⁴⁹ *Id.* at 562.

³⁵⁰ Waldron, *Partly Laws Common to all Mankind*, at 25.

³⁵¹ However, there is some debate over whether the ATS really applies international law, or rather domestic US law *derived from* international law, to defendants. Perhaps in recognition of this controversy, Ralph Steinhardt has suggested that the ATS actually relies on the “protective” theory of prescriptive jurisdiction because there is a “federal plenary interest in adjudicating issues of international law.” Steinhardt at 74.

over the defendant.³⁵² This is because while international law limits on prescription do not apply when a court adjudicates a claim on the basis of international law, they do when a court applies its own domestic law.³⁵³ As scholar M. Cherif Bassiouni notes, “A sovereign state...can enforce the prescription of another state, or of international law, even though the enforcing power may not have prescribed what it enforces.”³⁵⁴ Initially, the ATS would appear to satisfy these requirements insofar as the causes of action on which U.S. courts rely are accurate reflections of international law and insofar as the U.S. courts’ test for personal jurisdiction (derived from the requirements of the 5th and 14th amendments to the U.S. Constitution) satisfy international law’s requirements for the exercise of adjudicative jurisdiction.³⁵⁵

However, if the answer is (b), and the ATS is more properly considered as the application of U.S. law *informed by* international law, then in order to comply with international law, U.S. courts must apply the statute to non-U.S. corporations in a manner that comports with one of six recognized bases of “prescriptive jurisdiction” that govern when a state is permitted to apply its own laws to a dispute.³⁵⁶ In the case of U.S.-based corporations, there are few restrictions, as states have a right to prescribe jurisdiction on the basis of nationality. However, in the case of non-U.S. corporations, the situation is more complicated. In order to exercise jurisdiction over a non-U.S. defendant in a case that bears no “nexus” to a U.S. forum (and a significant number – though certainly not all – of ATS cases do not), the U.S. courts would presumably have to rely on the basis of universal jurisdiction.³⁵⁷

At least one U.S. commentator, Michael Ramsey, has recently argued that the ATS must be an exercise of the United States’ prescriptive jurisdiction insofar as it creates a private right of action for violations of international law not present in international law itself.³⁵⁸ His argument

³⁵² These requirements are satisfied by the US courts’ tests for personal jurisdiction under the Due Process Clause of the 5th and 14th amendments to the US Constitution.

³⁵³ See U.N. Int’l Law Comm’n, *Report on the Work of its Fifty-Eighth Session*, Supp. No. 10, Annex E, at 520, U.N. Doc. A/61/10 (2006); (excluding from discussion of prescriptive jurisdiction situations in which a nation enforces foreign law or international law).

³⁵⁴ M Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 89 (2001).

³⁵⁵ See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, *supra* n. __ at 25-27 (arguing that the “systematic and continuous contacts” requirement inherent in the test U.S. courts apply for general personal jurisdiction satisfies the requirements of international law in this regard).

³⁵⁶ See *id.* at 14 (customary international law, even in its most permissive scope, gives nations prescriptive (conduct-regulating) jurisdiction only if at least one of five possible bases is present: (a) the conduct has effects within the territory of the regulating nation (“effects” jurisdiction); (b) the defendant is a citizen of the regulating nation (“nationality” or “active personality” jurisdiction); (c) the regulating nation’s central sovereign interests are threatened (“protective” jurisdiction); (d) the victim is a citizen of the regulating nation (“passive personality” jurisdiction); or (e) the defendant’s actions are of universal concern (“universal” jurisdiction) (citing RESTATEMENT (THIRD) §§ 401-402 (1987)).

³⁵⁷ Stephens, *Translating Filartiga* at 40 (“To the extent that domestic transnational law litigation addresses abuses arising out of events in a foreign country and targets defendants who are not citizens or residents of the forum state, it must rely on an extraterritorial justification for the forum state’s assertion of jurisdiction.”).

³⁵⁸ *Id.* at 28 (“customary international law itself generally does not establish any particular way that customary international law violations should be redressed...The decision whether to allow individuals to make claims in court, as opposed to offering some other kind of remedy, lies with individual nations.”); see also William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 625, 638-44 (2006) (noting that “the creation of a private damage remedy is an act of judicial lawmaking. The tort remedy in ATS litigation does not come from international law. It is pure domestic law.”).

has been countered by a number of commentators, including Ralph Steinhardt, who note that international law and international legal agreements almost never specify the means of their domestic enforcement.³⁵⁹ Moreover, some commentators have argued that international law's limitations on prescriptive jurisdiction only apply to a state's criminal and administrative laws, and not to private international law.³⁶⁰ While the arguments in favor of considering the ATS to be a relatively pure expression of international law are persuasive, particularly given the stringent nature of the *Sosa* test, the debate regarding this complicated jurisdictional aspect of ATS litigation highlights a number of challenges to use of the litigation as a global regulatory endeavor, both from a practical and a legitimacy perspective.

From a practical perspective, were the U.S. courts to exercise unbounded jurisdiction under the ATS, there would be a significant risk that their assertions of power would bring the U.S. into varying degrees of tension with the governments of the states in which violations occurred or in which corporate defendants were domiciled. Bassiouni speculates that the exercise of universal jurisdiction in any context (civil or criminal) is very risky, as it can "cause disruptions in world order and deprivation of...human rights when used in a politically motivated manner or for vexatious purposes," and can still "cause frictions between states, potential abuses of legal processes, and undue harassment" even if used in good faith.³⁶¹ Similarly, Anne-Marie Slaughter and David Bosco argue that corporate ATS claims are even more likely "to complicate diplomatic relations and generate pressure on governments from powerful corporate interests" than classic ATS suits against individual perpetrators, particularly where they allege that the defendant's misconduct constituted aiding and abetting offenses primarily committed by state actors (such as *Bowoto* and *Talisman*), but also where they "ensure[] high-level government involvement" simply because of the nature of the claims at stake.³⁶²

³⁵⁹ Steinhardt at 75-76. Steinhardt has pointed to the ICJ's decision in *The Lotus Case*, which stated, "Far from laying down a general obligation to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." Steinhardt at 77 (citing *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 19); see also Stephens, *Translating Filartiga*, at 35 ("varied domestic procedures all implement the common mandate to hold accountable those who violate internationally protected human rights and thus fall within the reach of universal jurisdiction."); *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring) ("The law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach -- particularly on the technical accoutrements to an action -- and it is hard even to imagine that harmony ever would characterize this issue."). Note, however, that Ramsey rejects this analysis, finding that states practice would appear to indicate that many states consider the exercise of extraterritorial jurisdiction by U.S. courts, even in cases dealing with civil law claims related to antitrust or securities regulation, to be limited by the requirements for prescriptive jurisdiction under international law. He notes that the Supreme Court applied international legal restrictions on prescriptive jurisdiction to a civil suit in the *F. Hoffman LaRoche v. Empagran* case, pursuant to the *Charming Betsy* interpretive rule. *Id.* (citing *Empagran*); see also *id.* at 25 ("The international concern arises from Congress's attempt to control extraterritorial conduct, not the way in which it does so.").

³⁶⁰ Ramsey at 24.

³⁶¹ M Cherif Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* n.____ at 82.

³⁶² Slaughter and Bosco, *Plaintiff's Diplomacy*, FOREIGN *supra* n.____.

“Provocation” by U.S. courts is not inherently undesirable; in fact, a “spiral of pressure and argumentation” may be a necessary precursor for states to agree to compliance with international human rights law.³⁶³ Yet excessive resistance and hostility on the part of foreign countries could seriously undermine the utility of the ATS as tool of global regulation, particularly if foreign states subsequently refuse to enforce judgments rendered in ATS cases. As Linda Silberman has noted, many foreign courts are already highly restrictive in their enforcement of even uncontroversial judgments from U.S. courts, in part because some countries only recognize judgments based on a set of jurisdictional grounds even more limited than those authorized by their own system.³⁶⁴ Foreign courts are very likely to reject enforcement of U.S. judgments if they authorize multiple or punitive damages (as the ATS judgments rendered in individual-defendant cases uniformly have)³⁶⁵ or particularly if they are based on general “doing business” jurisdiction, since that basis of jurisdiction is not recognized in almost any other country.³⁶⁶ To date, ATS litigators have had little success in executing judgments rendered in many successful cases against individual defendants, perhaps in part because foreign courts viewed the jurisdiction exercised by the U.S. courts as “exorbitant.”³⁶⁷ However, as mentioned above, some courts – like the Swiss court that addressed the *Marcos* judgment – have occasionally proven willing to exercise more flexibility and to enforce judgments that reflect widely shared beliefs regarding the need to deter violations of *jus cogens* norms. Conversely, however, to the extent that the U.S. applies its laws – including the ATS – in an aggressive, extraterritorial manner, it may “lead to a reputation as a judicial bully, and may lead foreign authorities to refuse to enforce judgments from that bully’s jurisdiction.”³⁶⁸ Certainly, where the defendants in a case are non-U.S. MNCs, potentially with substantial assets in the United States, resort to foreign courts may not be necessary for judgments to be collected.

On the other hand, from a regulatory perspective, the fact that so many states other than the United States have endorsed the notion of universal jurisdiction over a selected number of offenses is very significant. Without such burgeoning agreement, extraterritorial “regulation” of corporate activities pursuant to the ATS would certainly pose significant legitimacy, publicness, and representativeness problems. Without at least tacit agreement on the part of other states that the U.S. courts have any justification for adjudicating disputes involving foreign plaintiffs and foreign defendant corporations, and regarding conduct occurring wholly in a foreign country, ATS litigation could not realistically be described as the U.S. courts “applying law wrought by

³⁶³ Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms*: *supra* n. __ at 314-315.

³⁶⁴ Silberman, *The impact of jurisdictional rules and recognition practice on international business transactions*, *supra* n. __. In Switzerland, a decision of a foreign court where jurisdiction was based on the act, the effect, or both of a tort will be recognized, but not if the defendant was domiciled in Switzerland. *Id.* at fn. 69.

³⁶⁵ For example, the plaintiffs in *Filartiga v. Pena-Irala*, the first modern ATS case, were awarded a \$10.4 million in damages for the torture and murder of a single individual. See Coliver et al, *Holding Human Rights Violators Accountable*, at 180.

³⁶⁶ *Id.*

³⁶⁷ As of 2005, litigators reported that money had been collected in only four of the sixteen successful individual defendant ATS cases that had concluded by that point, including approximately \$1 million from the estate of Ferdinand Marcos, \$1,000 each from General Suarez-Mason and Kelbessa Negewo, and \$270,000 from one of the defendants in *Romagoza-Arce v. Garcia*, 400 F.3d 1340 (11th Cir. 2005).

³⁶⁸ Wai, *Transnational Liftoff and Juridical Touchdown*, *supra* n. __ at 248.

the whole society, by the public, and address[ing] matters of concern to the public as such.”³⁶⁹ Moreover, such attempts at global governance could have little claim to legitimacy, as although U.S. courts might claim to apply internationally-agreed upon norms, they would do so “by a disenfranchisement of people and peoples.”³⁷⁰ Thus, particularly because U.S. jurisdictional principles are so much more expansive in certain respects than those endorsed by the rest of the world, the fact that U.S. courts claim to be applying standards derived from international law in their adjudication of ATS disputes is of crucial significance.

Thus, when applying the ATS to the activities of non-U.S. corporations, it seems clear that U.S. courts will be able to regulate most legitimately where the offenses at issue are at least plausibly subject to universal jurisdiction. Of course, the list of offenses that may be subject to universal jurisdiction is similarly contested. However, Bassiouni argues that the *jus cogens* offenses under international law, those that “call for universal jurisdiction” are piracy, slavery; war crimes; crimes against humanity; genocide; apartheid; and torture,³⁷¹ and that “it would be a valid argument to propose...the existence of universal jurisdiction for *jus cogens* and even other international crimes.”³⁷² However, as the debate over whether the ATS is a relatively pure application of international law or not remains undecided, it would be unnecessarily cautious to insist that U.S. courts refrain from entertaining ATS claims that are based on offenses recognized in customary international law but which have not yet risen to the level of “universal jurisdiction” offenses. Rather, in limiting the scope of actionable offenses under the ATS to “norm[s] of international character accepted by the civilized world” and defined with a high degree of “specificity,” U.S. courts applying the *Sosa* standard have endorsed a test that would seem to accommodate the need for caution with the desire to provide a cause of action for conduct that is universally prohibited. Moreover, as described above, in the wake of the *Sosa* decision, U.S. courts become increasingly insistent that secondary as well as primary standards of liability should reflect standards found in international law where they exist.³⁷³ Thus, it appears that U.S. courts have increasingly recognized that in such foreign-corporate defendant cases, “[t]he task of a domestic court is to provide a forum, procedures, and a remedy.”³⁷⁴ To the degree that U.S. courts adopt this orientation in resolving ATS disputes, they will enhance their ability to legitimately play a valuable and necessary “backup” function in a global regulatory scheme, one that is not only more likely to be perceived as legitimate abroad, but that also might help encourage the development of similar regulatory mechanisms in other jurisdictions.

C. Modifying the Application of Foreign Sovereign Immunity to State-Owned Corporations in US Courts

Certainly, one objective of any global regulatory regime should be the articulation of standards that can be applied to all relevant actors in a given industry and that will result in like cases being treated alike by various decision-makers in the regulatory scheme. As this paper has

³⁶⁹ Kingsbury, *The Concept of “Law” in Global Administrative Law* at 31. See also Jeremy Waldron, *Can there be a democratic jurisprudence?*, NYU PILT Research Paper 08-35 (Nov. 2008 version) (SSRN).

³⁷⁰ Weiler, *The Geology of International Law* at 562.

³⁷¹ Bassiouni at 108-136.

³⁷² *Id.* at 150.

³⁷³ *Id.*

³⁷⁴ *In re South African Apartheid Litig.*, 2009 WL 960078 (S.D.N.Y. April 8, 2009) at *11.

demonstrated, the current U.S. tradition of providing immunity to state-owned corporations may critically undermine the potential effectiveness of the ATS regime unless it is remedied.

Thus far, the advancement of international law and corporate accountability, as manifested in corporate ATS litigation and as endorsed by an increasing number of international observers, has been premised on the notion that states – jointly and separately – must exert their power and compel business entities to respect human rights in the course of their operations. Yet at least in the United States, the current formulation of foreign sovereign immunity law threatens to make the U.S.’s assertion of its power over corporate actors that do business within its borders far less effective and less politically feasible than it would be if foreign corporations, state-owned as well as privately-owned, were held to the same standards as private corporations. From a legitimacy and legality perspective, the uneven liability that results from the interaction of the ATS and the FSIA in U.S. law might be seen to contradict the principle that like cases should be treated alike, and the defy the notion that individuals, as rights-bearers, have a bottom-up claim to fairness in the adjudication of claims involving human rights violations.³⁷⁵ Moreover, a systematically unbalanced transnational corporate governance scheme as that currently created by the ATS and FSIA in combination might very well fail altogether to actually improve the situation of communities that find themselves particularly susceptible to human rights abuse by MNCs, and instead merely prohibit one class of MNCs from engaging in such activity while awarding the other near-complete freedom to do so.

If corporate ATS litigation in the U.S. were to evolve into a transnational regulatory regime, one would expect that in the future, corporations might eventually begin to seek to use the statute to their own ends, either by encouraging prospective plaintiffs injured by the activities of their rivals to seek redress, or framing injuries to their operations in terms of customary international law violations and seeking redress under the statute against state actors.³⁷⁶ However, the obvious imbalances currently reflected in ATS litigation – particularly the perception that the statute targets only privately-owned businesses that operate in the United States – clearly provide defendant corporations with an incentive to lobby the U.S. government, as well as the governments of non-US MNCs, to restrict or eliminate the statute altogether.³⁷⁷ Mattli and Woods confirm that “groups disadvantaged by the regulatory status quo will not necessarily sit quietly. They may threaten to exit a jurisdiction...in order to amplify their voice in domestic regulatory politics, or they may build powerful coalitions of pro-change groups to lobby governments.”³⁷⁸ This is likely to be true even if the corporations at issue are relatively socially responsible. While some corporate opposition to the ATS may be inevitable, the risk that it will be well-received by policymakers will increase greatly if the ATS comes to be perceived as a tool that engenders significant hostility on the part of businesses and foreign governments, but accomplishes little else. Moreover, the disparate standards in liability between private and state-owned corporations may give rise to an even more invidious consequence: private corporations

³⁷⁵ Waldron, *Partly Laws Common to All Mankind*, at 27-33.

³⁷⁶ See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992), cert. denied, 506 U.S. 955 (1992) (rejecting attempt by Panamanian businesses that alleged U.S. liability for losses they suffered during the U.S. invasion of Panama in 1989 on sovereign immunity grounds); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (rejecting corporation’s attempt to sue Argentina under the ATS for damage caused to vessel during the Falklands War on sovereign immunity grounds).

³⁷⁷ Slaughter and Bosco, *Plaintiff’s Diplomacy*, *supra* n.____.

³⁷⁸ Mattli and Woods, *In Whose Benefit?* At 8.

may be less susceptible to the deterrent effects of the ATS if they fear that they will be financially disadvantaged by compliance. As Matti and Woods note, “[a]s long as more ‘responsible’ global firms do not enjoy consistently stronger financial performance than their less responsible competitors – and to date they do not – the incentives of firms to invest substantial resources into complying with civil regulation will remain limited,” specifically noting that the competitive challenge faced by more “responsible” corporations has only been exacerbated by the growing market presence of firms based in emerging economies.³⁷⁹ Thus, in order for the ATS to serve as one element in a viable and effective transnational corporate regulatory regime, the FSIA should be reformed or reinterpreted to allow for greater parity between the liability risks faced by privately-owned and state-owned corporations.

Several motivations may have driven the U.S. government to render the subject matter jurisdiction of the U.S. courts over state-owned corporations narrower than their subject matter jurisdiction over privately-owned foreign corporations, and even more narrowly than demanded by international law or the U.S. Constitution. For example, the U.S. government’s desire to reduce the potential for conflict with sovereigns likely motivated it to limit the bases of jurisdiction on which state-owned corporations can be brought before a US court. The drafters of the FSIA may have been right to suspect that the US courts’ assertion of jurisdiction might spark the ire of even those states that have formally accepted the doctrine of restrictive immunity,³⁸⁰ reflecting the notion that the US may have had good cause in the mid-1970s – and may still have cause now – to suspect that a foreign state would take offense at their “presumptive” assertion of jurisdiction over a state-owned company, as their understanding of the role of those entities would likely be that although they engage in commerce, they do so solely in the public interest and on behalf of the state itself.

Moreover, one of Congress’ express purposes in enacting the FSIA was to limit the U.S.’s exercise of jurisdiction over sovereign entities in accordance with limitations imposed by international law at the time of its drafting. Unsurprisingly, the text of the FSIA clearly reflects an attempt by its drafters to avoid “assertions of jurisdiction that would be perceived as exorbitant abroad.”³⁸¹ Not only are the jurisdictional criteria modeled after U.S. due process requirements and the D.C. long-arm statute, but they exclude any reference to universal or “doing business” jurisdiction altogether.³⁸² The drafters of the FSIA likely declined to allow the U.S. courts to exercise general “doing business” jurisdiction over states and state-owned corporations because the United States is one of the only countries in the world that recognizes this broad basis for asserting personal jurisdiction over a defendant.³⁸³ On the other hand, universal jurisdiction was likely excluded on the basis of the fact that its use was highly uncommon at the time that the statute was drafted. Furthermore, a body of case law in which the courts have summarily rejected various attempts by plaintiffs to assert that a “human rights exception” should be recognized in the FSIA demonstrates an extreme reluctance by the courts to

³⁷⁹ *Id.* at 41.

³⁸⁰ Dellapenna at 22-23 (“If one takes at face value the claims that all property belongs to the state, that management of all economic activity is in the hands of the state, or that foreign trade is a state monopoly, then one must conclude that every entity from such a state is an agency or instrumentality of that state.”).

³⁸¹ Lowenfeld at 743.

³⁸² H.R. Rep. 94-1487 at 6612. See generally Note, *The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts*, 14 CORNELL INT’L L.J. 97, 110-115 (1981).

³⁸³ Silberman, *Comparative Jurisdiction in the International Context*, *supra* n.____ at 331.

indulge in such notions.³⁸⁴ Moreover, where Congress has expressed an increased desire to submit state authorities to liability for offenses under international law, it has done so either without amending the FSIA at all, or by doing so in a very limited way. For example, when Congress enacted the Torture Victim Protection Act (TVPA), the amendment to the ATS for U.S. nationals, it did not amend the FSIA to increase liability for states and state-owned corporations.³⁸⁵ As a result, TVPA claims may only be lodged against individuals acting under actual or apparent authority of a state, and not against states or state-owned corporations themselves.³⁸⁶

In justifying the limited scope of jurisdiction over foreign states and state-owned corporations authorized by the FSIA, U.S. officials specifically cited their fear that allowing too-broad bases of jurisdiction would overwhelm the U.S. court system and permit a number of claims in which the United States had little interest in resolving.³⁸⁷ As many commentators have noted, because almost every nation “does business” in New York as a result of its status as a preeminent financial center, including a general “doing business” provision in the FSIA could very well enable a host of lawsuits against states and state-owned corporations.³⁸⁸ Although the doctrine of *forum non conveniens* provides a basis for dismissing lawsuits brought in U.S. courts that

³⁸⁴ For example, in the early 1980s, a major American oil company brought suit against Argentina under the ATS, claiming that Argentina had violated international law during the course of its Falklands Islands War with the United Kingdom by bombing one of its tankers, a neutral ship in international waters. While the appellate court claimed that jurisdiction was permissible, essentially on the grounds that there was an “international law” exception to FSIA, the Supreme Court disagreed, arguing that FSIA was the sole basis for obtaining jurisdiction over foreign states in the US and that Congress had deliberately excluded an exception for international law violations. See *Amerada Hess Shipping Corporation v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) and *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)

³⁸⁵ See 28 USC § 1350 Note. Note that TVPA claims cannot be brought against corporations, state-owned or otherwise.

³⁸⁶ Conversely, Congress did amend the FSIA in 1996, as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) creating a new “terrorism” exception for immunity in section 1605(a)(7), which allows suits against sovereigns in US courts for personal injury or death caused by torture, extrajudicial killing, aircraft sabotage, hostage taking, or assisting such acts. Pub. L. 104-132 section 221(a), 110 Stat. 1214, 1241 (April 24, 1996). However, it made this exception applicable only to U.S. nationals, and only against states that are or have been designated by the government as state sponsors of terrorism. See § 1605(a)(7)(B)(ii). At the time the amendment was enacted, seven states were so designated – Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. Additionally, in creating a private right of action that would actually enable US citizens to bring such suits in US courts, Congress limited such liability to individual officials, agents, and employees of state sponsors of terrorism rather than allowing suits against the states themselves. See *Civil Liability for State Sponsors of Terrorism* (also known as the Flatow Amendment), Pub. L. 104-208 section 101(c), 28 U.S.C. § 1605 note; see also *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) (confirming that suits are not permitted against states themselves).

³⁸⁷ Bruno A. Ristau, Chief of the Foreign Litigation Section of the Civil Division of the Justice Department stated in testimony before the House of Representatives, “It should be stressed that the long-arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States and that our courts are not turned into small “international courts of claims.” The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.” House Hearings at 31. US courts considering whether to interpret section 1605(a)(2) of the FSIA to allow for general doing business jurisdiction frequently cited to this passage in the legislative history as a justification for their decision to adopt narrow interpretations of the commercial activities exception. See *Vencedora Oceanica Naigacion S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984).

³⁸⁸ See Dellapenna at 84 (citing *National Am. Corp. v. Nigeria*, 448 F. Supp. 622, 637 (SDNY 1978), aff’d, 597 F.2d 314 (2d Cir. 1979)).

would be more appropriately adjudicated in foreign forums, a foreign state must first respond to actions brought in U.S. courts and submit a motion for application of the doctrine in order to benefit from it.³⁸⁹ Thus, there remains a risk that relaxing the FSIA's jurisdictional prerequisites could encourage a flood of commercial contract and tort actions in U.S. courts against foreign states and their instrumentalities, clogging dockets and embarrassing foreign sovereigns.

Finally, the class of plaintiffs which would be most likely to benefit from an amendment to the FSIA enabling suits to be brought against states or state-owned corporations that commit or are complicit in gross violations of human rights during the course of engaging in commercial activity on the basis of "doing business" jurisdiction would be non-U.S. citizens. The U.S.'s only interest in adjudicating such claims would be on the basis of its commitment to the promotion of human rights principles and international criminal law abroad. Although the U.S. does profess to care deeply about such issues, its past practice suggests that it would be reluctant to risk offending foreign sovereigns unless even stronger national interests would be advanced by providing additional exceptions to sovereign immunity in U.S. courts.

Undoubtedly, the concerns that motivated the drafters of the FSIA to exclude certain bases of jurisdiction from the "commercial activities" exception to sovereign immunity were legitimate, both in the late 1960s when the statute was drafted and today. However, several justifications exist for modifying the FSIA to remove this disparity in treatment of corporate entities based on ownership alone. Moreover, such a change could be effected while accommodating the same concerns that motivated the FSIA's drafters thirty years ago.

Perhaps the most compelling justification for amending the FSIA to allow for suits against state-owned corporations accused of committing gross violations of human rights in the course of commercial activities abroad is that the FSIA deviates sharply from international practice regarding immunity for state-owned corporations. As discussed above, most jurisdictions in Europe and worldwide follow the "separate entity rule," according to which state-owned companies with separate legal personalities are not entitled to assert sovereign immunity unless they can prove that they were performing a "public" or "sovereign" function when the dispute against them arose.³⁹⁰ Conversely, the path taken by the drafters of the FSIA, which presumes that any foreign state-owned entity is a sovereign entity, actually enlarges the availability of the immunity defense for state-owned corporations.³⁹¹ Consequently, the FSIA does not, as its drafters claimed, bring US practice more closely in line with international practice in the area of sovereign immunity, nor did it do so in the 1970s. Where the FSIA brings U.S. practice more closely in line with the practice of other states is rather in the area of personal jurisdiction over state-owned corporations, namely by doing away with general "doing business" jurisdiction over those entities.

Moreover, since the time of the FSIA's enactment, universal jurisdiction has become an increasingly accepted basis for jurisdiction.³⁹² Certainly, if universal jurisdiction provides the authority for the U.S. courts to exercise their jurisdiction over non-U.S. MNCs in ATS litigation,

³⁸⁹ See Dellapenna at 161.

³⁹⁰ See generally, William C. Hoffman, *The Separate Entity Rule in International Perspective*, *supra* n. __ at 538.

³⁹¹ *Id.* at 538-40; see FSIA, § 1603(b)(2).

³⁹² RESTATEMENT, *supra* n. __, at § 404, comment *a*.

it similarly authorizes the exercise of such jurisdiction over state-owned corporations when they act in a commercial manner. Moreover, existing U.S. constitutional requirements for the exercise of jurisdiction would still protect state-owned corporations from being brought before U.S. courts in a wide variety of situations, similarly protecting U.S. courts from being forced to deal with a “flood of foreign claims.” Regardless of how the FSIA is amended, potential defendants will always retain the benefits of constitutional due process limitations on the exercise of jurisdiction by U.S. courts and the doctrine of *forum non conveniens*, whereby suits that would be more appropriately heard in another forum are dismissed in favor of that forum. Thus, disputes brought by foreign plaintiffs against foreign state-owned companies in the U.S. courts will only be heard if there is no adequate alternative forum able to hear the dispute.³⁹³

Finally, U.S. practice in other areas of sovereign immunity law suggests that legislators are not uniformly opposed to expanding U.S. court jurisdiction over states and state-owned corporations when doing so would advance the interests of the nation and its citizens (natural and corporate). For example, the U.S. has included a “doing business” test for exerting jurisdiction over states under the separate expropriation exception to immunity,³⁹⁴ and included “terrorism” exceptions in the 1996 amendment to the statute that actually go well beyond the restrictive theory of immunity, as it strips foreign states and their officials of immunity even when they are not alleged to have engaged in commercial activity.³⁹⁵ Although the U.S.’s expressed concerns about offending foreign sovereigns are doubtless genuine, those concerns have occasionally been outweighed by the nation’s desire to protect its interests and those of its nationals. So long as the U.S. continues to impose civil liability on both domestic and foreign private corporations for complicity in conduct amounting to offenses under international criminal law, it would be in its interest and the interest of companies domiciled in its territory to expand that liability as far as justified under international law, and including to state-owned corporations.

Pursuant to both the “separate entity” rule and the restrictive doctrine of foreign immunity, state-owned corporations should not be granted to immunity from jurisdiction when performing commercial functions.³⁹⁶ An amendment to the FSIA recognizing this fact and expanding the bases of jurisdiction on which state-owned corporations can be brought into U.S. courts would actually bring the United States more closely into line with international practice relating to immunity. There are at least four ways in which such a change in U.S. practice could be effected.

³⁹³ As Judge Higgenbotham noted in his concurring opinion in *Vencedora*, “Underlying the court’s opinion is the fear of affronts to foreign sovereigns hauled into our courts over disputes having nothing to do with the United States. Undoubtedly many cases over which United States courts could have jurisdiction only because of an FSIA “doing business” exception ought not to be heard in the United States. But an over-broad jurisdictional ban is not the best way to exclude such cases. Perhaps I am more confident in our ability to weed out cases on an individualized basis. But, more importantly, I believe that those cases that could survive a motion for *forum non conveniens* ...ought to be heard because Congress meant for commercial, governmental entities to be subject to a suit like any other commercial entity.” *Vencedora Oceanica Naigacion S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984) (Higgenbotham, J., concurring).

³⁹⁴ § 1605(a)(3).

³⁹⁵ See Lowenfeld at 861.

³⁹⁶ Dellapenna notes, “the whole thrust of the Immunities Act is... to restrict immunity to cases in which the foreign state’s legitimate right to manage its affairs would be genuinely impaired if subjected to suit in the courts of another country...the intent of Congress was to restrict immunity to cases where it is imperative.” Dellapenna at 163-64.

First, U.S. legislators could amend the FSIA so that state-owned corporations are subjected to liability on general “doing business” jurisdiction and universal jurisdiction by simply removing the “nexus” requirement from the commercial activities exception to the FSIA altogether, so that if a state or state-owned corporation is engaged in commercial activity, and if constitutional due process requirements are satisfied, a U.S. court could exert its jurisdiction over a claim against it (subject to the doctrine of *forum non conveniens*). Second, Congress could adopt the “separate entity” rule followed by the majority of countries in the world, revising the FSIA so that state-owned corporations are only entitled to immunity if they can demonstrate that they were engaged in a sovereign or public activity when the claim against them arose.³⁹⁷ Third, Congress could adopt a narrower additional exception to immunity which would add an additional ground for jurisdiction under the commercial activities exception, authorizing suits against state-owned corporations that do business in the U.S. but concerning claims that do not arise directly from those activities, but only where the state-owned corporation was engaged in commercial activity and (a) the state-owned corporation has a branch office in the United States or (b) where the corporation’s activity in the U.S. is evidence of a substantial presence in the U.S., and (c) the plaintiff is habitually resident in that state or (d) the action is one for damages under U.S. law based on conduct constituting a violation of customary international law, including genocide, crimes against humanity, war crimes, torture, slavery, and other offenses that give rise to universal jurisdiction.³⁹⁸

Fourth, and perhaps most promising, U.S. courts have begun to reexamine the test for determining when a state-owned corporation is entitled to immunity, but from a different point than the “commercial activities exception.” Instead, courts including the U.S. Supreme Court have begun to interpret the initial determination that brings a corporation under the umbrella of the FSIA – whether the corporation is an “instrumentality of the state” – in a manner that “severely limits” the applicability of the FSIA to state-owned corporations. Specifically, the Court has determined that “the state itself must own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state.”³⁹⁹ Increasingly, states have mimicked privately-owned transnational corporations in organizing their operations in more complex forms, often involving “tiered” ownership through parent corporations and layers of subsidiaries.⁴⁰⁰ Thus, state-owned companies may increasingly find themselves outside the protection of the FSIA as a result of this redefinition of what it means to be “state-owned” by the U.S. courts. However, despite the fact that this development is practically beneficial from a consistency perspective at the level of all corporate entities, it is based on a rather arbitrary distinction (the difference between 49% direct state ownership and 51% direct state ownership

³⁹⁷ Professor Hoffman’s suggestion would have the further advantage of depriving state-owned corporations that do not qualify for immunity of all of the other benefits they are given by the FSIA merely as a result of the fact that they are owned directly by a state. These benefits include (a) special rules for service of process, (b) more extensive removal power, (c) pendent party jurisdiction, (d) special rules for default judgments, (e) special rules on attachment, (f) no jury trials, (g) no pre-judgment attachment, and (h) the shifting of the burden of proof to plaintiffs to show that an immunity exception applies and a nexus with the United States is present. *See Hoffman* at 567, 571-74.

³⁹⁸ This recommendation expands upon Linda Silberman’s proposal for resolving jurisdictional differences between America and the EU during the Hague Conference

³⁹⁹ *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003)

⁴⁰⁰ Examples of state-owned corporations organized in this “tiered” manner include the state-owned petroleum companies of Mexico and Venezuela, and the state-owned lumber industry in Honduras. *See David Graham and Stubbs LLP, A Primer on Foreign Sovereign Immunity* (March 8, 2006).

not being particularly significant) and actually results in like cases being treated differently where state-owned entities are concerned, perhaps violating the principle of consistency at one level while attempting to correct it in another. Certainly, some state-owned entities do not engage in “tiered” ownership, meaning that they will not be affected by this change in U.S. law, and furthermore, even if a state-owned corporation was affected by the change, all it would need to do to remain protected by FSIA would be to restructure accordingly. Thus, while this approach to eliminating foreign sovereign immunity for state-owned corporations in ATS cases is most likely to be immediately effective, it is the least likely to result in consistent and meaningful change.

In sum, only by amending or reinterpreting the FSIA can the U.S. government demonstrate to the states of the world that corporate accountability tools like the ATS can be used to effectively deter both privately-owned and state-owned corporations from becoming complicit in conduct amounting to international crimes and at the same time safeguard the competitive position of its own corporations as they endeavor to conduct their overseas operations in compliance with both U.S. and international law.

D. External Coordination – Allocating Jurisdiction and Resolving Competing Claims for Authority

Perhaps the most challenging aspect of the use of the ATS as a global regulatory mechanism for corporations is the fact that it employs private litigation based on standards derived from international law to adjudicate disputes. Although as demonstrated above, this is a relatively effective approach to regulation, it is an uncommon one, and so if U.S. courts are to operate in an effective decentralized network of domestic courts, they must develop clear and effective procedures for determining when it is appropriate to retain their jurisdiction over a given dispute and when it is appropriate to decline to exercise such jurisdiction in favor of a foreign court. These issues will be extremely prominent in cases involving non-U.S. corporations, particularly when there is little or no “nexus” between the United States and the ATS claim at issue. In these cases, the question is how U.S. courts can best implement existing tools at their disposal to manage such competing claims for jurisdiction in a manner that complies with the requirements of legality (including fairness and consistency) and promotes the legitimacy of the global regulatory scheme. Moreover, although a decentralized regulatory network of domestic courts is a beneficial structure for a global regulatory regime insofar as it is more likely to avoid capture, there are certain drawbacks to such an approach as well. In particular, the quality of enforcement will likely vary from country to country.⁴⁰¹ Thus, another challenge for U.S. courts adjudicating ATS cases will be to determine when, despite the fact that other states may have a stronger interest in adjudicating a given dispute, it is nevertheless necessary to retain jurisdiction because those other fora are unlikely to function as fair or effective regulators.

Wai argues that U.S. courts participating in transnational private litigation, like courts resolving corporate ATS claims, should adopt a “cosmopolitan approach to justice and order in the international system.”⁴⁰² This involves considering objectives such as effective regulation,

⁴⁰¹ Sikkink, *From State Responsibility to Individual Criminal Accountability* at 129.

⁴⁰² Wai, *Transnational Lifting and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 Colum. J. Transnat'l L. 209, 232 (2002).

distributive fairness, and also taking into account “the interests and values of individuals and societies outside of a defined state’s boundaries.”⁴⁰³ U.S. courts should endeavor to recognize the existence of “plural and complex identities and interests across borders” and “begin to define jurisdictional interests more broadly to include a consideration of the interests of actors other than members of the jurisdiction.”⁴⁰⁴ They must also be cognizant of the fact that U.S. courts, acting in isolation, cannot hope to provide “even a partial solution to the problem of providing redress to victims of gross human rights violations,”⁴⁰⁵ and thus recognize that interaction with foreign adjudicative authorities is both desirable and necessary for such as transnational governance scheme to be effective. Similarly, U.S. courts must recognize that other states are unlikely to have mirrored the ATS approach, but that other procedures in those states might be appropriate for achieving the broader goals of ATS litigation – remedies for individuals affected by gross violations of human rights, and accountability for those responsible for those violations. Through the exercise of appropriate deference and comity to other jurisdictions and their national remedies for transnational corporate wrongdoing, U.S. courts can apply the ATS as one component in a transnational network, ensuring its viability and promoting effective cooperation with foreign partners.

Such deference is also critical from the perspective of legitimacy. Indeed, where an ATS claim has little or no connection to the United States, if a U.S. court can assure itself that a domestic court in a foreign country is “available” and “adequate” to adjudicate an ATS dispute, it should dismiss such a case in favor of the foreign jurisdiction, as that foreign court is far more representative of the “public” that will be affected by the resolution of the dispute than a US court. This is true even where the primary and secondary standards of liability that will be applied by one or both courts is derived from international law, because the forum’s procedural and some substantive law will likely be brought to bear on the case in some measure.

U.S. courts address the challenge of concurrent jurisdiction through a variety of mechanisms, including (a) requiring the exhaustion of local remedies, (b) the doctrine of *forum non conveniens*, (c) the doctrine of international comity and (d) the doctrine of international abstention. Each doctrine, where relevant, provides a U.S. court with the opportunity to defer to the adjudicative authority of another, more interested state. Yet courts have applied these doctrines, and particularly *forum non conveniens*, in an inconsistent and muddled manner, one which undermines the predictability of corporate ATS litigation for both plaintiffs and defendants. Moreover, U.S. courts have manifested both parochialism – retaining jurisdiction over cases that might well belong in other courts – and, more frequently, extreme reluctance to adjudicate ATS claims in certain situations. The following suggested approach to concurrent jurisdiction attempts resolve these defects and increase the predictability and effectiveness of corporate ATS litigation in the process.

1. Determining the “Nexus” with the United States

⁴⁰³ *Id.* at 231.

⁴⁰⁴ *Id.* at 272.

⁴⁰⁵ Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 Hum. Rts. Q. 216 (1993); Slaughter and Bosco, *Plaintiff’s Diplomacy*, *supra* n. __ (“American tribunals alone cannot and should not handle all of the underlying issues that such corporate trials raise.”).

As the above review demonstrates, the primary objection foreign governments have made to the U.S. courts' exercise of jurisdiction over MNCs under the ATS is that they occasionally do so even in the absence of a "nexus" or "legitimate and effective link" to the United States. There are six scenarios in which a corporate ATS claim might be thought to have a legitimate "nexus" with the United States or in which such a nexus is unnecessary: if the offense occurs on the territory of the United States; if the offense has effects within the U.S.; if the defendant MNC is domiciled in the U.S.; if the offense threatens the sovereign interests of the United States; if the victim is a citizen or resident of the U.S.; if the offense is one that gives rise to "universal" concern.⁴⁰⁶

A court's first inquiry in considering a corporate ATS case should be into the nature of the nexus between the claim and the United States. If the MNC in question is U.S. domiciliary, then the exercise of jurisdiction over it is unlikely to be controversial from an international perspective. Similarly, if one or more plaintiffs has become a U.S. resident since the offense occurred, the U.S.'s exercise of jurisdiction may be considered controversial by other interested states (as this is a less widely accepted basis of jurisdiction), but it is still justifiable. However, where an ATS claim involves only "universal" jurisdiction, U.S. courts should be mindful of the competing claims to jurisdiction asserted by other states. As Bassiouni notes, the purpose of universal jurisdiction is to permit states "to enhance world order by ensuring accountability for the perpetration of certain crimes."⁴⁰⁷ Thus, "[p]recisely because a state exercising universal jurisdiction does so on behalf of the international community, it must place the overall interests of the international community above its own."⁴⁰⁸ Bassiouni's approach suggests that the state in which a corporate ATS offense occurred should be accorded priority to exercise its jurisdiction, so long as it acts in good faith, if a U.S. court's jurisdiction is based solely on the universality of the offense.⁴⁰⁹ However, Bassiouni also notes that where other, more interested states' available jurisdictional means are ineffective, a state exercising universal jurisdiction should be permitted to do so.⁴¹⁰ This approach also enhances the legitimacy of ATS litigation insofar as it provides opportunities for the "public" affected by the ruling in the case to determine the outcome of the dispute where that forum is willing and able to fairly adjudicate the dispute.

2. Conducting the *Forum Non Conveniens* Inquiry

In jurisdictions where the courts have not applied an exhaustion of local remedies requirement to corporate ATS litigation, the first opportunity for U.S. courts to manage concurrent jurisdiction will be presented if the defendant files a motion for *forum non conveniens*. Moreover, even in those jurisdictions which require plaintiffs to exhaust local remedies, a defendant might still bring such a motion if the case at issue has a not-insignificant nexus to the United States, and thus is not subject to the exhaustion requirement.

The doctrine of *forum non conveniens* may allow defendants to seek dismissal of a corporate ATS claim to one of several potential alternative forums. One such forum, as discussed above, is

⁴⁰⁶ RESTATEMENT (THIRD) §§ 401-402 (1987).

⁴⁰⁷ Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* n. __ at 88-89.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 147.

⁴¹⁰ *Id.* at 150.

the state where the offense is alleged to have occurred. In corporate ATS cases involving non-US defendants, the home state of the defendant MNC's incorporation may be another candidate. In cases involving multiple corporate defendants, such as the *Unocal* case discussed above, several forums may have an interest in the adjudication of an ATS claim. Courts that approach the doctrine *forum non conveniens* with a cosmopolitan perspective may have an opportunity to combat unjustified forum shopping by plaintiffs while at the same time contributing to a more viable transnational governance regime. At the same time, they must be mindful that empirical evidence has demonstrated that the vast majority of cases dismissed on *forum non conveniens* grounds are never re-filed in the alternative forum.⁴¹¹ Courts must therefore be vigilant in their pursuit of the ultimate goal underlying the doctrine, to ensure the trial occurs in a forum that "will best serve the convenience of the parties and the ends of justice."⁴¹²

As noted earlier in the paper, the *forum non conveniens* analysis is described as a two-step (and occasionally a three-step) process by various courts.⁴¹³ The first step in the inquiry, and the one that is critical in many corporate ATS decisions, is whether there is an alternative forum that is "available" and "adequate." If one or more alternative jurisdictions are found to be available and adequate, the second step (in three-step test jurisdictions) is to determine the level of deference owed to the plaintiff's choice of forum, and the third step is the public- and private-factor balancing test described above. Throughout the inquiry, it is the defendant's responsibility to establish both that a presently available and adequate alternative forum exists and that the balance of private and public interest factors tilts heavily in favor of the alternative forum.⁴¹⁴

a. Conducting the "adequate alternative forum" inquiry

As several courts adjudicating corporate ATS cases have held, the first element of the *forum non conveniens* inquiry is determining whether the defendants are amenable to service of process there and whether the forum permits "litigation of the dispute."⁴¹⁵ Moreover, even if the first two conditions are satisfied, "a forum may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all."⁴¹⁶

One critical difference that has emerged in various *forum non conveniens* decisions is the placement of the burden to prove or disprove the presence of an adequate alternative forum. Some courts have placed that burden on the plaintiff, requiring it to produce evidence demonstrating the inadequacy or infirmity of the foreign forum.⁴¹⁷ Yet, as many such decisions have demonstrated, a plaintiff's ability to produce evidence of serious infirmities of the foreign

⁴¹¹ *Id.*

⁴¹² *Koster v. (American) Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 527 (1947).

⁴¹³ *Compare Piper* (2-step) and *Irragorri* (3-step).

⁴¹⁴ *Abdullahi v. Pfizer*, 2009 WL 214649 (2d Cir. 2009) at *19.

⁴¹⁵ *Id.*

⁴¹⁶ *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981).

⁴¹⁷ *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1199 (S.D.N.Y.1996) (quoting *Rasoulzadeh v. Associated Press*, 574 F.Supp. 854 (S.D.N.Y.1983), *aff'd*, 767 F.2d 908 (2d Cir.1985) ("[a] motion to relegate a plaintiff to a foreign forum will be denied if the plaintiff shows that foreign law is inadequate, or that conditions in the foreign forum plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.")).

forum might be extremely limited. In a recent decision, the Second Circuit recognized that, and insisted that the burden should be on the *defendant* to prove that the alternative forum is *adequate*, and not the other way around.⁴¹⁸ As a court's error at this stage of the inquiry will likely have the result of depriving the plaintiff of a remedy altogether, it would seem that the Second Circuit's approach is far more likely to encourage the development of a more effective transnational regime.

Next, in evaluating the adequacy of an alternative forum, be it the state in which the offense occurred or the home state of an MNC defendant, courts have generally been willing to find alternative fora "inadequate" or "unavailable" if they demonstrate any of the characteristics that would exempt plaintiffs from the exhaustion of local remedies requirement, detailed above. For example, some courts have taken into consideration whether the victims have alleged that they suffered gross violations of human rights in the "alternate" forum – particularly if those violations were allegedly perpetrated by the current government – on the grounds that it would be inappropriate to require "alleged victims of gross human rights violations to file suit in the place where the alleged violations occurred."⁴¹⁹ Courts will similarly entertain plaintiffs' arguments that an alternative forum is biased, and therefore inadequate, or unavailable because the likelihood that it would entertain the claim before the court is negligible.⁴²⁰ Certainly, such an approach greatly increases the likelihood that the ATS will actually serve an effective transnational regulatory function. Moreover, if the plaintiff has demonstrated that an alternative forum possesses characteristics that would be sufficient to render it "unavailable" or "inadequate" for the purposes of the exhaustion of remedies requirement, a court should similarly find that the forum is inadequate for purposes of the *forum non conveniens* inquiry.

As this paper has demonstrated, it appears to be extremely challenging in some cases for plaintiffs to provide direct, admissible evidence that the alternative forum proposed by the defendant is biased, corrupt, or otherwise lacking independence.⁴²¹ Yet some courts have found ways to assist plaintiffs in overcoming such evidentiary barriers. For example, the Second Circuit indicated in a recent ATS case that plaintiffs could satisfactorily establish "unavailability" by presenting evidence that claims similar to their own had languished in the alternative forum's courts or been rejected altogether.⁴²² In *Rio Tinto*, the district court denied the non-US defendant MNC's motion to dismiss for *forum non conveniens* on the basis of declarations submitted by the plaintiffs, finding that their detailed statements had explained that they believed that they would be in grave danger if they were forced to return to the state in which the offenses occurred.⁴²³ Courts considering future ATS cases should strive to identify other sources of evidence that can be considered sufficient to overcome evidence of an alternative foreign forum.

⁴¹⁸ *Abdullahi v. Pfizer*, 2009 WL 214649 (2d Cir. 2009) at *19.

⁴¹⁹ *Talisman* at 336 ("In light of the almost self-evident fact that, if plaintiffs' allegations are true, plaintiffs would be unable to obtain justice in Sudan and might well expose themselves to great danger in trying to do so, the Court finds that Sudan is not an appropriate forum under *forum non conveniens* analysis."); see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir.2000).

⁴²⁰ *Abdullahi v. Pfizer*, 2009 WL 214649 (2d Cir. 2009) at *20.

⁴²¹ See Scott and Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms*, *supra* n. __ at 301.

⁴²² *Abdullahi v. Pfizer*, 2009 WL 214649 (2d Cir. 2009) at *20.

⁴²³ *Sarei v. Rio Tinto, Plc.*, 221 F.Supp.2d 1116, 1173-74 (C.D. Cal, 2002).

As noted above, some U.S. courts have disagreed over whether the absence of “beneficial litigation procedures” such as the availability of class actions renders an alternative forum inadequate.⁴²⁴ Some courts have taken into consideration whether certain aspects of the alternative jurisdiction are such that they would prevent the plaintiffs from bringing a claim despite the fact that an alternative remedy might be hypothetically available. For example, the district court in *Sarei v. Rio Tinto*, noted that it was unclear whether the plaintiffs in that case would be able to find legal representation in Papua New Guinea, the alternative forum, and unlikely that they would be able to compel the production of critical witnesses and documents.⁴²⁵ However, the courts in *Aguinda* and *Talisman* disagreed as to whether the absence of a class action litigation mechanism in the alternate forum should render it inadequate.”⁴²⁶

Certainly, the procedural features made available to litigants in American courts vary greatly in many respects from those available to litigants in other jurisdictions. Courts approaching corporate ATS cases from a global regulatory perspective should approach such procedural variations cautiously. While the temptation may be great to avoid dismissing a claim on the basis of the alternative forum’s less favorable procedures, courts should base their decision solely on whether the absence of such a procedure in the alternative forum will render it functionally impossible for plaintiffs to pursue their claims. As the *Aguinda* court noted, the fact that Ecuador lacked a class action procedure was not fatal to the plaintiffs’ claims, because Ecuador provides for “joint actions” and had recently passed legislation waiving court filing fees for indigent litigants. However, the court rightly took a different procedural variation into consideration as well, conditioning its dismissal of the case on the defendant’s agreement to waive the applicable statute of limitations in Ecuador so that the plaintiffs would have sufficient time to file the thousands of individual actions that made up their class action in the United States. Similarly, as the English courts noted in the *Connelly* and *Cape* cases, the absence of legal aid or pro bono legal services in a foreign forum may very well render that forum inadequate for the purposes of the forum non conveniens inquiry.⁴²⁷ Additionally, if the foreign forum will not permit plaintiffs to access evidence in the possession of the defendant and necessary for establishing liability, a U.S. court could find that the foreign forum inadequate unless the defendant consented to the necessary degree of discovery. Finally, if a defendant argues that plaintiffs will be able to take advantage of discretionary exceptions to otherwise burdensome procedures in the alternative forum, such as waivers of high court fees, the court should require the defendant to demonstrate that such waivers are actually granted in similar cases before dismissing the action, and perhaps even condition its dismissal on the actual granting of such waivers.

Finally, some courts have suggested that the source of the law to be applied in alternative forums might render them inadequate to hear the ATS claims at issue. For example, one decision in the

⁴²⁴ See *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir.1993) (“[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate.”).

⁴²⁵ *Sarei v. Rio Tinto, Plc.*, 221 F.Supp.2d 1116, 1174 (C.D. Cal, 2002). Note, however, that the defendant’s forum non conveniens motion was denied primarily because the court determined that the plaintiffs would face significant danger if forced to return to the place where the offenses at issue occurred.

⁴²⁶ *Id.* at fn. 39.

⁴²⁷ *Connelly v RTZ Corporation; Lubbe and Others v Cape Plc* (n 2) 273; 282.

Wiwa case indicated that the British courts might be “inadequate” for the purpose of hearing ATS claims as a result of “rules of British law that would prevent a British court from reaching the merits,” including the act of state doctrine, the doctrine of double actionability, and the doctrine of transmissibility.⁴²⁸ Additionally, one decision in the *Talisman* case suggested that Canada might be an inadequate alternative forum because its courts would have treated the claim as one or more common law tort actions.⁴²⁹ The *Talisman* court found this problematic both because the claims would not be treated as international law offenses in Canada and because the courts were likely to apply the law of Sudan, *Shari’a* law, to govern the case, potentially subjecting the plaintiffs to “greatly reduced rights.” Moreover, the court noted that judicial precedent suggested that Canada’s courts were unlikely to determine that application of Canadian law was necessary in order to avoid injustice.

Although the notion that a U.S. court would find English or Canadian courts to be “inadequate” may seem bizarre, the inquiries performed by the US courts in these cases were likely justified from a transnational regulatory perspective. Certainly, courts dismissing corporate ATS cases to alternative forums should feel an obligation to inquire into the choice-of-law rules, if any, that the alternative forum is likely to apply. If, as in the *Talisman* case, the alternative forum will merely apply the law of another forum that the court has already determined to be “inadequate” to the claim, then dismissal is not warranted. Similarly, if the plaintiffs provide judicial decisions from the alternative forum demonstrating that its courts are highly unlikely to reach the merits of their claim, the U.S. court should retain jurisdiction. A court that would apply the doctrine of transmissibility to prevent plaintiffs from bringing a claim on behalf of a relative’s estate, as was the case in the *Wiwa* dispute, is not a court that “permits litigation of the dispute” before the U.S. courts, and thus dismissal would be inappropriate.

However, U.S. courts should be less reluctant to dismiss a claim on *forum non conveniens* grounds if the plaintiffs’ sole objection to the alternative forum is that it does not characterize their harms as offenses under international law. This is partly because the United States is the only state thus far to have taken this step (with the exception of a single recent case in a French administrative court), and if a US court were to insist that other courts adopt the same approach, it might very well be perceived as acting aggressively unilaterally by other states. If defendants can demonstrate that a foreign forum will be able to adequately adjudicate a the plaintiffs’ claim as a municipal tort action and that the courts of that country are empowered to award adequate remedies, as appears to be occurring in the *Aguinda* case in Ecuador, a U.S. court should consider finding the foreign forum to be adequate.

b. Determining Deference

The Second Circuit court of appeals has adopted a unique approach to the *forum non conveniens* test, requiring courts to inquire into the degree of deference that the court should afford to the plaintiffs’ choice of forum. Courts have long noted that in certain circumstances, such as where the plaintiff is a U.S. citizen or resident, the plaintiff’s choice of forum is to be granted special

⁴²⁸ *Wiwa*, 226 F.3d at 103.

⁴²⁹ *Id.* at 337.

deference.⁴³⁰ However, in *Iragorri v. United Technologies Corp.*, the Second Circuit substantially elaborated on the contours of the “deference” prong of the *forum non conveniens* test, finding that

The more it appears that a domestic or foreign plaintiff’s choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff’s forum choice. Stated differently, the greater the plaintiff’s or the lawsuit’s bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*.⁴³¹

The *Iragorri* case is significant in the ATS context insofar as it clarifies that in some situations, foreign plaintiffs may be entitled to deference in their choice of forum, and can be read to suggest that ATS plaintiffs who file suit against U.S.-based MNCs should be entitled to deference in their choice of a U.S. forum.⁴³² This will be particularly true if plaintiffs are unable to obtain jurisdiction over the parent company of the MNC in their home forum. Such a reading is desirable from a global regulatory perspective as well. Moreover, it will be particularly true where the defendant corporation is domiciled in the United States, and even moreso if that corporation has evidence and witnesses relevant to the case in the U.S.⁴³³ If U.S. courts were more reluctant to dismiss claims against U.S.-based MNCs on *forum non conveniens* grounds, they would bring U.S. practice more closely into line with that of other states. For example, as discussed above, the Brussels regime in Europe mandates that all general jurisdiction claims against an MNC be brought in its home forum, signaling the significance that other states attach to that particular nexus. By following the ruling in *Iragorri* and awarding some deference to ATS plaintiffs that bring suit against US-based MNCs, U.S. courts may contribute greatly to the effectiveness of ATS litigation as a component of a transnational governance regime.⁴³⁴

c. The Balancing Test

⁴³⁰ Traditionally, this deference had been thought to apply only to U.S. citizen plaintiffs, on the grounds that requiring them to litigate in a foreign forum would be particularly inconvenient, and had been thought to be one element of the public- and private-interest factor balancing test in the *forum non conveniens* inquiry. However, in a 2001 decision, the Second Circuit, sitting *en banc*, clarified that the “deference” test is a distinct step in the *forum non conveniens* inquiry, and that it may work to the benefit of U.S. or foreign plaintiffs, depending on their motivations for filing suit in the United States. *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 71-72 (2d Cir. 2001) (en banc).

⁴³¹ *Id.*

⁴³² *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (en banc). (“A plaintiff should not be compelled to mount a suit in a district where she cannot be sure of perfecting jurisdiction over the defendant, if by moving to another district, she can be confident of bringing the defendant before the court.”).

⁴³³ *Id.* at 75 (“the greater the degree to which the plaintiff has chosen a forum where the defendant’s witnesses and evidence are to be found, the harder it should be for the defendant to demonstrate inconvenience”).

⁴³⁴ U.S. courts should continue to award U.S. resident plaintiffs deference in their choice of forum, even if they were not residents at the time the alleged offenses occurred. The courts have recognized that this deference is awarded not because the U.S. claims to have a nexus with the claim as a result of the plaintiff’s residence, but because it is presumably more convenient for a US resident to litigate in the U.S. than to do so elsewhere. See *Jeffery E. Baldwin, International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT’L L.J. 749, 773 (2007) (citing *Wiwa*).

If a defendant is able to demonstrate the existence of an adequate alternative forum to hear a corporate ATS claim, the court must proceed to the private and public factor balancing test. Relevant private interests include “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”⁴³⁵ These factors also include the need for translation of documents, the ability to join or implead other parties, and the enforceability of any judgment.⁴³⁶

Several of these interests are relevant to corporate ATS cases. Often, if the offenses at issue occurred outside the U.S., it may appear to a court that the private interest factors tilt heavily in favor of the alternative forum. However, in ATS claims in which plaintiffs allege control or awareness of misconduct on the part of an MNC parent company, the private interest factors may weigh in favor of the United States, or at least not in favor of the place where the offense occurred.⁴³⁷ Moreover, courts have noted that the fact that the private interests inquiry favors the alternative forum may not be decisive. First, if a plaintiff’s choice of forum is entitled to deference, for example if the defendant is a US-based MNC, a court should not dismiss the case unless the alternative forum is manifestly more convenient than the United States. Second, even if the court has found the foreign forum to be “adequate,” the court should consider any other practical difficulties noted by the plaintiff at that stage of the inquiry, including such impediments to suit as prohibitively high filing fees in the foreign court,⁴³⁸ and inability to retain pro bono counsel in the alternative forum, if the plaintiff is able to secure counsel in the U.S.⁴³⁹ Moreover, as the Second Circuit noted in *Iragorri* and as Judge Schwartz noted in *Talisman*, the court should expressly take into consideration the relative means of the parties in determining whether dismissal is justified.⁴⁴⁰ However, one factor that may counsel in favor of dismissal is the amenability of third party defendants to suit in the alternative jurisdiction. For example, in the *Aguinda* case, the court noted that if the case was tried in Ecuador, both the government of Ecuador and the state-owned oil company, PetroEcuador, could be joined to the action.⁴⁴¹

Public interest factors that might counsel in favor of a dismissal on *forum non conveniens* grounds include “administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and

⁴³⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

⁴³⁶ See Silberman, *The impact of jurisdictional rules; Piper Aircraft*, 454 U.S. at 259, 102 S.Ct. 252

⁴³⁷ See *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001) (en banc) (noting that courts balancing private interest factors “should focus on the precise issues that are likely to be actually tried,” distinguishing between negligence claims involving conduct at the scene of an accident from those involving decisions made at a company’s facilities).

⁴³⁸ *Aguinda*, 303 F.3d at 479.

⁴³⁹ *Talisman.*, 244 F.Supp.2d at 341.

⁴⁴⁰ Said the *Iragorri* court, “the court is necessarily engaged in a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country.” Similarly, in *Talisman*, Judge Schwartz emphasized that while it would not be particularly burdensome to *Talisman* to litigate in New York, it would be incredibly inconvenient to the Sudanese plaintiffs to reinstitute litigation in Canada, and might even result in their loss of pro bono counsel.”

⁴⁴¹ *Id.* citing *Piper Aircraft*, 454 U.S. at 259, 102 S.Ct. 252 (noting that “inability to implead potential third-party defendants” supports holding trial in Scotland).

the application of foreign law.”⁴⁴² Generally, the public interest factors, at least as they are traditionally articulated, counsel in favor of dismissal of corporate ATS cases on *forum non conveniens* grounds. However, a recent article makes a strong case for the proposition that when a U.S. MNC is the defendant in a corporate ATS case, the United States should have a public interest in the dispute, as “there is a vital policy interest at stake in not allowing U.S. multinationals to escape responsibility.”⁴⁴³ While that interest in accountability might nevertheless be satisfied by the foreign forum at issue, it is appropriate, from a transnational law perspective, for a court to consider the U.S. as having an interest in the extraterritorial regulation of its own MNCs.

Finally, courts have differed sharply on the issue of whether the United States has a public interest in vindicating international human rights violations, particularly if they amount to violations of *jus cogens*.⁴⁴⁴ While the courts’ characterization of the ATS as representing a policy favoring the U.S. courts’ provision of a remedy where violations of *jus cogens* obligations have been alleged is admirable, from a regulatory perspective, the position of the *Aguinda* district court – that “the United States has no special public interest in hosting an international law action ...that can be adequately pursued in the place where the violation actually occurred” – might actually be preferable. Certainly, the U.S. has a public interest in the provision of an effective *remedy* to those affected by offenses recognized under international law, but not necessarily in its own courts. Rather, an effective regulatory regime depends on the cooperation of courts in many states, and not on the unnecessarily aggressive exercise of jurisdiction by the courts of one state alone. Perhaps certain U.S. courts invoke the U.S. policy interest in retaining their jurisdiction over such claims out of a concern that the plaintiffs will not actually have an opportunity to take advantage of the alternative remedy if their claim is dismissed. If that is the case, however, then the solution to such a situation is to strengthen the first prong of the *forum non conveniens* inquiry and to insist that any alternative remedy deemed “adequate” will actually be effective. Such an insistence would ensure the effective regulation of MNCs while providing greater certainty and predictability to all litigants, and thus allow the ATS to contribute meaningfully to the development of a global regulatory regime.

d. Conditional Dismissals

If a U.S. court determines that an adequate alternative forum for an ATS case exists and that the public and private factors suggest that the foreign forum would be far more appropriate than the U.S. for adjudication of the claim, a court should dismiss the claim accordingly. However, before doing so, it should take all possible steps to ensure that the foreign forum will indeed provide an effective remedy to the plaintiffs and that the defendants will submit to its jurisdiction (since in a *forum non conveniens* situation, the defendants have affirmatively sought the dismissal). Courts in prior ATS cases have done this by either issuing conditional dismissals (i.e., providing for resumption of the case in the event that certain outcomes do not occur) or

⁴⁴² *Aguinda*, 303 F.3d at 480.

⁴⁴³ Finty E. Jernigan, *Forum Non Conveniens: Whose Convenience and Whose Justice?*, 86 TEX. L. REV. 1079, 1099 (2008) (citing Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT’L & COMP. L. 31, 42 (2000)).

⁴⁴⁴ The Second Circuit has particularly endorsed this component of the public interest balancing test in *Talisman*, despite the district court’s contrary holding in *Aguinda*. See *Talisman*, XX at 552-53.

requiring that defendants make certain undertakings to the court before the dismissal is issued. For example, in the *Aguinda* case above, the Second Circuit made it clear that dismissal on *forum non conveniens* grounds was inappropriate unless the defendant MNC consented to submit to the jurisdiction of the Ecuadorian courts.⁴⁴⁵ Thereafter, Texaco consented to personal jurisdiction in both Ecuador and in Peru, and stipulated that it would waive certain statutes of limitations-related defenses and that the plaintiffs could utilize the discovery obtained in the U.S. in the foreign court proceedings in the foreign courts. When the *Aguinda* court actually dismissed the case, it further conditioned its dismissal on the Ecuadorian courts' acceptance of jurisdiction over the case.⁴⁴⁶ Similarly, in 2002, a district court ordered the *Abdullahi v. Pfizer* case dismissed on *forum non conveniens* grounds.⁴⁴⁷ However, the court did not simply dismiss the action in favor of a Nigerian forum; rather, it conditioned its dismissal on Pfizer's agreeing to the following: (1) consenting to suit and accepting process in any suit filed by the plaintiffs in Nigeria on the claims that were the subject of the U.S. suit; (2) waiving any statute of limitations defense that may be available to it in Nigeria; (3) making available for discovery and for trial, at its own expense, any documents, or witnesses, including retired employees, within its control that would be needed for a fair adjudication of the plaintiffs' claims; and; (4) refraining from acting to prevent the plaintiffs from returning to the U.S. court if the Federal High Court in Nigeria declined to accept jurisdiction of the action, so long as it was filed in Nigeria within 60 days of the entry of the U.S. court's order.⁴⁴⁸

U.S. courts similarly considering dismissing corporate ATS cases on *forum non conveniens grounds* should impose the same or similar measures before doing so, where they are warranted by the circumstances. In particular, if the court's determination that the foreign forum is "adequate" assumed that the courts or other authorities of the foreign state would make discretionary decisions in the plaintiffs' favor (such as providing legal aid, accepting a *partie civile* complaint, or even asserting jurisdiction over a claim), the U.S. court should condition its dismissal on those events actually occurring, so long as the plaintiff pursues the foreign remedy in good faith.

3. Determining Whether Local Remedies Have Been or Must Be "Exhausted"

If the U.S. has a "weak" nexus to the dispute at issue in a corporate ATS case, some courts in the United States – and particularly the Ninth and Seventh Circuit Courts of Appeals – will require the plaintiffs to exhaust all available "local" remedies – that is, the remedies available in the forum in which the dispute arose – before they will agree to assert extraterritorial jurisdiction over the dispute.⁴⁴⁹

⁴⁴⁵ *Jota*, 157 F.3d at 159.

⁴⁴⁶ *See id.* at 538-52.

⁴⁴⁷ This decision was later reversed by the Second Circuit.

⁴⁴⁸ *Abdullahi v. Pfizer, Inc.*, 2002 WL 31082956 (S.D.N.Y.,2002) at *12.

⁴⁴⁹ *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc); *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). Other U.S. courts have thus far declined to require plaintiffs to "exhaust" local remedies, and instead will only dismiss corporate ATS cases in favor of the courts in the jurisdiction in which the dispute arose pursuant to the doctrine of *forum non conveniens*. *See Sarei v. Rio Tinto, PLC*, 550 F.3d at 844-45 (Reinhardt, J., dissenting) ("we have always resolved the question of competing jurisdiction with foreign courts through the forum non-conveniens analysis-not exhaustion").

The local remedies rule – which the U.S. courts have derived from a preexisting principle of international law – is intended to reduce “interstate tensions” by “allowing a state to address and redress violations of international law that occurred in its territory.”⁴⁵⁰ In articulating the contours of the “exhaustion” doctrine in ATS case, the Ninth Circuit Court of Appeals endorsed this “tension reducing” purpose of the exhaustion requirement, and also noted that because the principle of universal jurisdiction is a permissive doctrine, as well as somewhat unsettled in the area of civil jurisdiction, the U.S. courts’ deference to the courts of states with stronger claims to jurisdiction is all the more appropriate.⁴⁵¹

As articulated by the Ninth Circuit, the exhaustion requirement is not triggered in an ATS claim unless a defendant invokes it and demonstrates its applicability. Significantly, the defendant must not only point to possible remedies in the “local” state; it must also show that those remedies are “available.” If the defendant is able to do so, the plaintiff can nevertheless avoid dismissal by demonstrating that the local remedies identified by the defendant are “ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.”⁴⁵² Courts generally determine that these conditions have been satisfied, and that the plaintiff is relieved of his duty to exhaust local remedies, if one or more of the following conditions is present.

- If a plaintiff has obtained a favorable judgment in a court in the local jurisdiction, but it has not been complied with.⁴⁵³
- If the executive branch of government dominates the courts in the local jurisdiction and those courts have been “reduced to submission and brought into line with a determined policy of the Executive.”⁴⁵⁴
- If there has been a significant delay in the proceedings in the local jurisdiction, relatively speaking.⁴⁵⁵
- If a plaintiff fears he would suffer physical harm if he returned to the local jurisdiction, including due to a risk of retaliation for filing a complaint.⁴⁵⁶

⁴⁵⁰ Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 Fordham Int'l L.J. 1245, 1255 (2006).

⁴⁵¹ *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc); see also *Restatement (Third)* §§ 703 cmt. d, 713 cmt. f

⁴⁵² *Sarei v. Rio Tinto, PLC*, 550 F.3d at 832. The Seventh Circuit appears to have reversed this burden, requiring a plaintiff to show that local remedies have been exhausted. This approach is inconsistent with international law, and should be corrected. See *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (Cudahy, J., dissenting) (Under both the TVPA and public international law, it is the *respondent or defendant's* burden to demonstrate that plaintiffs had adequate legal remedies which they did not pursue in the country where the alleged abuses occurred.).

⁴⁵³ *Id.*

⁴⁵⁴ Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation*; see also *Tachonia v. Mugabe* (finding that Mugabe essentially controlled Zimbabwe's judicial system and thus made the courts inaccessible to the plaintiffs).

⁴⁵⁵ *Sarei v. Rio Tinto, PLC*, 550 F.3d at 832; see Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation* (noting that “a tribunal would look at the totality of the circumstances of a case to determine whether inordinate delay makes it unfruitful to insist on exhaustion of local remedies,” and citing one case in which a tribunal found a nine year delay to be too long, as well as one in which a ten year delay was found not to warrant relief from the exhaustion requirement); see also *Xuncax v. Gramajo*, 886 F. Supp. 162 (D.Mass. 1995) (no exhaustion required where criminal proceedings had not made any progress for several years and Guatemalan law did not allow for the institution of civil action before the conclusion of criminal proceedings).

⁴⁵⁶ *Sarei v. Rio Tinto, PLC*, 550 F.3d at 836 (“a fear of physical harm may be evidence of futility”); *Id.* at 842 (Reinhardt, J., dissenting) (Stating “No rule of domestic or international law requires plaintiffs who are alleging serious violations of human rights to exhaust local remedies when there is evidence that plaintiffs would further risk

- If the local state’s judiciary has established jurisprudence or a “consistent course of decisions” that make it clear that the plaintiff’s pursuit of a remedy there would be hopeless.⁴⁵⁷
- If the local state’s courts have no jurisdiction to afford relief, including if the MNCs liability has been extinguished by an amnesty.⁴⁵⁸
- If the local jurisdiction’s legal system is not independent or not functioning.
- In situations of continuing injury or repetition of the same injury.⁴⁵⁹

In determining whether local remedies have been “exhausted,” U.S. courts should be mindful of the fact that, as demonstrated above, other legal systems are unlikely to have implemented means of enforcing international law in their domestic courts in a manner at all similar to the ATS. International tribunals considering the “exhaustion” requirement have clarified that “local remedies” means all legal remedies, whether judicial, executive, or administrative.⁴⁶⁰ Moreover, remedies are only considered “legal” if a claimant has recourse to them as a matter of law, rather than on the basis of discretion, grace or favor.⁴⁶¹ While domestic tort remedies incorporating international law standards are unknown outside the U.S., the principle that “all national legal systems with adjudicative jurisdiction must provide a procedural means by which victims of atrocities can receive compensation” is shared around the world.⁴⁶² Thus, U.S. courts adjudicating corporate ATS claims should be prepared to consider unfamiliar remedies, provided they are capable of adjudicating responsibility and ordering that the plaintiff be compensated in the event of a favorable determination, and so long as they are not ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.

This is not to say, however, that U.S. courts should dismiss ATS claims – even those with weak connections to the United States – liberally. Rather, their primary objective in conducting an exhaustion inquiry should be to ensure that if the claim is dismissed, the plaintiff will actually have the opportunity to have its case heard on the merits. Thus, U.S. courts should remain willing to find a potential remedy “ineffective” or “unavailable” if procedural rules or other conditions will likely function to deny the plaintiff access to the local remedy, or will leave the plaintiff with a remedy that is ultimately useless. The Restatement permits as much, directing courts to look to the circumstances surrounding access to the remedy and the ultimate utility of the remedy to the plaintiff in determining its effectiveness.⁴⁶³ Moreover, courts that consider the local remedies rule to be a “prudential” doctrine (meaning their jurisdiction does not turn on it)

their lives by doing so” and citing three cases in which courts found the TVPA’s exhaustion requirement inapplicable for that reason); *see also* Estate of Rodriguez v. Drummond Co.

⁴⁵⁷ Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation* at 1264.

⁴⁵⁸ *Id.* (citing PCIJ in the Panevezys-Saldutskis Railway case (“There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief)); *see also* Doe v. Savaria (plaintiff was not required to exhaust domestic remedies because of the unavailability of a civil remedy in El Salvador from the Chief of Security for the organizer of Salvadoran paramilitary groups, the lack of prosecution, and the issuance of an amnesty law exempting the defendant from civil or criminal liability).

⁴⁵⁹ Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation*.

⁴⁶⁰ *Id.* at 1259-60.

⁴⁶¹ *Id.* (citing Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 55th Sess., Supp. No. 10, at 516, P 188, U.N. Doc. A/56/10 (2001)).

⁴⁶² Dubinsky at 314-315 (citing examples from a number of international and regional treaties, declarations, and other sources).

⁴⁶³ *Sarei v. Rio Tinto*, PLC, 550 F.3d at 832 (citing *Restatement (Third)* §§ 703 cmt. d, 713 cmt. f.).

should exercise what power they have in guaranteeing that a dismissal on the basis of the local remedies rule will result in an actual proceeding elsewhere, for example by requiring as a condition of dismissal that the defendant submit to the local court's jurisdiction and waive certain defenses related to statutes of limitations.

Moreover, as ATS claims invariably involve allegations of gross human rights violations, and often implicate the local authorities of the territorial state, U.S. courts approaching the exhaustion requirement should resolve doubts concerning the "availability" of potential local remedies in favor of the plaintiff. In a dissenting opinion to the Seventh Circuit's opinion on exhaustion in *Enahoro v. Abubakar*, one judge acknowledged the real threat that the exhaustion of local remedies requirement might deprive litigants of a remedy altogether. Judge Cudahy noted that in passing the Torture Victim Protection Act (TVPA), which explicitly includes an exhaustion of remedies requirement, Congress stated that the mere initiation of claims alleging such offenses as torture and extrajudicial killing⁴⁶⁴ "will be *virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred.*"⁴⁶⁵ Thus, Judge Cudahy emphasized that if a court is in doubt regarding the availability of remedies in the local jurisdiction, it should resolve those doubts in favor of the plaintiff and retain the case.⁴⁶⁶

Thus, provided that courts remain committed to the goal of assuring plaintiffs a genuine remedy, the exhaustion of local remedies requirement can play a beneficial role in promoting comity and cooperation among judicial participants in a transnational corporate governance network. The U.S. courts' use of the local remedies rule might even serve as a catalyst for the local jurisdiction, actually increasing the effectiveness of transnational regulation.⁴⁶⁷

4. The Doctrines of Judicial Abstention and International Comity

U.S. courts can make use of two additional abstention doctrines to dismiss ATS cases in which a foreign jurisdiction appears to have a stronger interest in the dispute than the United States or in which the potential for conflict as a result of U.S. court adjudication is significant.

U.S. courts typically invoke the doctrine of international abstention in the context of parallel judicial proceedings regarding the same claim but ongoing in more than one state.⁴⁶⁸ In order to decide whether to defer an action in favor of an ongoing criminal investigation or truth commission in the state in which the conduct at issue occurred, U.S. courts typically weigh the interests of all the states concerned, as well as the interest of the international community as a whole, in resolving the particular dispute in the "local" forum.⁴⁶⁹ If that inquiry reveals that the state in which the offense occurred has "taken explicit, targeted steps to address the situation

⁴⁶⁴ These are the only two offenses addressed by the TVPA.

⁴⁶⁵ *Enahoro v. Abubakar*, 408 F.3d at 892 (Cudahy, J., dissenting) (citing S.Rep. No. 102-249, at 9-10 (emphasis added)).

⁴⁶⁶ *Id.*

⁴⁶⁷ Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation*, *supra* n. __ at 1288.

⁴⁶⁸ *Mujica*, 381 F.Supp.2d at 1157 (citing *Ungaro-Benages*, 379 F.3d at 1238); *see also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C.Cir.1984).

⁴⁶⁹ *Id.* ("federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum").

giving rise to the litigation,” and such steps include at least quasi-judicial proceedings, U.S. courts may be justified in dismissing claims without prejudice until those proceedings have concluded.⁴⁷⁰

This doctrine may counsel U.S. courts to decline to exercise their jurisdiction over an ATS case alleging misconduct on the part of an MNC if the state in which the MNC’s conduct occurred (or the home state of the MNC) has already authorized a prosecutorial investigation into the matter at issue in the ATS suit. The doctrine may even counsel for restraint if the state in which the offense occurred has authorized a fact-finding inquiry, such as a truth and reconciliation commission (TRC), and particularly if that mechanism has the power to recommend prosecution (of the corporation or its individual officers) in its final report. However, if at the conclusion of the criminal investigation or TRC process the territorial State does not make any final determination of responsibility with respect to the MNC, the plaintiffs should be able to bring their claims before the U.S. courts at that time.

On the other hand, international comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”⁴⁷¹ Courts have emphasized that the doctrine is discretionary and is not to be extended in a way that would contradict the law or policy of the forum state.⁴⁷² One variety of the doctrine of international comity is “comity among courts,” defined as “a discretionary deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.”⁴⁷³ Pursuant to this variety of the doctrine, U.S. courts can dismiss an ATS case for adjudication in another jurisdiction if representatives of another state have officially objected to the U.S. court’s exercise of jurisdiction and if there is a “true conflict of law” between U.S. law and the law of the foreign jurisdiction.⁴⁷⁴ The Supreme Court has defined a “true conflict” to mean that the foreign law would prohibit the defendant from complying with an order of the U.S. court.⁴⁷⁵ If there is indeed a true conflict, then U.S. courts often apply the test for exercising the doctrine of international comity laid out in the Restatement of the Foreign Relations Law of the United States § 403(2), which instructs U.S. courts to award comity and dismiss the case if it would be “unreasonable” to exercise jurisdiction over the activity. The Restatement provides a “nonexhaustive” list of factors to be considered in making such a reasonableness determination, the overarching effect of which is to ask the U.S.

⁴⁷⁰ *Id.* at 1163.

⁴⁷¹ *In re South African Apartheid Litig.* at *29 (citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

⁴⁷² *J.P. Morgan Chase Bank*, 412 F.3d at 423, citing *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772), as reprinted in Robert M. Cover, *Justice Accused* 87 (1975) (finding the doctrine of comity inapplicable and ordering the release of an American-owned slave held on board ship in England); Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (8th ed. 1883).

⁴⁷³ *In re Maxwell Comm Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996).

⁴⁷⁴ See *In re Simon*, 153 F.3d at 999 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)) ((limiting the application of the international comity doctrine to cases in which “there is in fact a true conflict between domestic and foreign law.”); see also *United International Holdings, Inc. v. Wharf Holdings Ltd.*, 210 F.3d 1207, 1223 (10th Cir.2000) (“In general, we will not consider an international comity or choice of law issue unless there is a ‘true conflict’ between United States law and the relevant foreign law.”); *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1049 (2d Cir.1996) (“International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.”).

⁴⁷⁵ *In re S. African Apartheid Litig.* at *30.

court to weigh its interest in adjudicating the claim against the interests of the foreign state in doing so itself. Normally, the U.S. court must also satisfy itself that “an adequate forum exists in the objecting nation” and that “the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum”⁴⁷⁶ However, even if the defendant is not amenable to suit in the foreign forum, the U.S. court can still dismiss the case if “a foreign sovereign’s interests were so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted.”⁴⁷⁷ Additionally, in determining whether the exercise of jurisdiction in a case would be “unreasonable,” U.S. courts may – but are not required to – refer to the views of the U.S. Executive and the governments of the foreign state or of other interested states, although separation of powers and rule of law principles instruct the courts to afford the opinions of the Executive Branch and foreign governments with only “persuasive deference.”⁴⁷⁸

In practice, U.S. courts have generally declined to dismiss corporate ATS claims pursuant to the doctrine of international comity. Often, this is because they have determined that there is no “true conflict” between U.S. and foreign law that would trigger the applicability of the doctrine. For example, in one ATS case involving alleged corporate misconduct in Colombia, the U.S. court found that as Colombia’s courts had not already made any findings of liability or provided any remedies relating to the issues before the court, there was no *present conflict* between domestic and foreign law, and no reason to believe that the defendant corporation would be unable to comply with an order or judgment of the U.S. court.⁴⁷⁹ Additionally, in the recent decision in *In re South African Apartheid Litigation*, the District Court held that there was no “conflict” between the ATS litigation in the United States and South Africa’s Truth and Reconciliation Commission (TRC) process. The court noted that neither the defendants nor the government of South Africa had identified an adequate alternate forum for the claims at issue, and found that the case was not an “extreme” one permitting dismissal in the absence of such an available alternative forum because the ATS litigation did not conflict with the goals of the TRC process, as the TRC process was nonexclusive, the defendants had not received immunity from the TRC, and as both the TRC and the ATS claim were intended “to uncover the truth about past crimes and to confront their perpetrators.”⁴⁸⁰

Moreover, courts adjudicating ATS cases have regarded submissions from the U.S. and foreign governments requesting the court to apply the doctrine of international comity with some skepticism. For example, in *Rio Tinto*, the Ninth Circuit rejected the U.S. Department of State’s contention that entertaining a corporate ATS claim would interfere with the ongoing peace process in Papua New Guinea, the state in which the offenses at issue occurred, relying instead on factual submissions from participants in the country’s peace process and members of the foreign government indicating that conditions in the foreign country had changed since the State Department’s submission to the court was written.⁴⁸¹ In *Presbyterian Church of Sudan v.*

⁴⁷⁶ *In re S. African Apartheid Litig.* at *29 (citing *Jota*, 157 F.3d at 160).

⁴⁷⁷ *Id.*

⁴⁷⁸ Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680-81 (2000) (“as with many issues concerning federal policy, ‘persuasiveness deference’ may be proper. But these forms of deference are not Chevron deference”).

⁴⁷⁹ *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1134, 1156 (C.D. Cal., 2005).

⁴⁸⁰ *In re S. African Apartheid Litig.*

⁴⁸¹ *Sarei*, 487 F.3d at 1206-07.

Talisman, the U.S. court rejected a request for dismissal based on assertions from the government of Canada that the ATS claim interfered with its foreign policy, finding that “while a court may decline to hear a lawsuit that may interfere with [another] State’s foreign policy... dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and the foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public’s interest in vindicating the values advanced by the lawsuit.”⁴⁸²

While the doctrine of international comity has not provided the basis for dismissal in many ATS cases thus far, it can potentially serve as a tool that U.S. courts can rely on to dismiss cases that provoke significant hostility from foreign governments, particularly if they are able to demonstrate that the defendants would not be able to comply with an ATS judgment rendered against them without violating foreign law; an ATS claim at issue conflicts with the goals of a current or past transitional justice mechanism; there is a genuine risk that an ATS claim would undermine a peace settlement or process in a foreign state; or the ATS claim directly conflicted with a significant foreign policy interest of a foreign state. It will be particularly – though not exclusively – appropriate to dismiss ATS cases in such situations if the foreign state is able to provide an adequate alternative forum for the resolution of the claims at issue.

V. CONCLUSION

This paper has sought to demonstrate that that corporate ATS litigation is increasingly becoming an established feature of U.S. law and a mechanism for promoting extraterritorial corporate accountability in the form of establishing and implementing global regulations that establish baseline rules governing corporate behavior in the area of human rights. It has demonstrated that there is a normative justification for increased regulation of transnational corporate activity, at least to deter corporations from engaging in or directly facilitating serious human rights violations. It has further demonstrated that the ATS is structurally capable of serving as an effective and legitimate mechanism for global regulation of corporate behavior, particularly as one component of a decentralized network of domestic courts. However, it has also revealed that the ATS will actually lead to effective global regulation only if it is implemented in a legitimate manner – that is, if it is applied in such a way that like cases are treated alike, and if U.S. courts decline to exercise their jurisdiction over a dispute involving solely foreign litigants when foreign courts with a closer connection to the public(s) directly affected by the case are available and adequate to resolve the dispute.

Certainly, this paper suggests that the optimal solution for the regulation of transnational corporate conduct is a multilateral treaty or other explicit international-level instrument that articulates and defines the international legal prohibitions applicable to MNCs and specifies various domestic courts’ obligations and rights with respect to asserting jurisdiction over disputes involving transnational corporate activity. Yet in the absence of any indication that such a development is likely, this paper suggests that bottom-up regulation is a theoretically viable basis for a transnational global regulatory network.⁴⁸³ Insofar as it incorporates and

⁴⁸² See *Talisman*, 2005 WL 2082846 at *7 (rejecting Canada’s request for comity on the grounds that an ATS lawsuit would interfere with its policy of using the prospect of future trade and economic revitalization in Sudan).

⁴⁸³ See *Wai, Transnational Liftoff and Juridical Touchdown*, *supra* n. __ at 269 (“in the absence of international agreement and given the continuing fragmented nature of regulatory authority in the international system, the

reflects international normativity and simultaneously adopts a conservative approach to its application, the ATS is a legitimate source of global corporate regulation. Moreover, insofar as U.S. courts develop clear procedures for identifying other, more appropriate fora for the resolution of disputes, which recognize that other approaches to regulation (such as criminal law mechanisms) may be appropriate substitutes for private litigation, U.S. courts can enhance the degree of “publicness” of the global regulatory standards that emerge.

In sum, the ATS can and should be perceived – by litigants, judges, and legislators – as but one component of a broader enterprise of MNC regulation in the area of serious human rights violations, even if the contours of that broader enterprise have only begun to emerge. By recognizing that international law places obligations on U.S. courts when they act as global regulators, and by increasing their attention to international normativity, rule-of-law values, and differing approaches to dispute resolution across the globe, actors in this regulatory endeavor can encourage the development of a fair, consistent, and legitimate bottom-up regulatory regime for transnational corporate behavior. Such an orientation will be necessary if the domestic courts of jurisdictions with dramatically different capacities and legal traditions hope to generate and sustain an effective and legitimate regulatory regime over some of the most economically powerful and sophisticated actors in the global economy and to deter the commission of universally-condemned activity by businesses in the future.

continuing use of national laws applied extraterritorially seems like a necessary practice”); Stephens, *Translating Filartiga* at 45 (“civil claims fit comfortably within the framework of international law and universal jurisdiction”).