THICKER THAN BLOOD: HOLDING EXXON MOBIL LIABLE FOR HUMAN RIGHTS VIOLATIONS COMMITTED ABROAD

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I. INTRODUCTION

Cut Zamarah Hamzah was born and raised amid the noise and dense smoke of the "petro-city" of Lhok Seumawe, North Aceh.[1] Roughly a mile behind Hamzah's house was the Rancung building belonging to PT Arun.[2] This building is famous among the villagers as the center for torture, rape, and execution by the Indonesian military.[3] Each night Hamzah heard a military van pass by her house and later, the sound of gunshots. She would only learn the next day who had been taken from their home the night before and led to the Rancung building to be tortured or executed.[4] It was widely unknown amongst the villagers what happened to the bodies of those taken until mass graves were discovered within the Cluster 5 site of Exxon Mobil's property.[5]

Aceh is a relatively small province in Northern Sumatra, Indonesia.[6] In 1971, Mobil Oil, in conjunction with Pertamina, an Indonesian state-owned oil and gas company, discovered a large natural gas field in Arun, an area in the Aceh province.[7] Mobil Oil contracted with the Indonesian government, which at the time was controlled by a military regime led by General Suharto, to obtain exclusive rights for exploration and production of natural gas in the Arun area.[8] Shortly thereafter, Mobil Oil built facilities to extract the natural gas while PT Arun developed a natural gas liquefaction facility to process the gas for

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1. Cut Zahara Hamzah, *Testimony on Exxon Mobil Involvement in Human Rights Abuses in Aceh*, (May 29, 2002), *at* http:// http://www.pacificenvironment.org/stopexxonmobil/aceh_testimony.html (last visited Mar. 19, 2004).

2. *Id.* PT Arun is a tri-national joint venture company of which Mobil Oil Indonesia owns 30%, Pertamina owns 55% and JILCO owns 15%. *See Petroleum Report Indonesia 2001*, American Embassy Jakarta, at 35, *available at* http://www.usembassyjakarta.org/petroleum/bab-5.pdf (last visited Mar. 19, 2004).

3. Hamzah, *supra* note 1.

4. *Id.*

5. *Id.*

6. Complaint, John Doe I v. Exxon Mobil Corp. et al., at 13 (D.D.C. 2001) (No. 01-1357), *at* http://www.laborrights.org/projects/corporate/exxon/exxoncomplaint.pdf (last visited Mar. 19, 2004).

7. *Id.* at 12.

8. *Id.*

shipment.[9] Mobil Oil exercised "ownership and significant control" over PT Arun by virtue of its part ownership and its exclusive contract to supply PT Arun with 100% of the natural gas it liquefies and sells.[10]

As part of the agreement between Mobil Oil and the Indonesian government, Mobil Oil agreed to provide General Suharto's family with "blank shares" in Mobil Oil Indonesia, a subsidiary of Mobil Oil Corporation.[11] In exchange, the Suharto regime agreed to provide military units of the national army, known as Tentara Nasional Indonesia ("TNI"), as security for the company's operations.[12] At least one military unit, Number 113, was assigned to the sole purpose of providing security to Mobil's project, and received regular compensation by Mobil for their services.[13] From 1989 to 1998, the Indonesian government, under the rule of General Suharto, designated Aceh a "military operational area" and directed the military to occupy the province to suppress factions in Aceh seeking independence from the Indonesian government.[14] During this nine-year period, the Indonesian military killed, tortured, raped, maimed, and caused many villagers to "disappear" under the pretext of operating as security for Mobil.[15]

In 1998, with the fall of the tyrannical regime of General Suharto, the village became aware that Mobil was funding the military operation in Aceh.[16] Mobil provided the facilities where the torture, rape, and execution of villagers occurred, as well as paid the salaries of the soldiers who burned and robbed the villagers' homes.[17] Worse yet, the company continues to compensate the soldiers who kill civilians, rape women, and burn villages around the Exxon Mobil complex all in the name of protecting the company.[18]

Exxon Mobil was created on November 30, 1999 through the merger of Exxon Corporation and Mobil Corporation and is the successor in interest to all assets and liabilities previously owned by the merged entities.[19] When the merger occurred there was "a clear public

9. Complaint, *supra* note 6, at 12–13.
10. *Id.* at 11.
11. *Id.* at 12, 14.
12. *Id.*
13. *Id.* at 14–15.
14. Complaint, *supra* note 6, at 13–14.
15. *Id.*
16. *Id.* at 8.
17. Hamzah, *supra* note 1.
18. *Id.*
19. Complaint, *supra* note 6.

record of pervasive and systematic human rights violations" perpetrated against the Aceh villagers by the troops hired as security for Mobil and PT Arun.[20]

This Note focuses on the accountability of multinational corporations that commit human rights violations abroad. More specifically, this note will focus on whether Exxon Mobil, who reported approximately $210 billion in revenue and was listed by *Fortune* as the largest publicly held corporation for the year 2000, may be held liable under the Alien Torts Claim Act ("ATCA") for knowingly supporting the egregious behavior of the Indonesian military.[21] Part I of this Note explores the scope of the corporate human rights problem. Part II discusses the birth of multinational corporations ("MNCs"). Part III examines the history of the ATCA and its recent developments. Finally, Part IV argues that Exxon Mobil should be held liable under the ATCA for complicity in genocide, torture, and crimes against humanity by providing funding, equipment, and facilities to the Indonesian military, which was committing human rights violations.

II. CORPORATE HUMAN RIGHTS PROBLEM

Corporations have long been profiting from abusive behavior. Although corporate human rights abuses can be traced back to the seventeenth century and the British and Dutch East India Companies, the Holocaust is perhaps the most graphic example of corporate greed leading to human rights violations.[22] The Holocaust was also instrumental in forming the foundation for modern day corporate liability for human rights abuses, in large part because of the worldwide reaction to corporations extracting economic gain without regard for human harm.[23]

World War II

The full extent of corporations profiting from the Holocaust has only recently begun to receive attention.[24] Thousands of corporations are believed to have profited from the atrocities of the Holocaust.[25]

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20. Complaint, *supra* note 6.

21. *Id.* at 8.

22. Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 49 (2001).

23. *See* Lucinda Saunders, *Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT'L L.J. 1402, 1450 (2001).

24. Stephens, *supra* note 22, at 49.

25. *Id.*

Delayed investigations have not only made it difficult to know exactly how much corporations profited, but also demonstrate the corporations' power to conceal their transactions.[26] Legal actions have been filed against banking institutions that profited by retaining the assets of those killed by the Nazis, as well as by accepting profits resulting from slave labor and assets looted by the Nazis.[27] At the same time, many companies conducted business with Nazi Germany. It has been reported that companies such as Siemens, Volkswagen, BMW, and Daimler-Benz profited greatly from Jewish forced labor supplied to them by the German army.[28]

Furthermore, Allianz, the second largest insurance company in the world, failed to pay the life insurance policies of Jewish customers who were killed in the Holocaust.[29] In addition, documents were discovered in 1997 that revealed the company also insured buildings and civil employees of the Auschwitz concentration camp.[30] Moreover, pharmaceutical companies supplied medication and other equipment used in Nazi medical experiments and IBM supplied punch cards for Nazi record keeping.[31] These cases reveal the extent to which the corporate pursuit of profit can lead to human rights violations.[32] Even more unsettling is the fact that "profits from these activities enriched successor corporations and have been distributed to investors throughout much of the Western world."[33]

The Nuremberg Principles

After World War II, representatives from the United States, the United Kingdom, France, and the Soviet Union met to establish procedures for prosecuting Nazi war criminals.[34] One result of this conference was the Nuremberg Charter, which set forth four grounds under which accused war criminals could be indicted.[35] The ideas

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26. *Id.*

27. Stephens, *supra* note 22, at 49.; Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 332 (1998).

28. *Companies and the Holocaust: Industrial Actions*, THE ECONOMIST, Nov. 14, 1998, at 75.

29. John Marks & Jack Egan, *Insuring Nazi Death Camps History Catches Up with Another German Corporation,* U.S. NEWS & WORLD REP., Feb. 22, 1999, at 52.

30. *Id.*

31. Stephens, *supra* note 22, at 50.

32. *Id.* at 49.

33. *Id.*

34. Ramasastry, *supra* note 27, at 395.

35. *Id.* The four grounds set forth by the Charter were crimes against the peace, war crimes, crimes against humanity, and common plan or conspiracy.

contained in the Charter were particularly significant because it was the first time individuals were held to have violated international law.[36] The Charter's legal principles were later restated by the International Law Commission and named the Nuremberg Principles. These principles are now recognized as customary international law.[37] Moreover, the Principles recently served as the basis for liability in a suit filed under the ATCA in late 1996 by Holocaust survivors and their descendants against Swiss banks alleging that the banks knowingly profited from slave labor and stolen property from the Nazi regime.[38]

Modern Day Abuses

The Holocaust is a distinctive example of corporate human rights abuses, but similar concerns persist today. Corporations, "[i]n the pursuit of profit and often in partnership with repressive governments, violate the right to life, to health, to gainful employment, and to political participation."[39] Consequently, corporations increasingly face charges levied against them for their complicity in human rights violations.[40] For example, Enron Corporation has been accused of working with the Indian police to suppress local residents opposed to an energy project.[41] Also, Royal Dutch Shell has been sued for allegedly conspiring in the executions of activists protesting the company's policies in Nigeria.[42] Additionally, Coca-Cola has been accused of complicity in human rights violations committed by Columbian paramilitaries hired by the managers of a local bottling plant to suppress union efforts.[43] Lastly, Unocal Corporation has been charged with supporting human rights violations committed by the Burmese military hired to protect their oil pipeline development.[44]

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36. Ramasastry, *supra* note 27, at 422.

37. Saunders, *supra* note 23, at 1450; *see* J. Starke, INTRODUCTION TO INTERNATIONAL LAW 34–38 (9th ed. 1984) (discussing how customary international law crystallizes over time from usages or practices between countries, of international organs, or from a concurrence between nations' domestic laws or administrative practices).

38. Saunders, *supra* note 23, at 1450.

39. Stephens, *supra* note 22, at 51.

40. *See, e.g.,* AMNESTY INTERNATIONAL, INDIA: THE "ENRON PROJECT" IN MAHARASHTRA: PROTESTS SUPPRESSED IN THE NAME OF DEVELOPMENT, Amnesty International Index: ASA 20/31/97 (1997).

41. *See id.*

42. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000) [hereinafter *Wiwa II*].

43. *See* Sinaltrainal v. Coca-Cola Complaint, *available at* http://www.laborrights.org (last visited Mar. 19, 2004).

44. *See* Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000) [hereinafter

These examples underscore the danger that arises when corporations either directly or indirectly commit human right violations or enter circumstances in which their behavior leads to human rights abuses. "Current economic incentives are insufficient to trigger voluntary compliance with international human rights standards" and sadly the legal system has not faired much better.[45] However, before tackling the problems of regulating these conglomerates and why the way they are viewed should be altered, it is helpful to understand the history and origin of MNCs.

III. THE RISE OF MNCS

The Birth of MNCs

"The fundamental legal attributes of corporate existence had been generally recognized as early as the end of the thirteenth century and gradually crystallized over the years, forming the common law doctrine of corporations."[46] The first corporations were creatures of law and could only achieve legal status through the King or Parliament.[47] Early scholars described corporations as being "invisible" and an "artificial person."[48]

Corporations upon formation had innate core legal concepts including the right to sue and be sued, to contract, to acquire and dispose of real and personal property, and to have perpetual life.[49] Furthermore, corporations were granted a seal, which allowed the corporate body to act separate from its members.[50] A corporation was thought of as a separate legal unit from its owners, with its rights exercisable only by the corporation and not by its individual shareholders.[51] Limited liability, a concept thought to be central to a corporation, only became common in the early nineteenth century in the U.S. and fifty years later in England.[52]

Unocal I].

45. Stephens, *supra* note 22, at 53.

46. PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 3 (1993).

47. *Id.* at 4.

48. *Id.*

49. Stephens, *supra* note 22, at 55.

50. BLUMBERG, *supra* note 46, at 4.

51. *Id.* at 5.

52. *Id.* at 7–19.

Corporate Rights

Although corporations had some core rights, they lacked other legal rights possessed by individuals.[53] Specifically, jurists of the time believed that corporations could not commit personal offenses, such as treason or assault, because they were "invisible" and lacked a "soul."[54] Although some of the restrictions on corporate identity were eventually rejected, a corporation is still not allowed to appear in court without an attorney, even when its president and sole stockholder wants to appear *pro se*, and it was not until the early twentieth century that a corporation was held capable of committing a crime that required intent.[55]

Early corporations, both in the U.S. and in England, were largely portrayed as a delegation of authority by the King to accomplish some public purpose.[56] Well into the nineteenth century corporations could only be created through some state action; in England it took the form of a Charter from the King or Parliament, and in the U.S., a legislative act.[57] It was not until after the Civil War that general incorporation statutes allowing people to utilize the corporate form, became common.[58] Over time, the trend toward general incorporation and industrialization changed the purpose of corporations from serving public goals to generating profit.[59]

Obstacles to Market Domination

There was a generally accepted rule, due in large part to hostility towards monopolies and corporations in general, that one corporation could not hold stock in another.[60] This rule persisted at common law and, in some states, as statutory law for the most part of the nineteenth century.[61] Even with this limitation, large dominating groups began forming in the late nineteenth century as trusts.[62] A trust gave corporate control to a trustee who held shares of formerly competing companies in trust for beneficial owners.[63] Beneficial owners continued to receive the

53. BLUMBERG, *supra* note 46, at 3–7.
54. *Id.* at 5.
55. *Id.* at 4.
56. *Id.* at 22.
57. *Id.*
58. BLUMBERG, *supra* note 46, at 22.
59. *Id.* at 7.
60. *Id.* at 52–54.
61. *Id.* at 54.
62. *Id.* at 55.
63. BLUMBERG, *supra* note 46, at 55.

economic benefits of ownership, while the trustees exercised the power to vote and controlled the companies in question, thereby permitting domination of the relevant markets.[64] Two markets primarily controlled through trusts were oil, by Rockefeller, and sugar, by the Havemeyers.[65]

As antitrust legislation and litigation put an end to the use of trusts, corporate counsel discovered a new route to market domination – the power to acquire shares of competitive corporations.[66] A New Jersey statute drafted by the legislature to attract corporate licensing fees represented an enormous change for U.S. business by allowing corporations to own stock in other corporations and, as other states followed suit, led to the liberalization of corporate formation.[67] By the late 1880s, the first modern MNCs in the U.S. emerged.[68]

Limited liability had emerged prior to the birth of MNCs when the corporation constituted an enterprise and the stockholders were investors in the enterprise in order to protect the investors from the risks of business.[69] Thus, large corporate groups were being formed by corporations purchasing stock of other corporations and the "subservient subsidiary corporation and their dominant parent shareholder collectively conducted the enterprise."[70] The safeguards of limited liability were immediately imposed on these new corporations without regard to the distinction between limited liability for shareholders and that of the parent and subsidiary companies.[71]

This extension of protections has been characterized as illogical by some because it overlooks the fact that the "parent corporation and its subsidiaries were collectively conducting a common enterprise," that the business had been broken down into component parts and that limited liability, a doctrine designed to protect investors and not the corporation itself, would protect each component of the business from the obligations of others.[72] Even with this apparent flaw in the system, limited liability within MNCs continues today.

With the ability to own the stock of other corporations, MNCs grew rapidly and by the end of World War II the modern MNC, with

64. BLUMBERG, *supra* note 46, at 55.
65. *Id.*
66. *Id.* at 56.
67. *Id.*
68. Stephens, *supra* note 22, at 55.
69. BLUMBERG, *supra* note 46, at 58.
70. *Id.* at 58–59.
71. *Id.* at 59.
72. *Id.*

"integrated production across borders, and goods and services flowing in multiple directions," had become commonplace.[73]

IV. THE DIFFICULTIES WITH REGULATING MNCS

Regulating MNCs has posed a problem because economic incentives are not sufficient to trigger voluntary compliance and the legal system has not faired much better.[74] The problem stems from the fact that corporations are multinational while the legal systems that govern them are national.[75] To put it another way, the MNCs have outgrown the legal structures that govern them, and have, until recently, been effectually ungoverned.[76] MNCs are incredibly efficient economically and, through their coordinated efforts, can far outperform smaller domestic businesses.[77] MNCs follow a policy of "group profit maximization in which the interests of the individual constituent members of the group are subordinated to the interests of the parent, that is, the group as a whole."[78]

The economic power of many MNCs dwarfs that of most nations.[79] For example, based upon 1999 statistics, only eleven nations have a larger national budget than Exxon's $100.7 billion yearly revenue.[80] MNCs' economic power brings with it serious political clout and often puts MNCs, with their clear goals, in an advantageous position when negotiating with often divided governments.[81]

The strength of MNCs makes them difficult to regulate. As MNCs become increasingly international they become more unattached from their home state and can escape state power.[82] Regulation, for the most part, is domestic while MNCs' operations have virtually no borders.[83] The weakening ties between MNCs and the state allow MNCs to become 'denationalized' and stateless.[84] "The fact that they have

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73. Stephens, *supra* note 22, at 53.

74. *Id.*

75. *Id.*

76. *See id.*

77. *Id.* at 56.

78. BLUMBERG, *supra* note 46, at 139.

79. *See* Global Policy Forum, *Comparison of Revenues among States and MNCs*, *available at* http://www.globalpolicy.org/socecon/tncs/tncstat2.htm (last visited Mar. 19, 2004).

80. *Id.*

81. *See* Stephens, *supra* note 22, at 58.

82. *Id.*

83. *Id.*

84. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a*

multiple production facilities means that [MNCs] can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world."[85]

The same problem arises with regulation under international law.[86] Since there is no international forum for regulating MNCs, international law sets guidelines for adjudication in domestic legal systems.[87] These guidelines generally base the ability of a domestic system to exercise jurisdiction over MNCs on contacts with the state seeking to exercise jurisdiction or on "home state jurisdiction."[88] "Home state jurisdiction" occurs in the state of incorporation, however, when a MNC is composed of multiple constituent members, each incorporated in different states, and then each member has a different "home state."[89] MNCs often use this to their advantage and "argue that the parents and the subsidiaries are not subject to the jurisdiction of the other's home state."[90]

The problem of regulation is minimized somewhat by the application of enterprise law, which examines the "reality of control, decision-making and economic benefit rather that the formalities of corporate legal structures."[91] Once the reality of economic interdependence is unveiled from the "legal fiction of separate corporate identities" it becomes evident that the parent and subsidiary corporations have been collectively conducting worldwide economic enterprises.[92] This approach to regulating MNCs recognizes the corporation as a whole, rather that a particular subsidiary company, as the juridical unit.[93]

Although the enterprise approach was recently used and rejected in response to the Union Carbide disaster in Bhopal, India, absent an effective international approach, domestic enforcement must step in to ensure that corporate human rights abuses do not persist.[94] To be effective, domestic regulation must recognize the "reality of economic interdependence" or MNCs will continue to avoid regulation in

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People-Centered Transnational Legal Order?, 9 AM. U. J. INT'L L. POL'Y 1, 8 (1993).

85. *Id.*
86. Stephens, *supra* note 22, at 88.
87. *See id.* at 68.
88. *Id.* at 89
89. *Id.*
90. *Id.*
91. Stephens, *supra* note 22, at 88.
92. *Id.* at 89.
93. *Id.*
94. *Id.*

domestic legal systems.[95]

In the somewhat shaky world of domestic regulation of MNCs, there has been one bright spot in recent years – the ATCA. The ATCA is a unique statute that has come to the forefront for regulating MNCs' human rights violations because it allows domestic litigation to enforce international law.[96] MNCs are reachable under the ATCA because it grants federal court jurisdiction over a "civil action by an alien for a tort only committed in violation of the law of nations or by a treaty of the U.S."[97]

History of the ATCA

The ATCA was enacted in 1789, yet it was not adjudicated until 1900 when the Supreme Court stated in *The Paquette Habana* decision that "international law is part of our law."[98] Despite the recognition that a violation of international law is a violation of U.S. domestic law, international law is continues to be seldom litigated U.S. courts, especially when dealing with human rights.[99] In 1976, Judge Henry Friendly referred to the ATCA as a "legal Lohengrin" because the statute was enacted in the first Judiciary Act, yet no one seems to know its origin.[100]

The ATCA subscribes to the notion that "less is more" and states in its entirety: "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."[101] The statute was not thought of as a tool for prosecuting human rights violators until the 1980 *Filartiga* decision.[102] In 1995 the statute gained further distinction when the Second Circuit held that it could be used to reach the conduct

95. Stephens, *supra* note 22, at 90.

96. *Id.* at 85.

97. 28 U.S.C.A. § 1350 (2002).

98. Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 540 (1997).

99. *Id.* at 540.

100. *Id.* at 543; Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 89 (1999) (explaining that the description "legal Lohengrin" refers to a myth of a mysterious knight that appears on a swan-boat to save a princess on the condition that she not ask him his background; after being saved, she surrenders to curiosity and asks him his background; and, as a result, he disappears again on his enchanted vessel).

101. 28 U.S.C.A. § 1350 (2002); Zia-Zarifi, *supra* note 100, at 89.

102. Zia-Zarifi, *supra* note 100, at 89; *see* Filartiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

of private individuals and not just state actors.[103]

The actual meaning of the statute as well as the drafter's intent has been disputed, particularly with no legislative history accompanying the statute.[104] Additionally, the statute's requirement that the tort be committed in "violation of the law of nations" has spawned lively debate.[105] Some have argued that the ATCA was only intended to address one tort, that prohibited by the law of prize, while others have argued that while the statute provides jurisdiction it does not provide a right of action, and that a suit brought under the ATCA could only proceed if a right of action was found either under the law of nations or a treaty.[106] The statute's "violation of law of nations" requirement has been the subject of such strict scrutiny because it makes U.S. courts identify "customary international law, establish [its] contents, and enforce [its] provisions in contexts where [it has] seldom, if ever, been used" – against MNCs.[107]

Filartiga: A New Outlook

The 1980 *Filartiga v. Pena-Irala* decision was the first "major appellate court interpretation" of the ATCA.[108] In *Filartiga*, Dr. Joel Filartiga, a Paraguayan, and his daughter, Dolly, filed suit alleging that Pena-Irala, the former inspector general of the Paraguayan Police, had tortured and killed Joelito Filartiga in violation of the law of nations, creating an actionable tort under the ATCA.[109] Dolly had been living in the U.S. since 1978 under a visitor's visa and was able to serve Pena-Irala, who had retired and was living in Brooklyn, New York at the time.[110] The district court dismissed the claim for lack of subject matter jurisdiction, but the Second Circuit Court of Appeals reversed.[111] The Second Circuit held that "deliberate torture perpetrated under the color of law" was a violation of international law and that the ATCA provided jurisdiction to hear an alien's claim against the alleged torturer.[112]

In reaching its conclusion, the court stated that the law of nations is

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103. Zia-Zarifi, *supra* note 100, at 90.
104. *See* Walker, *supra* note 98, at 544.
105. Zia-Zarifi, *supra* note 100, at 90.
106. Walker, *supra* note 98, at 544.
107. Zia-Zarifi, *supra* note 100, at 90–91.
108. Walker, *supra* note 98, at 545.
109. *Filartiga*, 630 F.2d at 878–79.
110. *Id.*
111. *Id.* at 878.
112. Walker, *supra* note 98, at 546.

not fixed and that it must be interpreted as it exists today, not as it was in 1789.[113] The judges examined contemporary sources of customary international law and found torture prohibited by the law of nations and, thus, that the ATCA provided jurisdiction.[114] The court concluded that "the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture."[115]

The court's holding in *Filartiga* represents a modern understanding of the ATCA. The decision was monumental in two respects. It marked the first time a federal court found it had jurisdiction to adjudicate human rights abuses even though the alleged acts occurred in another nation and neither party was a U.S. citizen.[116] Furthermore, by basing their decision on contemporary customary international law, the court established precedent for other courts to do the same.[117] Since *Filartiga* U.S. courts have experienced a drastic increase in ATCA cases. All the ATCA cases, except the *Tel-Oren* decision, have reaffirmed the holding in *Filartiga* that the ATCA provides "both a private cause of action and a federal forum where aliens may seek redress for violations of international law."[118]

Tel-Oren: A Bump in the Road

In 1984, the Court of Appeals for the District of Columbia in a short per curiam opinion held that the ATCA did not provide subject matter jurisdiction for victims of a terrorist attack on a civilian bus in Israel committed by the Palestinian Liberation Organization.[119] The decision was fractured with three concurring opinions and while cited widely, the holding does not have much precedental value.[120] Judge Bork's concurring opinion, in which he takes a distinctly different position than that of the *Filartiga* Court, has received a particularly fair amount of attention.

In his opinion, Judge Bork stated that the ATCA only confers jurisdiction, not a specific cause of action, and that a cause of action

113. Walker, *supra* note 98, at 546; *Filartiga*, 630 F.2d at 881.
114. *Id.*
115. *Filartiga*, 630 F.2d at 890.
116. Walker, *supra* note 98, at 546–47.
117. *Id.* at 547.
118. *Abebe-Jira*, 72 F.3d at 847.
119. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984).
120. Zia-Zarifi, *supra* note 100, at 103.

would have to come from a source other than the ATCA.[121] He further explained that Congress could provide a specific cause of action for torture, but it had not, and that customary international law did not provide one either.[122] Judge Bork also stated that the only proper causes of action under the ATCA are those that the drafters of the Act would have had in mind, namely "piracy, infringement of the rights of ambassadors, and violations of the laws of safe conduct."[123]

The Ninth and Eleventh Circuit Court of Appeals have rejected Judge Bork's position and held that a "tort in violation of international law is actionable" under the ATCA and is not restricted to the law of nations as of 1789.[124] The Eleventh Circuit addressed Judge Bork's opinion explicitly in *Abebe-Jira v. Negewo* and held that an Ethiopian defendant was liable under the ATCA for torture he committed while working for the Ethiopian government.[125] Specifically, the court stated that the statute does not require a "separate enabling statute as a precondition to relief" under the ATCA and that "the [ATCA] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."[126] While *Tel-Oren* first appeared to be a set back for human rights plaintiffs, it, in actuality, led to Congress ratifying the *Filartiga* holding in enacting The Torture Victim Protection Act of 1991 (TVPA).[127]

The Torture Victim Protection Act: Solidifying the Path

In passing the TVPA, Congress ratified the *Filartiga* holding and rejected Judge Bork's argument in *Tel-Oren* that the ATCA only confers jurisdiction and does not create a cause of action.[128] Congress intended the TVPA to compliment the ATCA and not alter it.[129] This statute was meant to provide an additional basis upon which claims of torture and extrajudicial killings may be made.[130] Congress noted that the TVPA provided the specific grant of a private right of action before

121. *Tel-Oren*, 726 F.2d at 801; Walker, *supra* note 98, at 547.

122. Walker, *supra* note 98, at 548.

123. *Id.*

124. *Id.*

125. *Abebe-Jira*, 72 F.3d at 847.

126. *Id.* at 847–48.

127. Rachel E. Schwartz, *And Tomorrow? The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 283 (1994).

128. *Wiwa II*, 226 F.3d at 104.

129. *See id.*

130. Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV.8386 (KMW), 2002 WL 319887, *4 (S.D.N.Y. Feb. 28, 2002) [hereinafter *Wiwa I*].

U.S. courts that Judge Bork felt was lacking.[131] Specifically, Congress stated that the TVPA "would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATCA], which permits federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.'"[132] The TVPA makes clear that Congress intended U.S. courts to play an important role in enforcing the law of nations and providing redress to human rights victims.

Kadic v. Karadzic: A Step in the Right Direction

The Second Circuit decision in *Kadic v. Karadzic* was a significant expansion of the ATCA. In *Kadic*, the court held that the ATCA applies to private parties, or non-state actors, to the extent that either "their conduct. . . [was] under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties."[133] This case involved claims brought by Croatian and Muslim citizens of Bosnia as "victims and. . . [on behalf] of victims of various atrocities, including brutal acts of rape, forced prostitution, force impregnation, torture, and summary execution," committed by the Bosnian-Serb military during the Bosnian Civil War.[134] Karadzic, the president of the self-proclaimed Bosnia-Serb republic, had command authority over the military and he, as part of a genocidal campaign, directed the military to commit the injuries plaintiffs complained of.[135]

The court found that the contemporary understanding of the law of nations is not confined to state action and that certain forms of conduct violate the law of nations whether taken by a state or a private individual.[136] The court also found that genocide, war crimes, and crimes against humanity are crimes that, in accordance with customary international law, non-states actors could commit.[137]

According to the *Kadic* decision, there are two ways that a private individual can be held liable under the ATCA: under color of authority, when he "acts together with state officials or with significant state aid," or if he acts alone and he commits acts so serious that they violate *jus*

131. H.R. REP. NO. 102-367 at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86, *cited in Abebe-Jira*, 72 F.3d at 848.

132. *Id.* at 3.

133. *Wiwa II*, 226 F.3d at 104; *see also* Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

134. *Kadic*, 70 F.3d at 236–37.

135. *Id.* at 237.

136. Walker, *supra* note 98, at 549.

137. *Id.* at 550.

cogens: genocide, piracy, slavery, and war crimes.[138] However, it is important to note that torture is "proscribed by international law only when committed by state officials or under color of law."[139]

Kadic expanded the scope of liability under the ATCA and left it open for future enlargements. In fact, after *Kadic*, courts recognized the potential of extending ATCA liability to MNCs.[140] In this regard, financial ties between corporate and state actors are sufficient to meet the "under color of official authority" requirement.[141] Furthermore, since most resource extraction companies like, Exxon Mobil, are responsible for the majority of a developing country's exports, it is highly unlikely that they would not have ties to its host state's domestic activities.[142]

Wiwa v. Royal Dutch Petroleum: One Foot in Front of the Other

Wiwa illustrates the final procedural obstacle to obtaining domestic jurisdiction over MNCs: *forum non conveniens*.[143] As stated earlier, domestic legal systems are ill-equipped to regulate MNCs, whose operations know no boundaries.[144] One common strategy used by MNCs to escape liability in domestic courts is *forum non conveniens*.[145]

The plaintiffs in *Wiwa* were former citizens and residents of the Ogoni region of Nigeria, where most of the country's oil is found.[146] A wholly-owned subsidiary of the defendants, Shell Petroleum Company of Nigeria was conducting oil exploration and development in the

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138. Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self After Wiwa*, 16 EMORY INT'L L. REV. 187, 196-97 (2002); BLACK'S LAW DICTIONARY 864 (7th ed. 1999) (defining *jus cogens* as a mandatory norm of general international law from which no two or more nations may exempt themselves or release one another).

139. *Kadic*, 70 F.3d at 243.

140. Saunders, *supra* note 23, at 1444.

141. *See* Skolnik, *supra* note 138, at 199.

142. *See id.* at 198.

143. The scope of this note is too narrow to go into all of the claims presented in the *Wiwa* complaint and will, therefore, just touch on the major issues with respect to the claims brought forth in the *Exxon Mobil* case.

144. *See* Stephens, *supra* note 22, at 53.

145. Skolnik, *supra* note 138, at 201 (explaining that a U.S. district court, if there is no real U.S. interest in the case, is allowed to dismiss the case under the *forum non conveniens* doctrine in favor of a fair and convenient foreign forum if it bears some relation to the case. The Supreme Court, in *Gilbert v. Reyno*, explained that the court must determine whether an adequate alternative forum exists. If they determine one does exist, then the court weighs "the private interests of the parties in the competing forums and any public interests at stake").

146. *Wiwa I*, 2002 WL 319887, at *1.

Ogoni region.[147] A protest movement developed among the Ogoni because Shell Nigeria allegedly "coercively appropriated land" without proper compensation and caused "substantial pollution."[148] Shell Nigeria recruited the Nigerian police and military to suppress the opposition group and ensure that the development activities proceeded "as usual."[149] The plaintiffs sued on behalf of members of the opposition group who were arrested, detained, tortured, and then killed by the Nigerian police and military recruited by Shell Nigeria.[150] The defendants allegedly provided "money, weapons, and logistical support to the Nigerian military."[151] Defendants filed a motion to dismiss the suit on the basis of *forum non conveniens* and failure to state a claim.[152]

The trial court granted Defendant's motion for *forum non conveniens* dismissal and listed England as an "adequate alternative forum." However, this dismissal was later reversed by the Second Circuit Court of Appeals.[153] The Court of Appeals noted that a plaintiffs' choice of forum should rarely be disturbed.[154] While Plaintiffs were not U.S. citizens, two of the four plaintiffs were living in the U.S. when the case was filed, and the court's deference to a plaintiff's choice of forum "increases as the plaintiff's ties to the forum increase."[155] The court further noted that the district court did not properly consider the U.S. interest in adjudicating human rights violations.[156] Congress intended the TVPA to codify *Filartiga* and expressed an undeniable U.S. interest of justice in hearing cases involving violations of international human rights law.[157] This interest of justice is lost if human rights cases are dismissed for alternative forums.[158]

This decision is particularly significant because it weakens a procedural tool often employed by MNCs – *forum non conveniens.* The court in *Wiwa* outlined a statutory basis for granting *forum non conveniens* dismissals only when "the defendant has fully met the

147. *Wiwa II*, 226 F.3d at 92.
148. *Id.* at 92.
149. *Wiwa I*, 2002 WL 319887, at *2.
150. *Wiwa II*, 226 F.3d at 92.
151. *Id.* at 92–93.
152. *Id.* at 94.
153. *Id.* at 94–95.
154. *Id.* at 103.
155. Skolnik, *supra* note 138, at 210.
156. *Wiwa II*, 226 F.3d at 106.
157. *Id.* at 105.
158. *See* Skolnik, *supra* note 138, at 211.

burden of showing that the *Gilbert* factors tilt strongly" in their favor.[159] It is unlikely that a case similar to *Wiwa* will be dismissed on *forum non conveniens* grounds in the future given the significant deference the court gave to the plaintiffs' choice of forum, the heavy burden the defendant has to meet to be granted dismissal, "and the clearly expressed policy objectives of the TVPA."[160]

The district court ruled on February 28, 2002 to deny Defendants' motion to dismiss for failure to state a claim.[161] As stated earlier, torture is "proscribed by international law only when committed by state officials or under color of law."[162] The court found Plaintiffs' allegation that Defendants were financing and participating in the torture and killing of activists was sufficient to support a claim that Defendants were joint actors with the Nigerian police and military. As a result, the court found that Defendants acted "under color of law."[163]

John Doe v. Unocal Corporation: The Light at the End of the Tunnel?

In 1988, a new military government, the "Myanmar military," took control of Burma and renamed the country Myanmar.[164] The Myanmar military formed Myanmar Oil and, in 1992, licensed Total, a French company, "to produce, transport, and sell natural gas" extracted from Myanmar's coast.[165] Later that year, Unocal acquired an interest from Total in the Myanmar Project ("Project").[166] In order to transport the extracted gas, Unocal and Total constructed a pipeline "from the coast of Myanmar through the interior of the country to Thailand."[167]

Plaintiffs, villagers from the Tenasserim province of Myanmar, filed suit under the ATCA against Unocal for human rights violations that allegedly occurred in connection with the construction of the pipeline.[168] Specifically, they allege that Unocal "directly or indirectly subjected villagers to forced labor, murder, rape, and torture" by the

159. *Wiwa II*, 226 F.3d at 106; Skolnik, *supra* note 138, at 214.

160. Skolnik, *supra* note 138, at 214.

161. *Wiwa I*, 2002 WL 319887, at *1.

162. *Kadic*, 70 F.3d at 243.

163. *Wiwa I*, 2002 WL 319887, at *13.

164. John Doe I v. Unocal Corp., 2002 WL 31063976, at *1 (9th Cir. 2002) [hereinafter *Unocal II*].

165. *Id.*

166. *Id.* Total, Myanmar Oil, Unocal, and the Petroleum Authority of Thailand Exploration and Production each had an interest in the project. *Id.* Unocal, in particular, had a 28% interest in the project. *Id.*

167. *Unocal II*, 2002 WL 31063976, at *1.

168. *Id.* at *1.

Myanmar military who they hired as security for the construction of a gas pipeline through the region.[169] Defendants filed a motion for summary judgment, which was granted by the district court and overturned on appeal.[170]

The Ninth Circuit Court of Appeals issued a decision on September 18, 2002 allowing Plaintiffs' claims to go forward.[171] In its decision, the court held there was sufficient evidence to raise a genuine issue of material fact whether the Project directed the Myanmar military in their security activities and whether Unocal was involved in their direction.[172] The court also held that Unocal was made aware of the Myanmar military's history of human rights violations prior to investing in the Project and was aware of allegations that violations were occurring in connection to the project after they had invested.[173] Lastly, the court held that Unocal could be held directly liable for knowingly aiding and abetting the military in perpetrating forced labor along with the other alleged abuses.[174]

The majority stated that the correct standard to apply was an international law standard recently used by the *ad hoc* criminal tribunals in Yugoslavia and Rwanda.[175] Judge Reinhardt, in his concurring opinion, agreed that Plaintiffs provided sufficient evidence to survive Defendants' motion for summary judgment, but felt that the applicable standard for third party liability was agency, joint venture, and reckless disregard.[176] The Ninth Circuit Court of Appeals decision appears is a major breakthrough for holding MNCs liable for complicity in human rights violations. However, the future impact of the Ninth Circuit decision is unclear because on February 14, 2003 the court issued an order stating that the case is scheduled to be reheard *en banc*.[177]

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169. *Unocal II*, 2002 WL 31063976, at *1.

170. *Id.*

171. *Id.*

172. *Id.* at *3–4.

173. *Id.*

174. *Unocal II*, 2002 WL 31063976 at *9; International Labor Rights Fund, News and Press, *Plaintiffs Win Ninth Circuit Victory over Unocal* (Sept. 18, 2002), *at* http://www.laborrights.org/press/unocal091802.htm (last visited Apr. 16, 2004) (discussing the court's rejection of the classic Nuremberg defense, "we are not liable because we were not holding the gun").

175. *Unocal II*, 2002 WL 31063976, at *12.

176. *Id.* at *24.

177. *Id.* at *1. Parties argued June 17, 2003; however, the case was ordered withdrawn from submission on December 9, 2003 pending issuance of the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, 2003 WL 22070605. *Id.*

Exxon Mobil: A Case for Accountability

On June 20, 2001, eleven villagers filed an ATCA claim for human rights abuses by the TNI who served as Exxon Mobil's security forces in Aceh, Indonesia.[178] Aceh is an area with a history of civil unrest.[179] In particular, factions of the Acehnese have sought independence from Indonesian rule over the years resulting in violent clashes with the Indonesian government.[180] Consequently, security was an important aspect of Exxon Mobil's project in the area and became even more important when their involvement with the Indonesian government became public knowledge.[181]

The plaintiffs are victims and the survivors of victims who were "subjected to genocide, murder, torture, crimes against humanity, sexual violence, and kidnapping" by the TNI, who were operating in Aceh under the auspices of security for Exxon Mobil.[182] Plaintiffs allege that Exxon Mobil aided and abetted the atrocities through financial and other "material support" to the forces.[183] More specifically, Exxon Mobil and its predecessors in interest are alleged to not only have financed the TNI unit in the area, but also "controlled and directed" the activities of the security forces and made decisions concerning the location of bases, strategic mission planning, and specific deployment areas.[184] In its defense, Exxon Mobil filed a motion to dismiss.[185]

MNCs rely on four policy concerns as defenses to ATCA liability in addition to standard procedural defenses, such as *forum non conveniens*.[186] The first defense is that the broad scope of international

178. Complaint, *supra* note 6, at 1–2.

179. Michael Shari, *Indonesia: What did Mobil Know?* BUS. WK., Dec. 28, 1998, at 68 (discussing the separatist rebellion in Aceh and its beginnings four centuries prior against Dutch colonial rule).

180. *Id.* (explaining that the Indonesian government angered the Acehnese by favoring ethnic Javanese for most high level jobs and contracts in area oil and gas extraction and, despite horrific local poverty, investing less than 10% of Aceh's wealth back into the region).

181. *See* Complaint, *supra* note 6, at 14.

182. *Id.* at 1.

183. *Id.* at 14–16; Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, at 2, *at* http://www.laborrights.org (last visited Mar. 19, 2004).

184. Complaint, *supra* note 6, at 15.

185. International Labor Rights Fund, *Exxon Mobil: Genocide, Murder, and Torture in Aceh, Indonesia*, *at* http://www.laborrights.org/projects/corporate/exxon/index.html (last visited Mar. 19, 2004).

186. *See* Plaintiff's Memo in Opposition to Defendants' Motion to Dismiss, *supra* note 179; *see also* Terry Collingsworth, *The Alien Torts Claim Act – A Vital Tool For Preventing Corporations from Violating Fundamental Human Rights* 2-5, *at* http://www.laborrights.org

law will make it impossible for companies to know what behavior may subject them to liability.[187] The second is that MNCs will be held liable for the conduct of foreign governments who commit human rights violations simply because they have invested in those countries.[188] The third is that trial attorneys will reap huge rewards for frivolous claims filed under the ATCA.[189] Finally, the fourth defense is that liability under the ATCA will discourage MNCs from foreign investment.[190]

Scope of International Law

MNCs facing liability under the ATCA often argue that the scope of international law is so broad that if liability is found under the ATCA good intentioned companies wishing to do business abroad would be unable to know exactly what conduct might subject them to liability.[191] However, the ATCA specifically addresses only violations of the "law of nations."[192] A crime, to be considered a violation of the law of nations, must be encompassed in customary international law, which requires a significant degree of international consensus.[193] Furthermore, crimes that constitute a violation of the law of nations have specifically been defined as "genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity."[194] Therefore, this defense fails to raise a significant policy concern.

The limitations on the applicability of the ATCA ease any concern a MNC has about inadvertently subjecting themselves to liability. The crimes that are encompassed by the statute are clearly defined and represent a class of crimes that is in "extreme derogation" of international standards.[195] These are not crimes that one may inadvertently commit.[196] Indeed, to be considered a party in an ATCA suit, the MNC would have to be directly involved in violating "fundamental human rights."[197] Therefore, most companies investing abroad are conscientious actors and are simply not going to engage in

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(last visited Mar. 19, 2004).

187. Collingsworth, *supra* note 186, at 2–5

188. *Id.*

189. *Id.*

190. *Id.*

191. Collingsworth, *supra* note 186, at 2–5.

192. 28 U.S.C.A. § 1350 (2002).

193. *Id.*

194. Collingsworth, *supra* note 186, at 2.

195. *Id.*

196. *Id.*

197. *Id.*

any business practice that will subject them to liability under the ATCA.[198]

Liability for a Country's Conduct Based Upon Investment

Another argument often made by a MNC seeking to avoid liability under the ATCA is that MNCs who invest in countries committing violations will be held liable for the country's behavior simply because of their investments and projects in that country.[199] While the concern is understandable, especially for a company such as Exxon Mobil who invested $3.5 billion in one project alone last year, the argument is unfounded.[200] The Ninth Circuit Court of Appeals directly addressed this argument and held that an MNC cannot face liability for simply investing in a country headed by an ill-behaved leader.[201] Rather, to face liability, the party must be a direct perpetrator of the crime or knowingly be aiding and abetting the party committing the crime.[202]

Frivolous Claims Equaling Huge Verdicts

MNCs also argue that it is unfair to subject them to liability under the ATCA because trial lawyers would be able to convert frivolous claims into enormous jury awards.[203] However, there is simply no basis for this argument. Courts have not hesitated to dismiss cases that fail to provide the requisite links between the MNC and the alleged human rights violation.[204] Furthermore, MNCs named as defendants in ATCA cases have the resources to acquire the best legal counsel in the country and to defend themselves vigorously.[205] If the claims are baseless, they will be dismissed.

Foreign Investment

One of the strongest policy considerations offered by MNCs against ATCA liability is that liability will discourage foreign

198. *See* Collingsworth, *supra* note 186, at 2.

199. *Id.* at 3.

200. Jerry Useem, *Exxon's African Adventure; How to Build a $3.5 Billion Pipeline – with the 'Help' of NGOs, the World Bank, and Yes, Chicken Sacrifices*, FORTUNE, Apr. 15, 2002, at 102.

201. *See* Collingsworth, *supra* note 186, at 3.

202. *Unocal II*, 2002 WL 31063976, at *10.

203. Collingsworth, *supra* note 186, at 4.

204. *Id.* at 4; *see, e.g.*, Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

205. Collingsworth, *supra* note 186, at 5.

investment and result in the loss of foreign investment opportunities.[206] This was the principal justification for immunity from ATCA liability offered by William H. Taft IV, the Department of State's Legal Advisor, in a letter to the presiding judge in the Exxon Mobil litigation.[207] Mr. Taft, in response to Judge Oberdorfer's invitation, stated that the Department believed that adjudication of the Exxon Mobil dispute could have serious effects on U.S. interests, such as discouraging relations between the U.S. and Indonesian governments and curtailing U.S. businesses' success in attaining public and private contracts in Indonesia.[208]

Harold Koh, an expert in the field of international law, stated that these justifications overlook an essential U.S. interest, namely, guaranteeing that U.S. corporations abide by international human rights obligations in their business activities abroad.[209] Koh explains that all three branches of the U.S. government have "consistently maintained that an honest and public scrutiny of Indonesia's human rights record that truthfully chronicles military and police abuse does not inappropriately intrude into Indonesian sovereignty or interfere with U.S. policy towards Indonesia."[210] Specifically, the State Department's Bureau of Democracy, Human Rights, and Labor has consistently criticized the human rights record of the Indonesian military and condemned the Indonesian government for not taking "action to prevent and punish human rights violations, including [those] in Aceh."[211] Additionally, Congress, after determining that U.S.-Indonesian relations would not be adversely affected, condemned human rights abuses in Indonesia and "suspended military assistance to Indonesia" for the majority of the past decade because of their military's history of human rights abuses.[212] Moreover, federal courts have held high-ranking Indonesian military personnel directly responsible in the past for

206. *See* Collingsworth, *supra* note 186, at 3.

207. *Id.* at Attachment A.

208. *Id.*

209. *Id.* at Attachment C. Mr. Koh served as Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor in the U.S. State Department from 1998-2001. While with the State Department, he monitored human rights issues in Indonesia and supervised the preparation of the 1998 and 1999 Country Report for Human Rights Practices concerning Indonesia. He now is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School and has currently written over eighty articles and book chapters on international law, foreign relations, constitutional law, and human rights. *Id.*

210. Collingsworth, *supra* note 186, at Attachment C.

211. *Id.*

212. *Id.* at Attachment C; S. Res. 91, 107th Cong. (2001) (enacted).

violations of human rights that occurred within Indonesia's borders.[213]

Koh also addresses the inconsistency in the argument for immunity from liability due to fear of possible prejudices by the Indonesian government towards U.S. corporations seeking contracts and the position taken by the U.S. Foreign Corrupt Practices Act of 1977.[214] In particular, the fact that a foreign company may be able to secure an investment or business opportunity over an American company because they are free to engage in bribery or corruption has never been held to be a sufficient reason for an American court to decline to prosecute an American company under the Corrupt Practices Act.[215] Following the same logic, the fact that a foreign corporation may employ security practices in violation of international law to win a contract over a U.S. corporation is not a sufficient reason for American courts to decline to prosecute an American corporation for committing human rights violations under the ATCA.[216]

Fifty members of Congress expressed their concerns regarding Mr. Taft's statements in a letter to Secretary of State Colin Powell.[217] They feared Mr. Taft's statements illustrated a wavering commitment to the continuation of the ATCA and the TVPA as a viable solution for the adjudication of legitimate human rights claims.[218] In particular, they felt Mr. Taft's comments were in conflict with the objectives of the ATCA and the TVPA.[219] Moreover, they felt that Mr. Taft's letter, in conjunction with other action by the Department of State, appeared to suggest an effort by the executive branch to "unilaterally effectuate a de facto repeal of the ATCA and the TVPA."[220] Congress passed the TVPA for the particular purpose of adjudicating "legitimate human rights claims committed abroad" and stated that its undoing would weaken the United States' ability to promote a "climate of respect for human rights" in Indonesia and elsewhere.[221] Accusations of human rights violations may be ill received by foreign governments, but Congress decided that U.S. courts should hear such claims, and did not give the executive branch veto power over such litigation.[222]

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213. Collingsworth, *supra* note 186, at Attachment C.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at Attachment B.
218. Collingsworth, *supra* note 186, at Attachment B.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at Attachment C.

Procedural Defenses

It is unlikely that the Exxon case will be dismissed on *forum non conveniens* grounds given the significant deference given to plaintiff's choice of forum, the heavy burden the defendant has to meet to be granted dismissal, and the clearly expressed intent for the U.S. to serve as a forum for violations of human rights law.[223] Furthermore, a suitable alternative forum will be difficult to find since Indonesia has a history of shielding individuals suspected of perpetrating human rights violations and the strong ties between Exxon Mobil and Washington D.C., which make jurisdiction proper.[224]

V. CONCLUSION

"In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[225] MNCs are the driving force of the global economy and gaining control over MNCs' unrestricted power and imposing regulations that force accountability for human rights abuses is "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[226]

223. *See Wiwa II*, 226 F.3d at 100–06; Skolnik, *supra* note 138, at 214.

224. *See* S. Res 91, 107th Cong. (2001); Complaint, *supra* note 6, at 7–9 (discussing Exxon Mobil's connections to the city, including places of business, shareholders residences, and lobbying efforts with the federal government).

225. *Filartiga*, 630 F.2d at 890.

226. *See Filartiga*, 630 F.2d at 890; Stephens, *supra* note 22, at 90.