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## Articles

# The Economic Cost of Alien Tort Litigation: A Response to *Awakening Monster: The Alien Tort Statute of 1789*

Emeka Duruigbo\*

“As a moth is drawn to the light, so is a litigant drawn to the United States.”<sup>1</sup>

## INTRODUCTION

Few issues command more attention in scholarly, advocacy, and policy circles today than the lawsuits brought in the courts of the United States by foreign claimants seeking redress for international law violations by multinational corporations (MNCs). The principal statutory basis for such suits has been the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA), a nineteenth-century piece of legislation that is playing a major role in modern times.

Section 9 of the First Judiciary Act of 1789, the statutory foundation for the federal courts that also regulated their jurisdiction and structure, provided that the federal district courts

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1. Lord Denning, *Smith Kline & French Labs. Ltd. v. Bloch*, 2 All E.R. 72, 74 (C.A. 1983).

“shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>2</sup> Congress has re-codified this alien tort provision a couple of times, with only slight changes.<sup>3</sup> The current version, dating back to a 1948 revision of the Judicial Code, provides that 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.”<sup>4</sup>

An impressive array of publications on the ATS exists.<sup>5</sup> A very recent, and unarguably unique, addition to this voluminous list is Gary Clyde Hufbauer and Nicholas K. Mitrokostas’ *Awakening Monster: The Alien Tort Statute Of 1789*.<sup>6</sup> This book, which approaches ATS litigation from a business perspective, debuts on the heels of a battery of sustained attacks on the ATS by governmental authorities and business interests.<sup>7</sup> This spate of attacks has sent jitters through, raised the ire of, and produced angst in the public interest community, which is all too aware of what can happen when business and political interests form an alliance to achieve a particular objective.<sup>8</sup>

Indeed, the current wave of attacks against the ATS is eerily reminiscent of the battle successfully waged by the corporate sector, with the active cooperation and support of the federal government, to stop the use of selective purchasing laws to address human rights abuses in foreign countries.<sup>9</sup> In a ‘war’

2. Judiciary Act, ch. 20, § 9, I Stat. 73, 77 (1789).

3. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 587 n.2 (2002) (citing the 1873 and 1911 re-codifications of the statute).

4. 28 U.S.C. § 1350 (2001).

5. A search on Westlaw and Lexis Nexis for “ATS,” “ATCA,” and “Filartiga” returned over a thousand results.

6. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (Institute of International Economics 2003).

7. See *infra* notes 8 and 16.

8. For a recitation of the attacks from the business sector, see Marcia Coyle, *9<sup>th</sup> Circuit Spurns U.S. Over Alien Tort Claims*, NAT’L L.J., June 10, 2003, at 1, which details attacks from the Chamber of Commerce, the National Foreign Trade Council, the National Association of Manufacturers, and others.

9. In the days of the apartheid regime in South Africa, campaigns were launched against corporations doing business with South Africa. The object was to get them to boycott and consequently coerce the apartheid government to reverse its despicable policies. In the 1990s, selective purchasing laws resurfaced as tools to campaign for human rights and fight repressive regimes. In a bid to address the human rights issues in Burma, the state of Massachusetts enacted a law in 1996,

that was waged all the way to the United States Supreme Court, Massachusetts's selective purchasing law was invalidated on the ground that federal legislation enacted after the Massachusetts statute, which authorized the imposition of sanctions on Burma, preempted the state law.<sup>10</sup>

In a similar vein, at the state level, the Texas Supreme Court clearly indicated that it was amenable to opening the doors of Texas courts to foreign victims of corporate violations and abuses by eliminating the doctrine of *forum non conveniens*<sup>11</sup> in personal injury cases.<sup>12</sup> It was met with the resistance

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which barred companies doing business with the military regime in Burma from bidding for large public contracts in Massachusetts. Measures such as this had a significant level of success. A number of large companies including Apple, Kodak, Hewlett-Packard, and Philips Electronics were reportedly induced to divest from Burma because of Massachusetts's selective purchasing law. On the other hand, the measure also faced formidable challenges. One and a half years after the law took effect, on January 1, 1997, a consortium of more than 580 businesses launched a lawsuit against the state on the ground that the law was unconstitutional. On November 4, 1998, the District Court of Massachusetts felt that it was beyond Massachusetts's jurisdiction to handle issues bordering on foreign policy. Accordingly, it declared the law an unconstitutional usurpation of the federal government's exclusive authority over matters of foreign relations. The U.S. Supreme Court agreed. See generally Craig Forcese, *Municipal Buying Power and Human Rights in Burma: The Case for Canadian Municipal 'Selective Purchasing' Policies*, 56 U. TORONTO FAC. L. REV. 251, 257 (1998); Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 374 (1999); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443 (1998); Harvey Oyer, Note, *The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations Under NAFTA*, 11 FLA. J. INT'L L. 429, 450-51 (1997).

10. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). The Supreme Court decided this case on the narrow preemption ground rather than broader commerce clause and foreign policy grounds, which featured prominently at both lower courts. See Bernard H. Oxman et al., *International Decision: Crosby v. National Foreign Trade Council*, 94 AM. J. INT'L L. 750, 754 (2000); see also Jeffrey A. Berger, *Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 NW. U. L. REV. 941, 954 n.70 (2003); Joshua A. Brook, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573 (2004); Jonathan Fielding, *Enforcing International Labor Standards through the Use of the Alien Tort Claims Act and Traditional Corporate Law*, 17 N.Y. INT'L L. REV. 77 (2004).

11. The doctrine of *forum non conveniens* presents a mechanism for courts to refuse to exercise jurisdiction over cases they ordinarily have the power to hear on the basis that an adequate alternative forum is available elsewhere. See ADRIAN BRIGGS, *THE CONFLICT OF LAWS* 96 (2002).

12. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990) (Hightower, J., concurring); see also Joseph H. Sommer, *The Subsidiary: Doctrine Without A Cause?*, 59 FORDHAM L. REV. 227, 252 n.94 (1990).

of the business-political alliance. Successful lobbying by business groups led to a partial reinstatement of the doctrine by the Texas legislature.<sup>13</sup>

With the preceding background in mind, it is safe to consider *Awakening Monster* an important piece of work. This Response, therefore, proceeds on an understanding of this background, accentuated by a host of other reasons. In the first place, it is one of the first monographs on the ATS, a signal of the growing importance that this piece of legislation has garnered in the short time since its resurrection.<sup>14</sup> Second, this book appears to fit into the pattern of efforts by business and political interests to continue to resist ATS litigation. It represents the concerns of the business community (also shared by the U.S. government) that the courts have been broadening the reach of the ATS beyond the statute's original purpose to the detriment of the economic, political, and national security interests of the United States. Third, this work is pioneering in its treatment of the subject primarily from the perspective of economic costs. Previous discussions seem to have focused on legal analysis, foreign policy questions, and the national security implications of ATS litigation.<sup>15</sup>

The arrival of the book has been greeted with praise from the business community, and aversion, revulsion, and derision from interests that are not closely aligned to business, namely human rights and consumer protection groups. The pro-business world has welcomed it as "a highly thoughtful and well-documented analysis of the damaging consequences these ATP [Alien Tort Provision] suits could have, not only on the U.S. economy, but also on the economies of many developing nations,"<sup>16</sup> while public interest practitioners have denounced the

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13. See Brooke Claggett, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 524 (1996).

14. The ATS was largely buried, until it was brought back from near death about two and half decades ago. See Anthony D'Amato, *Preface to THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY*, at vii (Ralph G. Steinhardt et al. eds., 1999) (stating that the ATS "was adopted by the first Congress in 1789 and promptly went into hibernation for nearly two centuries").

15. But see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001) (discussing the costs of ATS litigation on U.S. foreign relations, U.S. democracy and costs to the international system with secondary implications for trade policy and environmental protection, among others).

16. Press Release, USA\*Engage, USA\*Engage Hails IIE Study Finding that Alien Tort Lawsuits Pose Real Threat to Global Economy (quoting Bill Reinsch, President of the National Foreign Trade Council and Co-Chairman of USA\*Engage)

work as “guesswork”<sup>17</sup> and “lacking in credibility.”<sup>18</sup> In the course of this Response, prevailing notions, arguments, and counter-arguments on alien tort litigation will be examined.

To undertake the monumental task that is required, the present Response is organized into four major parts. Part I presents a background to the Alien Tort Statute. The objective of this section is to provide a helpful insight into the overall context of the present discussion. Part II consists of an overview of *Awakening Monster* and a discussion of some of the contentious issues raised in the book. Part III considers and critiques the authors’ policy proposals, the most important of which is Congressional action to limit the application of the ATS. It also suggests alternatives. Part IV is the conclusion.

## I. ALIEN TORT STATUTE: A BACKGROUND

The history of the Alien Tort Statute is shrouded in mystery.<sup>19</sup> As one writer puts it, “[t]he ATCA has no explicit legislative history.”<sup>20</sup> Controversy has centered on the original intent of the lawmakers and what the statute was designed to achieve.<sup>21</sup> One contention is that the intention of Congress in enacting the legislation was the provision of jurisdiction over prize cases.<sup>22</sup> Some scholars, however, favor an interpretation

at [http://www.usaengage.org/press\\_releases/2003/20030724%20ats%study.html](http://www.usaengage.org/press_releases/2003/20030724%20ats%study.html) (July 24, 2003).

17. Katrin Dauenhauer, *Human Rights Experts Defend Law from Business Attack*, INTER PRESS SERVICE (quoting Sugundo Llorens of the International Labor Rights Fund) at <http://www.globalpolicy.org/intljjustice/atca/2003/0730refute.htm> (July 29, 2003).

18. *Id.* (quoting Jo Marie Griesgraber of Oxfam America) at <http://www.globalpolicy.org/intljjustice/atca/2003/0730refute.htm>.

19. EMEKA A. DURUIGBO, *MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY* 164 (2003). As Judge Friendly puts it, the statute is “a kind of legal Lohengrin . . . no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

20. Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U.L. REV. 881, 886 n.23 (1999); see also Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 CORNELL INT’L L.J. 153, 161 n.47 (1998).

21. See David I. Becker, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT’L L.J. 183, 189 (1998); Jeffrey Rabkin, *Universal Justice: The Role of the Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2123–24 (1995); Courtney Shaw, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359, 1386–86 (2002).

22. Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*,

of the statute that is liberal enough to accommodate the expanding international legal and moral obligations of the United States.<sup>23</sup> Regardless of what side one comes down on in this controversy, one incontrovertible fact is that this piece of legislation remained in near-total obscurity until a few decades ago when it was exhumed to assume an important role: a veritable instrument for addressing pressing needs in the world.

The modern history of the ATS thus dates back to 1980, when it was utilized in holding a former Paraguayan police officer liable for torture committed while serving in Paraguay.<sup>24</sup> In that case, the plaintiffs, Dr. Filartiga and his daughter, alleged human rights abuses, particularly torture by a former inspector general of police in Paraguay, which led to the death of Dr. Filartiga's son.<sup>25</sup> The court exercised jurisdiction and awarded damages of \$10 million against Inspector General Pena.<sup>26</sup> It is hard to overstate the importance of this case.<sup>27</sup> Indeed, the implications and ramifications of the *Filartiga* decision were considered so phenomenal that Professor Harold Koh dubbed it the *Brown v. Board of Education* of "transnational public litigation."<sup>28</sup>

For some time, use of the ATS remained limited to cases involving agents of the state who abused the power of government to oppress their people, often with impunity.<sup>29</sup> The situation changed in the mid-1990s,<sup>30</sup> however, when a lawsuit was

18 HASTINGS INT'L & COMP. L. REV. 445, 446-47 (1995).

23. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 493 (1989).

24. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). For an extensive and exhaustive discussion of the Second Circuit's decision in *Filartiga*, see 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 (1981). For a recent recounting of the case by one of the plaintiffs, see Dolly Filartiga, *American Courts, Global Justice*, N.Y. TIMES, March 30, 2004, at A21.

25. *Filartiga*, 630 F.2d at 878.

26. *Id.* at 888-89.

27. See David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 256 (1995-96) ("In a sense, all current human rights litigation owes its fortune to *Filartiga*.").

28. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

29. Examples of such cases include those brought against Karadzic and the Estate of Marcos.

30. It should be noted that this type of non-corporate ATS case has continued to receive attention, notwithstanding the expansion to cases against corporations. In October 2003, a federal jury in Miami, relying in part on the ATS, awarded \$4

launched against the California-based oil corporation, Unocal.<sup>31</sup> That case enunciated the principle that a federal court can exercise subject matter jurisdiction over improprieties and human rights abuses involving multinational corporations in joint ventures with foreign dictatorial governments.<sup>32</sup> The *Unocal* case opened the floodgates in this arena, so much so that in recent times, ATS jurisprudence has been dominated by cases alleging human rights, labor, and environmental abuses by multinational corporations operating in the developing world.<sup>33</sup>

Notwithstanding that lawsuits brought against corporations under the ATS are still in their rudimentary stages, anti-corporate ATS litigation has sent some shockwaves through the business community. Corporations have voiced their opposition to the current state of affairs. Opposition has been led by the National Foreign Trade Council (NFTC), (which was at the forefront of the successful business attack against selective purchasing laws), the U.S. Chamber of Commerce, the U.S. Council of International Business, and the International Chamber of Commerce.<sup>34</sup> While some of the attackers have made alarmist statements and reported half-truths,<sup>35</sup> there remains some basis for concern that litigation under the ATS may have a negative

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million in compensatory and punitive damages to the plaintiffs in the first U.S. civil jury verdict for crimes against humanity. See Josh Richman, *Bay Area Family Wins Chilean 'Atrocity' Suit: First U.S. Civil Jury Verdict for Crimes Against Humanity*, OAKLAND TRIB., October 16, 2003.

31. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); see also Tobias Barington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002).

32. *Unocal*, 963 F. Supp. at 880.

33. Up to fifty lawsuits have been brought against MNCs under the ATS. See LINDA A. WILLETT ET AL., *THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS* (National Center for the Public Interest 2003); Kenny Bruno, *De-Globalizing Justice: The Corporate Campaign to Strip Foreign Victims of Corporate-Induced Human Rights Violations of the Right to Sue in U.S. Courts*, MULTINATIONAL MONITOR, March 2003, at 13.

34. See Bruno, *supra* note 33, at 16; Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563 (2003).

35. See Bruno, *supra* note 33, at 16 (stating that John Howard of the U.S. Chamber of Commerce wrote an article, subtitled *Is Our Litigation Run-Amok Going Global?*, in which he lamented that under current U.S. law, foreigners could sue companies that simply carried on business, paid taxes, and were in compliance with the laws of their host countries where atrocities were alleged to have been committed). The truth is that no company has been attacked for the reasons he stated. Instead, corporations have been sued for playing a role in those atrocities. See John E. Howard, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, UNITED STATES CHAMBER OF COMMERCE, at <http://www.uschamber.com/press/opeds/0210howarditigation.htm> (last visited Sept. 25, 2004).



impact on business. The business sector, according to the NFTC, has outlined three possible approaches for undermining the way the ATS is currently being used. These approaches include seeking legislative amendments limiting the use of the ATS, mounting a judicial challenge to the present interpretation of the statute at the Supreme Court, and getting the Executive Branch to write a generic letter that objects to ATS suits for interference with U.S. foreign policy-making.<sup>36</sup>

The U.S. government has also stepped in to oppose these suits and align its interests with those of the business sector. The Department of Justice (DOJ) has filed *amicus* briefs in ATS suits urging courts to reconsider previous interpretations of the ATS.<sup>37</sup> Upon the urging of the courts, the State Department has also expressed its opinion in letters discouraging the continuation of ATS suits in the *Exxon Mobil*<sup>38</sup> and *Rio Tinto*<sup>39</sup> cases on the ground that they would interfere with the war on terrorism.<sup>40</sup> *Awakening Monster* joins the chorus of those objecting to the current use of the ATS. The next part of this Response discusses some of the important arguments contained in the book, which form the basis of the recommendations discussed in Part III.

## II. AWAKENING MONSTER: AN OVERVIEW

Aggravating the apprehension and exasperation that has visited the pro-ATS community as a result of the relentless attacks on the statute, a new addition to the list of ATS opponents emerged in July 2003. *Awakening Monster* is organized into eight chapters. It begins by asserting that a “one-sentence law,” the ATS, could cause a nightmare scenario to become a reality.<sup>41</sup> The scenario is as follows:

Within the next decade, 100,000 class action Chinese plain-

36. See Bruno, *supra* note 33.

37. See *infra* note 57 and accompanying text.

38. Doe v. Exxon Mobil Corp., No. 1: 01-cv-01357-LFO (D.D.C. filed June 20, 2001).

39. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1181 (C.D. Cal. 2002).

40. See Letter from William H. Taft, IV, Legal Adviser, Department of State, to Louis F. Oberdorfer, District Court Judge, United States District Court for the District of Columbia (July 29, 2002), available at [www.laborrights.org](http://www.laborrights.org) (last visited Sept. 19, 2004) [hereinafter Letter from William H. Taft, IV]. For an illuminating discussion of Executive Opinions in ATS cases, see Brian C. Free, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM. L. & POL'Y J. 467 (2003).

41. HUFBAUER & MITROKOSTAS, *supra* note 6, at 1.

tiffs, organized by New York trial lawyers, could sue General Motors, Toyota, General Electric, Mitsubishi, and a host of other blue-chip corporations in U.S. federal court for abetting China's denial of political rights, for observing China's restrictions on trade unions, and for impairing the Chinese environment.<sup>42</sup> These plaintiffs might claim actual damages of \$6 billion and punitive damages of \$20 billion.<sup>43</sup> Similar blockbuster cases are already working their way through federal and state court systems.<sup>44</sup> The authors believe that the nightmare could become a reality if the ATS is interpreted not only to confer jurisdiction on federal courts, but also to create a cause of action to apply international law.<sup>45</sup> They address the question of application of unratified treaties and conventions in the United States.<sup>46</sup> The book also looks at the implications of the ATS brand of international civil litigation on foreign policy and the war on terrorism.<sup>47</sup> The economic costs of alien tort litigation are also examined.<sup>48</sup> These issues are reviewed more closely in the following sections.<sup>49</sup>

#### A. ALIEN TORT STATUTE: CAUSE OF ACTION OR JURISDICTIONAL GRANT ONLY?

The authors subscribe to the view that the ATS is essentially a jurisdictional statute.<sup>50</sup> They do not mask their dislike for the current approach in which the ATS creates a cause of action by itself. They therefore seek to dismantle it:

We urge the State, Treasury, and Justice Departments to issue a joint declaration calling on the courts to interpret the ATS essentially as a

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. HUFBAUER & MITROKOSTAS, *supra* note 6, at 7–9.

47. *Id.*

48. *Id.* at 37–43.

49. The central arguments of the authors echo sentiments of other people who share their ideological position on the ATS. For instance, Daniel Griswold of the libertarian CATO Institute has stated that the “misuse of the [ATS] constitutes bad law, bad economics, and bad foreign policy,” adding that the “unjust wielding of the ATCA threatens to damage the U.S. economy and the often underdeveloped economies of the host countries.” Daniel Griswold, *Abuse of 18<sup>th</sup> Century Law Threatens U.S. Economic and Security Interests*, INVESTOR'S BUS. DAILY, February 5, 2003, at A15.

50. HUFBAUER & MITROKOSTAS, *supra* note 6, at 3 (“Before *Filartiga*, the ATS was rarely invoked by plaintiffs. Even then, the general view was that the ATS was principally a jurisdictional statute.”).

jurisdictional statute, limiting causes of action to those contemplated in 1789, until Congress enacts additional substantive standards for alien tort claims and enumerates further causes of action. This is the interpretation urged by Judges Bork and Randolph. This is the position advocated by the Justice Department in its *Unocal* brief, filed in May 2003.<sup>51</sup>

The authors, however, make little effort to engage in a rigorous analysis of the historical and legal arguments surrounding this issue. A possible explanation for the approach they adopted is that they did not set out to write a legal treatise, but rather, sought to concentrate on the economic implications of the current wave of litigation under the ATS.

The question of whether the Alien Tort Statute provides a cause of action, or provides jurisdiction only for causes of action established by other instruments, is fundamental. To underscore its importance, many who believe that the statute provides more than a jurisdictional grant refer to it as the "Alien Tort Claims Act (ATCA)," while some of their opponents and some neutral observers settle for the term "Alien Tort Statute (ATS)."<sup>52</sup> The distinction is not merely academic and certainly goes beyond a choice of nomenclature. If the statute is construed as not providing a cause of action, it could spell doom for alien tort litigation as we currently know it.

Explicitly construing the ATS as granting a statutory cause of action is a relatively recent development. The *Filartiga* decision that pioneered modern alien tort litigation did not construe the ATS as granting a cause of action, although it erroneously has been viewed as so holding in both judicial<sup>53</sup> and academic circles.<sup>54</sup> The overwhelming majority of decisions after *Filartiga* have held that the statute creates a cause of action as well as

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51. *Id.* at 52.

52. Bradley, *supra* note 3, at 592–93 ("Moreover, human rights advocates now commonly refer to the statute as the 'Alien Tort Claims Act,' a title suggesting that the statute is more than just a jurisdictional provision."); see also Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 157 n.11. This Response uses the term "Alien Tort Statute" and the abbreviation "ATS" for convenience only. See *id.*

53. *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("We thus join the Second Circuit [in *Filartiga*] in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action . . ."); see Bradley, *supra* note 3, at 592 n.21 ("In adopting the cause of action construction of the Statute, the Ninth Circuit appears to have been under the erroneous belief that the Second Circuit had already adopted this construction in *Filartiga*.").

54. See, e.g., Schrage, *supra* note 52, at 157 n.11 (stating that *Filartiga* found the ATS "to provide a statutory cause of action").

granting subject matter jurisdiction.<sup>55</sup>

While the cause of action construction of the ATS has received enormous judicial support, its correctness has been the source of intense dispute. According to Professor William Casto, “[A]ny suggestion that the statute creates a federal cause of action is simply frivolous.”<sup>56</sup> In an *amicus* brief filed in the Ninth Circuit in *Doe v. Unocal*, the Department of Justice (DOJ) latches onto this point, impressing upon the court that its previous construction of the statute as granting a cause of action was in error.<sup>57</sup> The DOJ relied on the opinions of two judges who in separate cases reasoned that the ATS was only a jurisdictional grant. In *Tel-Oren v. Libyan Arab Republic*,<sup>58</sup> Judge Bork stated, “it is essential that there be an explicit grant of a cause of action before a private plaintiff [can] be allowed to enforce principles of international law in a federal tribunal.”<sup>59</sup> Judge Randolph adopted a similar line of reasoning in *Al Odah v. United States*.<sup>60</sup>

Proponents of the cause of action construction reject the “jurisdiction only” logic. A number of people have explicitly or implicitly rejected Judge Bork’s position on the law of nations or its application in the courts of the United States.<sup>61</sup> Attorneys

55. See *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1258 (N.D. Ala. 2003) (“[T]he ATCA ‘creates both subject matter jurisdiction and a private right of action.’”); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) (“The ATCA provides a cause of action in tort for breaches of international law.”); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (“The plain language of the [ATCA] and the use of the words ‘committed in violation’ strongly implies that a well pled tort if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action].”); see also *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847–48 (11th Cir. 1996); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1365 (S.D. Fla. 2001); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (N.D. Cal. 1995); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988).

56. William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479–480 (1986).

57. Brief of Amicus Curiae United States of America at 8, *Doe v. Unocal Corp.*, U.S. App. LEXIS 2716 (2003) (Nos. 00-56603, 00-56628) (“The court should now examine the issue in this *en banc* proceeding and should overrule *Trajano* and *Hilao* because they erroneously read the ATS as providing, or permitting a court to infer, a private right of action.”) [hereinafter Brief of Amicus Curiae United States of America].

58. 726 F. 2d 774 (D.C. Cir. 1984).

59. *Id.* at 801.

60. 321 F.3d 1134 (D.C. Cir. 2003).

61. See Anthony D’Amato, *What Does Tel-Oren Tell Lawyers: Judge Bork’s Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT’L L. 92 (1985); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the*

for the appellants in *Doe v. Unocal* reject the DOJ's contention, stating "if the Act had been intended to be purely jurisdictional, it would have been meaningless when it was enacted."<sup>62</sup> In an *amici* brief by international law scholars and human rights organizations in support of plaintiffs in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,<sup>63</sup> *amici* responded to the DOJ's brief in *Doe v. Unocal*, which was submitted by the *Talisman* defendant. In the *amicus* brief, the scholars and organizations argue that "the Justice Department's current insistence that the ATCA does not contain an explicit cause of action would have mystified [eighteenth] century lawyers, who understood the law of nations to be part of American law and therefore available to claimants whose rights under that law had been abridged."<sup>64</sup>

The *amicus* brief in the *Talisman* case also challenges the DOJ position on the grounds that the government's position has met rejection in every court that has had the opportunity to address the issue.<sup>65</sup> Seeking to bolster an argument by relying on cases that the DOJ claims were decided in error, however, begs the question. If the cases were wrongly decided in the face of stronger arguments, the Supreme Court or the circuit courts can overturn the decisions.

The international law scholars and human rights organizations in their *amicus* brief also discount the reasoning that the ATS does not grant a cause of action, arguing that the very notion of a "cause of action" did not enter the legal lexicon of the United States until almost sixty years after the ATS was adopted.<sup>66</sup> With due respect, this argument is not persuasive.

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'Originalists', 19 HASTINGS INT'L & COMP. L. REV. 221 (1996).

62. Appellant's Brief at 12, *Unocal* (Nos. 00-56603, 00-56628). Support for this position can be found in the opinion of the district court in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988).

It is unnecessary that plaintiffs establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.

*Id.*

63. Brief of Amici Curiae International Law Scholars and Human Rights Organizations in Support of Plaintiffs, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (No. 01 Civ. 9882) [hereinafter Brief of Amici Curiae International Law Scholars and Human Rights Organizations].

64. *Id.* at 8.

65. *Id.* at 2.

66. *Id.* at 9.

The critical issue is whether statutes passed before the emergence of the term were worded differently from the ATS, so that one could conclude from the wording that the statute granted jurisdiction only or accompanied it with additional authority. Conversely, the argument could be buttressed with instances of similarly worded enactments being construed as granting a cause of action. As Professor Casto has noted, the language used by the First Congress in the Alien Tort Statute—particularly the use of the word “cognizance” which “refer[red] to a court’s power to try a case” —was quite different from the language it used in statutes that created causes of action.<sup>67</sup> One example is the copyright statute, which provides that copyright infringers would be “liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.”<sup>68</sup>

The above point is confirmed by the fact that the first recodification of the ATS in 1873, and all subsequent recodifications have replaced “cognizance” with the word “jurisdiction.” Prior to the recent controversies, this change in language was never viewed as evincing an intention to alter the scope of the ATS.<sup>69</sup> Professor Curtis Bradley notes that “historical” support for the cause of action construction of the Alien Tort Statute is virtually nonexistent save for an Attorney General opinion issued in 1907.<sup>70</sup> Professor Bradley aligns with Professor Casto’s statement, which seeks to minimize the import of the opinion by describing it as a “sloppy reference to the federal courts’ jurisdiction and not to the existence of a statutory cause of action.”<sup>71</sup> Professor Bradley is therefore unequivocal in the belief that “the First Congress did not intend in the Alien Tort Statute to create a federal statutory cause of action.”<sup>72</sup>

Nevertheless, proponents insist that the Statute did just

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67. Casto, *supra* note 56, at 479.

68. Act of May 31, 1790, ch. 15, § 6, 1 Stat. 124, 125–26 (1790); see Bradley, *supra* note 3, at 594 n.26.

69. Bradley, *supra* note 3, at 594.

70. The Attorney General stated that the Alien Tort Statute “provide[s] a forum and a right of action” when citizens of a foreign country bring suit for damages caused in Mexico by the tortious diversion of water in the Rio Grande river, so long as the act is in violation of the law of nations. 26 Op. Att’y Gen. 250, 253 (1907). In *Tel-Oren*, Judge Edwards relied on this Attorney General opinion in support of his claim that the statute creates a statutory cause of action. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 (D.C. Cir. 1984) (Edwards, J., concurring).

71. Bradley, *supra* note 3, at 596 (quoting Casto, *supra* note 56, at 479 n.58).

72. *Id.* at 597.

that. They contend that the 1992 Torture Victim Protection Act (TVPA),<sup>73</sup> passed almost two hundred years after the ATS, confirmed the belief that the ATS created a cause of action based in customary international law.<sup>74</sup> As the name indicates, TVPA gave victims of torture, American citizens and noncitizens alike, the ability to bring civil actions against the perpetrators of torture and extra-judicial killings.<sup>75</sup> While the TVPA could be read as providing clarity and constraint by explicitly providing a substantive cause of action and specifying the matters into which the courts may legitimately inquire, a different reading is that it seeks to lay the debate to rest for those judges who doubted whether torture and other violations of international law can be grounds for civil liability in the United States.

Ryan Goodman and Derek Jinks find specific evidence in the TVPA that Congress was authorizing the application of the *Filartiga* doctrine.<sup>76</sup> Construing the TVPA as an act of legislative redundancy,<sup>77</sup> Goodman and Jinks assert that "Congress intended the TVPA not to replace, but rather to solidify and extend, the ATCA's coverage. Accordingly, Congress stipulated two specific causes of action . . . and purposefully left the ATCA intact to continue the broader *Filartiga* doctrine's causes of action."<sup>78</sup>

In support of their position, the scholars place an overwhelming reliance on TVPA's legislative history. That history clearly suggests that Congress was responding to doubts raised (particularly by Judge Bork in *Tel-Oren*) about the ATS's validity as a basis for bringing lawsuits for international law violations in the absence of a separate congressional authorization. Thus, as one writer views it, "While giving Judge Bork the expression of legislative intent upon which he had insisted, Congress also admonished him that he was wrong to require it in the first place."<sup>79</sup> Support for this reading can be found in the words of TVPA's principal sponsor, Senator Arlen Specter.<sup>80</sup>

73. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 1992.

74. See *infra* notes 76-78 and accompanying text.

75. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 1992.

76. Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 514 (1997).

77. *Id.* at 522 ("Congress considered its legislative action to be redundant.")

78. *Id.* at 514.

79. Rachael E. Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 *ARIZ. J. INT'L & COMP. L.* 271, 284 (1994).

80. Quoted in Goodman & Jinks, *supra* note 76, at 522 ("One might think . . . it would be unnecessary to have legislation on such a subject, because torture is such a

Insisting that the ATS provided a statutory cause of action and that the TVPA ratified and modernized it, Goodman and Jinks refer to a statement from the House Report: "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]. Section 1350 has other important uses and should not be replaced."<sup>81</sup> This position was also adopted by a group of distinguished law professors in an *amicus* brief submitted to the Supreme Court in *Karadzic v. Doe*:

Congress erased all doubt about the effect of the ATCA to authorize suit when it enacted the Torture Victim Protection Act of 1991. . . . Both the House and Senate Reports expressly evince Congress's understanding that a "remedy" for such offenses was "already available" to aliens under the ATCA. Further, the legislative history emphasizes that the ATCA "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."<sup>82</sup>

Apparently, they spoke too soon, for doubts still remain. Professors Curtis Bradley and Jack Goldsmith subscribe to the first interpretation earlier mentioned.<sup>83</sup> They do not seem to place as much import on statements contained in the legislative history of the TVPA, and to the extent they do, they view them as harboring ambiguities as to the endorsement of the *Filartiga* position.<sup>84</sup> They also argue that if it is indeed true that Congress intended to endorse the *Filartiga* logic, there should be no resistance to a requirement that "Congress express this approval in a statute rather than in ambiguous legislative history."<sup>85</sup> Bradley and Goldsmith accept the premise that Judge Bork's opinion in *Tel-Oren* was "a proximate cause of the TVPA," and refer to his position that ATS jurisdiction was dependent on the existence of a cause of action in a separate statute or treaty or customary international law.<sup>86</sup> Judge Bork had not found any instrument that contained such a cause of action, and decided not to infer one so as to avoid a potential interfer-

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heinous offense, such a heinous crime, that the courts would have jurisdiction without a formal legislative measure. This is necessary because of litigated cases in the field, most particularly [*Tel-Oren*]."

81. *Id.* (quoting H.R. REP. NO. 102-367(I), at 3 (1991)).

82. *Id.* at 526 (quoting Brief of Amici Curiae Professors David E. Bederman et al., at 9-10, *Karadzic v. Doe* (No. 95-1599)).

83. See *supra* notes 50-54, 58-60 and accompanying text.

84. Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM LAW REV.* 319, 363-64 (1997).

85. *Id.* at 368.

86. *Id.* at 363.



ence with the conduct of foreign relations by the political branches.<sup>87</sup> Bradley and Goldsmith add: "Instead, [Judge Bork] argued, the court should wait for 'affirmative action by Congress' before applying the 1789 ATS to modern human rights litigation that the drafters of the Act could not have contemplated. Congress provided this affirmative action in the TVPA."<sup>88</sup>

The contention that the original intent of the ATS was to provide jurisdiction only and not to create a statutory cause of action is on firm ground, notwithstanding judicial opinions to the contrary. It is a testament to the strength of this position that even formidable adversaries concede that their opponents may be right on this score. Professor Michael Collins put it this way: "I agree that the ATS does not itself create a federal cause of action."<sup>89</sup> Professor William Dodge concurs, but proffers some explanation, including the point that the requirement of a cause of action was a more recent entrant in the legal domain:

I agree that the First Congress probably viewed the Alien Tort Statute in purely jurisdictional terms, but Bradley's discussion of this question masks two important points. First, the reason the members of the First Congress did not provide a statutory cause of action for alien tort suits is that it would not have occurred to them that cause of action was necessary. The requirement of a cause of action did not enter American law until 1848. The First Congress assumed that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be. Yet Judge Bork and Professor Bradley among others have argued that a cause of action should be required in alien tort suits. I have previously pointed out that such arguments are ahistorical. Indeed, the reason federal courts have, quite properly, read the Alien Tort Statute as granting a cause of action is precisely to eliminate this anachronism. Second, even if Congress did not intend the Alien Tort Statute itself to be a "Law [. . .] of the United States" under which cases might arise for the purposes of Article III, Congress could have enacted such a law if it so desired.<sup>90</sup>

I have already considered—and rejected—the argument that the requirement of cause of action needed to exist in the eighteenth-century to conclude that a statute passed then authorized litigants to commence an action under it.<sup>91</sup> I find, how-

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87. *Id.*

88. *Id.* at 363–64.

89. Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649, 671 n.105 (2002).

90. William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 690 (2002).

91. See *supra* notes 66–69 and accompanying text.

ever, the argument that the First Congress did not consider it necessary to grant a statutory cause of action is plausible. The specific reason why they chose not to do so is difficult to decipher. After all, as Professor Burley has noted, “definitive proof of the intended purpose and scope of the [ATS] is impossible.”<sup>92</sup> Supreme Court watchers expected the high court to put this matter to rest in *Sosa v. Alvarez-Machain*, which was argued before the court in March 2004.<sup>93</sup> In a decision handed down on June 29, 2004, the Supreme Court held that the ATS is a jurisdictional statute in the sense that it only addresses the power of courts to entertain certain claims and does not create a statutory cause of action for aliens.<sup>94</sup> The Court went further to add, however, that notwithstanding the fact the ATS is a jurisdictional statute, creating no statutory cause of action for aliens, “[t]here is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.”<sup>95</sup> Accordingly, Justice Souter, writing for the majority, favored and adopted the inference that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”<sup>96</sup> Included in this limited list are offenses against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy.<sup>97</sup>

The Court, nevertheless, admonished district courts to exercise caution in deciding to hear the type of ATS claims being brought in the courts today, stating that acceptable claims must be defined with the level of specificity that is comparable to the cases brought for offenses against ambassadors, violations of safe conduct, and piracy that Congress had in mind in the eighteenth century when it enacted the ATS.<sup>98</sup> The Court added that it was not within the province of the district courts to seek out and define new and debatable violations of the law of nations.<sup>99</sup>

Total clarity has not yet emerged on this issue.<sup>100</sup> The con-

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92. Burley, *supra* note 23, at 463.

93. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). For a report and commentary on the Supreme Court hearing, see Linda Greenhouse, *Justices Hear Case About Foreigners' Use of Federal Courts*, N.Y. TIMES, Mar. 31, 2004, at A16; *Legal Action Over Foreign Misdeeds*, N.Y. TIMES, Mar. 30, 2004, at A20.

94. *Sosa*, 124 S. Ct. at 2739.

95. *Id.* at 2759.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Sosa*, 124 S. Ct. at 2759.

100. Linda Greenhouse, *Same Justices, New Court*, N.Y. TIMES, July 3, 2004, at

troverly lingers, as divergent interest groups find something in the Supreme Court decision to claim victory for their position.<sup>101</sup> Moreover, there is the pertinent and persistent question as to whether the decision extends to corporations.<sup>102</sup>

## B. APPLICATION OF UNRATIFIED TREATIES THROUGH THE COURTS

The authors also navigate the murky waters of treaty ratification and application of unratified treaties through alien tort litigation.<sup>103</sup>

In *Sarei v. Rio Tinto* (221 F. Supp. 2d 1116 [C.D. Cal. 2002]), the federal district court held that the MNC could be held liable (by a foreigner, not a U.S. citizen) for violating the United Nations Convention of the Law of the Sea, even though the United States has declined to

A16 (noting that the decision "left many unanswered questions about the full reach of the statute").

101. See Anthony J. Sebok, *Is the Alien Tort Claims Act a Powerful Human Rights Tool?*, CNN, at <http://www.cnn.com/2004/LAW/07/12/sebok.alien.tort.claims/> (July 12, 2004); Jacqueline Koch, *Not in Their Backyard*, Corpwatch, at <http://www.corpwatch.org/article.php?id=11441> (July 14, 2004).

102. William Baue, *Does Supreme Court Validation of Alien Tort Claims Act Apply to Corporations?*, SRI NEWS, available at <http://www.socialfunds.com/news/article.cgi/1458.html> (July 1, 2004).

103. For a sampling of this controversial debate, see Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 324 n.87. "It is not fatal to international law based arguments that the nation has not signed the relevant conventions. Human rights norms, in particular, have in some cases entered the realm of customary international law as to states that have not signed the relevant international agreements." *Id.*; see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 4 (1992); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 87 (1992) (stating that customary international law is being applied in "compensat[ion] for the abstinence of the United States vis-à-vis ratification of international human rights treaties"). Professor Lillich has observed as follows:

Although Article VI, section 2 of the Constitution makes treaties the supreme law of the land, the United States always can avoid or lessen the domestic impact of human rights treaties by failing to ratify them or by ratifying them subject to non-self-executing declarations. However, customary international law, at least where the United States has not persistently objected to a particular norm during the process of its formation, *ipso facto* becomes supreme federal law and hence may regulate activities, relations or interests within the United States. . . . Thus, the potential impact of customary international human rights law upon the American legal system is substantial.

Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 856-57 (1989).

ratify the treaty. Under that reasoning, U.S.-based MNCs could be held liable under the ATS for violations of the Kyoto Protocol, the United Nations Convention on the Rights of the Child, and other treaties the United States has not ratified, on the theory that the treaty norms have become part of the law of nations. By the same theory, a firm could be held liable for violating a ratified treaty, such as the [International Covenant on Civil and Political Rights], that was not self-executing because Congress has yet to pass enabling legislation.<sup>104</sup>

The Justice Department makes a similar contention in the *amicus* brief in the *Unocal* case. The brief disagrees with the court for finding an implied right of action for the enforcement of rights anchored on “international agreements that the United States has refused to join, nonbinding agreements, and agreements that are not self-executing, as well as political resolutions of UN [United Nation] bodies and other non-binding statements.”<sup>105</sup>

A fundamental principle of international law is that a treaty binds only the parties to it.<sup>106</sup> A party signifies its interest to be a part of a treaty regime by consent manifested through appending its signature to the treaty and deposit of instruments of ratification (or accession if the treaty has already entered into force). Moreover, a treaty does not create rights and obligations for third parties without their consent.<sup>107</sup> These principles are founded on the principle of state sovereignty.<sup>108</sup>

104. HUFBAUER & MITROKOSTAS, *supra* note 6, at 8.

105. Brief of Amicus Curiae United States of America, *supra* note 57, at 14.

106. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (6th ed. 2003).

107. The principle of *pacta tertiis nec nocent nec prosunt* is the basis of the rule that treaties bind only parties thereto and cannot bind third parties without their consent. See MALCOLM SHAW, *INTERNATIONAL LAW* 52 (4th ed. 1997).

The general rule is that international agreements bind only the parties to them. The reasons for this rule can be found in the fundamental principles of the sovereignty and independence of states, which posit that states must consent before they can be bound by them. This, of course, is a general proposition and is not necessarily true in all cases. However, it does remain as a basic line of approach in international law.

*Id.*

108. The International Court of Justice declared in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 133 (June 27) that “the whole of international law” is anchored upon the “fundamental principle of sovereignty.” See also STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); STATE, *SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* (Gerard Kreijen et al. eds., 2002); John H. Jackson, *Sovereignty—Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782 (2003); Elizabeth E. Ruddick, Note, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U.L. REV. 429 (1997).

Where a State has refused to join a treaty or expressed reservations to parts thereof, the provisions of the treaty or the reserved portions are inapplicable to that State. Courts would therefore be in error to apply such treaties or the provisions that have been reserved. Norms of customary international law to which a state has consistently objected are also not binding on the persistent objector.<sup>109</sup> Similarly, resolutions of the United Nations General Assembly generally are not legally binding.<sup>110</sup> Those resolutions are often referred to as "soft law," a misnomer, since they are really not law.<sup>111</sup> Courts should therefore not impose them on States.

The problem, however, is that the legal attacks and the authors' charges may be founded on shaky ground. Treaties often contain provisions that have already become customary international law. Their incorporation into treaties does not destroy their original character as international customs. In such cases, the courts are really applying customary international law, not the treaties *per se*. This point was also addressed by the international law scholars and human rights organizations who stated that the statute "does not and cannot enforce unratified or non-self-executing treaties. Nor does it convert non-binding resolutions of the United Nations into law."<sup>112</sup>

Professor Gerald Neuman has also addressed this issue in response to the charge by Professors Bradley and Goldsmith that the modern application of customary international law seeks to circumvent deliberate decisions of the President and the Senate to prevent the enforcement of certain human rights norms through a declaration that those treaties are non-self-executing.<sup>113</sup> Professor Neuman agrees that it is not proper for

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109. A tricky issue arises where a State has not persistently objected to a norm of customary international law, but has also not accepted the practice. Thus, the State has chosen to remain neutral. A critical question is whether a particular norm is also binding on such a State. See arguments cited *supra* note 103.

110. See Jack M. Beard, *America's New War On Terror: The Case For Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 580 n.72 (2001).

111. For discussion on the concept of soft law, its evolution and significance, see Linda C. Reif, *International Environmental and Human Rights Law: The Role of Soft Law in the Evolution of Procedural Rights to Information, Participation in Decisionmaking, and Access to Domestic Remedies in Environmental Matters*, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE TO DOMESTIC LAW AND POLICY 73 (M. Young & Y. Iwasawa eds., 1996); C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

112. Brief of Amici Curiae International Law Scholars and Human Rights Organizations, *supra* note 63, at 18.

113. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law*

courts to do so, citing the express invocation of the Restatement on Foreign Relations, that only genuine norms of customary international law and those validly binding on the United States may be applied.<sup>114</sup> There is therefore no room for the enforcement of the so-called “emerging norms” of customary international law.<sup>115</sup>

The authors could not have chosen a more inapt treaty for their illustration. The 1982 United Nations Convention on the Law of the Sea<sup>116</sup> is well known as a codification of customary international law.<sup>117</sup> It is true that some of its provisions, such as Part XI dealing with deep seabed mining, sought to create new international law.<sup>118</sup> But many of the provisions, such as those on the Exclusive Economic Zone, reflect widely accepted international practice.<sup>119</sup> The Kyoto Protocol,<sup>120</sup> also cited by the authors, will not be applied on that same basis, in so far as it is not a codification of customary international law.<sup>121</sup> More importantly, claims founded on that protocol face a huge risk of being rejected, as the courts have been reluctant to extend the use of the ATS to “ecological genocide” or any other form of environmental claims.<sup>122</sup>

as *Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 869–70 (1997).

114. See Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 387 (1997).

115. *Id.*

116. U.N. Doc. A/CONF.62/122 (1982).

117. See Sonja Boehmer-Christiansen, *Marine Pollution Control: UNCLOS III as the Partial Codification of International Practice*, 7 ENVTL. POL'Y & L. 71, 73 (1981).

118. For a discussion of Part XI and the obstacles it created to ratification of the treaty, see SAID MAHMOUDI, *THE LAW OF DEEP SEA-BED MINING* (1987); Jonathan Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, 88 AM. J. INT'L L. 705 (1994).

119. For a comprehensive discussion of the Exclusive Economic Zone, see DAVID ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* (1987).

120. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22 (1998).

121. *Id.*

122. See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991); see also Richard Herz, *Text of Remarks on Panel: "Indigenous Peoples, Environmental Torts and Cultural Genocide"*, 24 HASTINGS INT'L & COMP. L. REV. 503, 505 (2001); Cyril Kormos et al., *U.S. Participation in International Environmental Law and Policy*, 13 GEO. INT'L ENVTL. L. REV. 661 (2001). Some scholars, however, believe that such claims should be allowed and may even succeed if properly and narrowly pleaded. See Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000); Martin Wagner, *The International Legal*

### C. CONDUCT OF FOREIGN POLICY AND CONCERNS ABOUT TERRORISM

Critics of the current use of the ATS also assail it on the basis that it engages the courts in foreign policy-making,<sup>123</sup> and could potentially embroil the United States in controversies and disputes with foreign governments. Of late, an additional but related charge has surfaced: ATS litigation could frustrate efforts at fighting the war against international terrorism. The authors do not forget to visit this issue:

In ATS cases, the decision essentially amounts to a judgment on the actions of a foreign state. Even when foreign citizens sue private actors, the judgments almost always question foreign state conduct. Such litigation interferes with the executive conduct of foreign affairs and may well jeopardize sensitive negotiations. For example, recently the U.S. State Department expressed concern that a decision in *Doe v. Exxon Mobil* could hinder U.S. cooperation with Indonesia to combat international terrorism.<sup>124</sup>

Similar arguments have been made by the DOJ regarding the impact of alien tort litigation on the conduct of foreign policy and the global war on terrorism.<sup>125</sup> The DOJ essentially denies the courts any qualification to dabble into foreign policy questions. It argues that “[t]he Supreme Court has long recognized that the Constitution commits ‘the entire control of international relations’ to the political Branches.”<sup>126</sup> Thus, courts should leave the conduct of foreign policy to the executive and legislative arms of government. After all, foreign policy issues are “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.”<sup>127</sup> In a similar line of reasoning, Professor Bradley emphasizes that the “courts are not institutionally equipped to conduct foreign relations.”<sup>128</sup> He notes that the

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*Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study*, 24 HASTINGS INT'L & COMP. L. REV. 491 (2001).

123. That ATS litigation involves foreign policy-making is beyond question, prompting some commentators to refer to the phenomenon as “plaintiff’s diplomacy.” See Anne-Marie Slaughter & David Bosco, *Plaintiff’s Diplomacy*, 79 FOREIGN AFF. 102 (Sept.–Oct. 2000).

124. HUFBAUER & MITROKOSTAS, *supra* note 6, at 48.

125. Brief of Amicus Curiae United States of America, *supra* note 57, at 21.

126. *Id.* (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)); see *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

127. Brief of Amicus Curiae United States of America, *supra* note 57, at 21 (quoting the Supreme Court in *Chicago & So. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)).

128. Adam Liptak, *U.S. Courts’ Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, at 1.

balancing acts based on a variety of considerations that go into executive decisions on foreign policy issues are lacking in court actions where plaintiffs and their lawyers (and even judges) possess neither adequate information nor the motivation to look at the bigger picture.<sup>129</sup> Professor John Yoo concurs with this point. According to him, a “court sees only the discrete case before it,”<sup>130</sup> and does not necessarily see the “totality of the facts of a given situation,” nor is it even allowed to do so.<sup>131</sup> Besides, Professor Yoo continues, “courts are only suited for deciding right and wrong, not [measuring] costs and benefits,” thus making their foray into these foreign policy issues improper.<sup>132</sup>

ATS litigation, it is also argued, can pose serious problems for the (ongoing) war against terrorism, since ATS claims have been asserted against the United States and allies in that war.<sup>133</sup> In an Executive Opinion in the *Exxon Mobil* case, William H. Taft IV, the State Department’s Legal Adviser, drew the court’s attention to the potential of the lawsuit to disrupt the efforts of the United States to obtain the cooperation of Indonesia in the fight against international terrorist activity.<sup>134</sup> Proponents of this position argue that the ATS is a threat to U.S. security operations because the Department of Defense (DOD) relies a great deal on some corporations as contractors for “essential combat support services” in foreign countries.<sup>135</sup> Contractors provide equipment, training, and repair services that are necessary for deterring or fighting war.<sup>136</sup> Moreover, DOD has also forged close partnerships with foreign governments in waging the war against terrorism by contributing troops or apprehending terrorists.<sup>137</sup> The manufacture and use of new weapons systems may also be hindered while foreign training programs could be disrupted.<sup>138</sup>

The DOJ brief also makes the terrorism argument, but the brief itself reveals the weakness in this argument. While arguing in one breath that “the ATS . . . places the courts in the

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129. See Bradley, *supra* note 15, at 460–62, 466–67.

130. Liptak, *supra* note 128, at 18.

131. *Id.*

132. *Id.*

133. *Id.*

134. See Letter from William Howard Taft, IV, *supra* note 40.

135. Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, at <http://www.nftc.org/default/usa%20engage/ATS%20-%20An%20Emerging%20Threat%20to%20National%20Security.pdf> (Aug. 2003).

136. See *id.* at 7.

137. See *id.* at 3.

138. See *id.*



wholly inappropriate role of arbiters of foreign conduct, including international law enforcement”<sup>139</sup> it adds: “Where Congress wishes to permit such suits (e.g., through the TVPA), it has done so with carefully prescribed rules and procedures. The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.”<sup>140</sup> Thus, while the argument, in part, is that the courts are not proper forums for decisions on foreign conduct, the very next sentence concedes that it is not necessarily a bad idea for courts to be involved in foreign policy-implicating international litigation, where the Congress has granted permission for such suits.<sup>141</sup>

The fact is that some foreign policy issues or matters that will implicate U.S. international relations are cognizable by the courts.<sup>142</sup> The crucial emphasis should be on selecting the ones suitable for judicial intervention on a case-by-case basis.<sup>143</sup> But that is a different and separate question from whether the courts are precluded from considering *all* cases pertaining to customary international law on the basis that they are not equipped to do so. Two decades ago, in a Memorandum submitted by the United States as *Amicus Curiae* in the *Filartiga* case, the government struck the right balance. “Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial

139. Brief of Amicus Curiae United States of America, *supra* note 57, at 23.

140. *Id.*

141. *Id.*

142. Brief of Amici Curiae International Law Scholars and Human Rights Organizations, *supra* note 63, at 25. The Justice Department’s argument to the contrary is inconsistent with the Supreme Court’s refusal to adopt any “inflexible and all-encompassing rule.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). It is also inconsistent with its conclusion that deference is appropriate only when judicial resolution of the case “may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” *See id.* at 423.

143. *See Kadis*, 70 F.3d at 249, in which the Second Circuit warned that “not every case ‘touching on foreign relations’ is nonjusticiable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.” The court laid out the proper approach to follow:

We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

*Id.*

cognizance.”<sup>144</sup>

On the terrorism issue, not only do ATS cases not apply to governments, as the Supreme Court has held,<sup>145</sup> but a blanket exclusion of all ATS cases may end up jeopardizing the war against terrorism since it would also shield those terrorist groups that use the corporate form.<sup>146</sup> Protecting corporations from lawsuits will insulate not just those corporations involved in legitimate businesses but will also encompass corporations allegedly involved in genocide and those who aid and abet crimes against humanity.<sup>147</sup>

#### D. ECONOMIC COSTS OF ALIEN TORT LITIGATION

A hallmark of *Awakening Monster* is its preoccupation with the economic implications of the continued use of the ATS to sue multinational corporations that are based in, or have a connection to, the United States. The observation has been made that international litigation confers some economic and non-economic benefits on the forum State. According to *Cheshire and North's Private International Law*, “[w]hen foreigners litigate in England, this forms valuable invisible export, and confirms judicial pride in the English legal system.”<sup>148</sup> The current wave of international litigation in U.S. courts is viewed in some quarters as tantamount to an export of U.S. legal values and an American conception of law, similar to what Britain did in the nineteenth century.<sup>149</sup> The authors of the *Awakening Monster* stake an opposite and opposing position: that cases brought by foreign litigants under the ATS portend serious economic consequences for the United States.<sup>150</sup> They construct what they refer to as a “nightmare scenario” that could become a reality if adequate

144. Brief of Amici Curiae International Law Scholars and Human Rights Organizations, *supra* note 63, at 26 (quoting Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), 19 I.L.M. 602–04).

145. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440–41 (1989).

146. See Harold Hongju Koh, *Wrong on Rights*, YALE GLOBAL (July 18, 2003), at <http://yaleglobal.yale.edu/display.article?id=2121>.

147. Brief of Amicus Curiae International Law Scholars and Human Rights Organizations, *supra* note 63, at 29.

148. SIR PETER NORTH & J. J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 347 (13th ed. 1999).

149. See William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1 (citing the separate views of Gregory J. Wallace and Burt Neuborne).

150. See HUFBAUER & MITROKOSTAS, *supra* note 6, at 1–3.

measures are not instituted to check the disturbing trend.<sup>151</sup>

Noting that trade ties, foreign direct investment (FDI), and extension of credit to government agencies could expose a company to liability under the ATS, the authors begin to take stock of what such economic connections could mean for American businesses.<sup>152</sup> With a U.S. FDI stock of \$220 billion in target countries and world FDI stock of about \$1,365 billion in these countries, a lot of money is involved.<sup>153</sup> Additionally, target countries hold a total public debt of \$1,229 billion.<sup>154</sup> While some of the debt is owed to international lending agencies such as the World Bank and the International Monetary Fund, which are immune to ATS litigation, more than half of the debt represents credit extended by private lenders.<sup>155</sup> Thus, these private creditors, usually international banks, also face exposure to suits for public and publicly guaranteed debts owed by target countries.<sup>156</sup> Some insurance companies and investment trusts are also exposed through their bond holdings.<sup>157</sup>

The authors believe that ATS litigation could do enormous damage to U.S. trade and foreign investment.<sup>158</sup> Support can be found from both the pro-ATS and anti-ATS camps for the proposition that ATS litigation operates as a form of economic sanction on countries allegedly perpetrating human rights abuses.<sup>159</sup> The authors use the issue of sanctions to illustrate the lurking

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151. *Id.* at 2 (“If plaintiff lawyers prevail, [in the numerous cases pending before the courts], today’s imagined nightmare will become tomorrow’s reality.”).

152. *Id.* at 37–41.

153. *Id.* at 17.

154. *Id.*

155. *Id.*

156. See HUFBAUER & MITROKOSTAS, *supra* note 6, at 37.

157. *Id.* at 16–17.

158. See *id.* at 37–42.

159. See, e.g., Comment, *Developments in International Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2042 (2001):

It is also possible that the potential for ATCA liability would alter corporations’ foreign direct investment decisions. Multinationals may choose to stay away from countries with poor human rights records, fearing that significant involvement would expose them to liability under the ATCA. The potential effect of ATCA liability on corporate conduct may in turn influence the behavior of host governments. If corporations base their foreign direct investment decisions in part on potential ATCA liability, foreign governments trying to attract corporate investment may alter their human rights policies. In this respect, corporate liability under the ATCA may amount to an indirect economic sanction on foreign governments that participate in gross human rights abuses.

dangers:

A parameter that can help size up the potential damage to trade flows can be drawn from the analysis of economic sanctions. Gravity model estimates indicate that extensive economic sanctions depress U.S. trade (merchandise imports and exports) with target countries by more than 95 percent. ATS litigation would not depress trade to nearly the same extent, but billion-dollar awards, predicated on corporate trade with the target country, would certainly dampen commerce. Trade tainted with links to the foreign government—oil and mineral imports, and exports to government agencies—would be most affected by the ATS.<sup>160</sup>

Going by the assumption of a ten-percent depression of overall U.S. trade in target countries from current levels as a result of ATS litigation, there is the possibility of a loss of \$42 billion in U.S. imports and \$21 billion in U.S. exports. In the case of the industries they consider to be the most vulnerable to ATS suits, such as oil and minerals, they envisage a 50% depression in U.S. imports of oil and minerals and U.S. exports to government agencies. This prediction translates to about \$37 billion loss in U.S. imports and a \$13 billion loss in U.S. exports.<sup>161</sup> Manufactured goods constitute the bulk of these exports. Based on data that indicate that \$1 billion of manufactured shipments keep approximately 8,300 U.S. manufacturing workers employed, over 100,000 jobs could be put at risk due to litigation under the ATS.<sup>162</sup>

The effect on foreign direct investment also seems glaring:

Adverse ATS decisions could prompt firms to disinvest en masse, as they did during the South African apartheid era. In that episode, the U.S. FDI stock in South Africa dropped by two-thirds. Conservatively, we think the ATS will be less devastating but that 25 percent of U.S. and 20 percent of world FDI (including U.S. FDI) in target countries will be at risk.<sup>163</sup>

If U.S. FDI is reduced by \$55 billion in countries that have already been targeted in ATS suits, this could endanger a minimum of \$10 billion of U.S. exports.<sup>164</sup> The consequence could be a loss of up to 80,000 manufacturing jobs.<sup>165</sup> It is not only U.S.-based MNCs that would be affected. European and other foreign-based MNCs doing business in the United States

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160. HUFBAUER & MITROKOSTAS, *supra* note 6, at 37 (citations omitted).

161. *Id.* at 38.

162. *See id.* at 38–39.

163. *Id.* at 40 (citations omitted).

164. *See id.*

165. *See* HUFBAUER & MITROKOSTAS, *supra* note 6, at 40.

and which suffer large damage awards may divest from target countries and—more likely—from the United States.<sup>166</sup> This result could jeopardize up to 130,000 jobs, which, in addition, are usually better-paying than the average private industry jobs.<sup>167</sup>

Target countries, mostly in the developing world, also face some danger, according to the authors, as ATS suits could inflict damage on them through curtailment of trade, investment, and access to credit.<sup>168</sup> The authors emphasize the importance of trade as “an engine of world growth” since the Second World War and add that depriving a country of trade opportunities can invite harm to that country’s economic prospects.<sup>169</sup> The International Chamber of Commerce has also brought attention to the possibility of the ATS impeding investment abroad by U.S. companies and reducing investment in the United States by foreign companies.<sup>170</sup> The State Department’s opinion in the *Exxon Mobil* case also stated that the lawsuit could affect Indonesia’s economy, with adverse implications for U.S. interests.<sup>171</sup>

The Government of South Africa appears to echo some of these views. In a July 15, 2003 letter by the South African Minister of Justice and Constitutional Development, Dr. Penuell M. Maduna, to U.S. District Court Judge John E. Sprizzo, urging the dismissal of an ATS lawsuit, the minister stated: “Permitting this litigation to go forward will, in the government’s view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals.”<sup>172</sup>

Another adverse economic effect is the competitive disadvantage faced by multinational corporations based in the United States or having sufficient connection thereto to make them amenable to ATS suits.<sup>173</sup> For instance, in the *Unocal* litigation, the court declined to exercise jurisdiction over Unocal’s partner,

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166. *See id.* at 41.

167. *See id.* at 42.

168. *Id.*

169. *Id.*

170. *See* Bruno, *supra* note 33.

171. Letter from William H. Taft, IV, *supra* note 40.

172. Rosen, *supra* note 135, at 10 (quoting “Declaration” to Judge E. Sprizzo, U.S. District Court for the Southern District of New York, from South African Minister of Justice and Constitutional Development Dr. Penuell M. Maduna, July 15, 2003).

173. *See* Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994) (contending that the courts, by entertaining suits by foreigners who were injured abroad, were placing American companies at a competitive disadvantage world-wide).

the French oil company Total.<sup>174</sup> A counter-contention holds that the competitiveness of American companies should not be promoted by allowing them to partake in criminal activity since doing so would be morally repugnant.<sup>175</sup> This is strictly beside the point. The issue is not whether American companies deserve to be protected if they insist on joining forces with those who perpetrate atrocity, but about allowing equally culpable corporations from other countries to go scot-free and use their immunity to gain an advantage over American companies. One is hard pressed to find the sense of fairness and justice behind that logic.

Further, U.S. laws penalizing U.S. corporations that engage in bribery abroad have been said to place U.S. companies at a competitive disadvantage, yet hardly anybody argues for a repeal of the Foreign Corrupt Practices Act.<sup>176</sup> Again, there are several holes in this argument. First, other corporate home countries have come out strongly against corruption under the aegis of the Organization for Economic Cooperation and Development (OECD), thus making the argument moot.<sup>177</sup> Second, the FCPA certainly conferred a competitive disadvantage, and this point was stridently made.<sup>178</sup> Yet, while there is a prohibition of foreign bribery in the law books, the danger has not been very real. Thus, the FCPA does not seem to pose as much a business risk as exposure to litigation under the ATS.<sup>179</sup> Given a choice between placing companies at a competitive disadvantage and holding them liable for human rights abuses, one would gladly opt for corporate liability and accountability. But framing the issue this way masks the fact that other choices exist or could be explored. For instance, uniform application of

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174. Many years later, in 2002, a lawsuit was instituted in France against Total. The fact that Total enjoyed freedom from suits for about six years while Unocal fought in U.S. courts is a huge advantage. Besides, this type of case is quite new in France and certainly the chances of success may not be very high. For more information on the Total case in France, see Nicholas Revise, *Total, Objet d'une Plainte en France Pour Travail Forcé en Birmanie*, AGENCE FRANCE PRESSE, Aug. 29, 2002.

175. Human Rights Watch, *Myths and Facts About the Alien Tort Claims Act*, available at <http://hrw.org/campaigns/atca/myths.htm> (last visited Sept. 20, 2004).

176. *Id.*

177. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

178. See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 288 (1999).

179. See *Corporate Ethics: Big Oil's Dirty Secrets*, ECONOMIST, May 10, 2003, at 53 (asserting that corporate executives have been skirting and weakening the FCPA through middlemen and law firms, mostly based in London).

sanctions would promote corporate liability without competitive disadvantage.

The discussion of economic costs is by far the book's strongest suit. It is important to examine the potential impact of litigation on the economy generally and more specifically on the MNCs and the labor force. As the authors observe, the asbestos industry was bankrupted out of existence through mass tort litigation.<sup>180</sup> While the effects of ATS lawsuits may not be that far-reaching, it is still important to examine how perilous they could be. This possibility calls for more in-depth studies from both sides, especially if damage awards, which have not been made to date in corporate suits, become a reality.

Dismissing these concerns as an attempt to protect the corporate "fat cats" is unhelpful and only inflames the rhetoric. It could be that at the end of the day, society would view the protection of human rights as an overwhelming consideration that trumps business interests, regardless of cost. But it could also be that society will seek a balance or look for less costly means of accomplishing the objective. These decisions cannot properly be made without a thorough analysis based on solid and reliable data. At the moment, such a decision may be difficult to make, since many of the cases are still in their infancy. In fact, corporations do not seem to be under a great deal of apprehension, although they are cautiously looking at developments in this area. As Human Rights Watch has observed, ATS lawsuits commenced against Shell in 1997 and Chevron in 1999 concerning their operations in Nigeria did not stop the two corporations from making multi-year, multi-billion dollar investments in that country from 1999.<sup>181</sup> Nevertheless, it is a good thing that we are having this debate.

### III. POLICY PROPOSALS

#### A. LEGISLATIVE REFORM

The authors decry the patchwork of *ad hoc* solutions that have been put in place so far to address the problems (perceived to be) generated by, or associated with, the ATS. Examples include the opinions sought by the courts from the State Department in the *Exxon Mobil* and *Rio Tinto* cases, statements from

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180. HUFBAUER & MITROKOSTAS, *supra* note 6, at 14.

181. Human Rights Watch, *supra* note 175.

the Treasury Department, and actions by the Justice Department. The authors call on the three departments to issue a joint statement calling on the courts to interpret the statute as a jurisdictional statute, until such time as Congress expands the scope of the ATS by enumerating other causes of action. The authors, however, do not have much confidence in the courts to provide the right solutions to this problem any time soon.

Therefore, the book places the ultimate resolution of this matter at the feet of Congress.<sup>182</sup> Asserting that "Congress must act," the authors propose a range of policy prescriptions to address the problem.<sup>183</sup> These proposals follow the lines of the TVPA and include defining the ATS cause of action and limiting its use to a short list containing widely recognized international norms such as slavery, piracy, genocide, torture, war crimes, extra judicial killings and forced labor.<sup>184</sup> Jurisdiction should also be vested in federal courts alone; state courts should be excluded.<sup>185</sup> Claimants should exhaust local remedies in the countries where the cause of action arose before being eligible to sue in U.S. courts.<sup>186</sup> There should also be a ten-year statute of limitations.<sup>187</sup>

## B. ADDITIONAL PROPOSALS

A Congressional resolution of this matter would certainly be welcome. There are reasons, however, to believe that it will not be a realistic resolution in the near future. A piece of legislation that will satisfy both sides of this controversy will be difficult to craft. Even if the business community gets its wish and succeeds in eviscerating or repealing the ATS, this species of litigation against multinational corporations will by no means disappear. Smart lawyers will continue to devise ways to hold

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182. The authors are not alone in espousing this view. In an editorial, the Washington Post forcefully stated:

We bow to no one in our contempt for the Burmese junta, and we can certainly imagine a law that would enable lawsuits like the one pending against Unocal. But such a decision is Congress's to make. The courts should not pretend that the legislature spoke to this question 200 years ago.

*Policing Human Rights*, WASH. POST, Aug. 14, 2003, at A18.

183. HUFBAUER & MITROKOSTAS, *supra* note 6, at 55.

184. *Id.*

185. *Id.* at 56.

186. *Id.*

187. *Id.*



multinational corporations accountable in U.S. courts.<sup>188</sup> Factors that draw litigants to U.S. courts and away from their countries' judicial forums remain. One scholar summarizes the *raison d'être* for international civil litigation as follows: "Governance deficits in host countries, substantive differences between legal systems, the possibility of higher damages awards being awarded in home rather than host countries, and innovative strategies on the part of plaintiffs' lawyers all play a role in the emergence of foreign direct liability cases."<sup>189</sup>

In addition, the United States' legal structure holds advantages that are peculiar to the country. The ATS is a unique piece of legislation, the equivalent of which does not exist in other countries.<sup>190</sup> U.S. personal jurisdiction rules have enough flexibility to enable suits against defendants who are only temporarily in the country. Foreign corporations whose presence in the United States is minimal compared with the volume of operations elsewhere can still be sued in the United States. Plaintiffs also do not need to show any connection between the events in question and the United States.<sup>191</sup> While other countries like Sweden (the Umbrella Rule)<sup>192</sup> have jurisdictional rules as liberal as, if not more liberal than, the rules applicable in the United States, the United States still holds advantages because its rules are better aligned to institute human rights claims by non-citizens for violations occurring in a foreign country.<sup>193</sup> The loser-pays system that applies in some countries, and which could dampen the desire to litigate cases of this magnitude, does not apply in the United States.

Moreover, a huge network of public interest lawyers and private law firms that provide *pro bono* assistance, which hardly

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188. Schrage, *supra* note 52, at 156.

189. Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 462 (2001).

190. Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 409 (2001) (stating that "[n]o other country has a statute that creates a specific statutory claim for human rights violations").

191. *Id.*

192. The "umbrella rule," which is applicable in such countries as Germany and Sweden, attaches jurisdiction to a person because of the mere presence in the country of an object belonging to that person that may even be of the slightest value. For a discussion of the rule, see Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 967 (1999); Brian Pearce, Note, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 542 (1994).

193. Stephens, *supra* note 190, at 410-11.

exists in most of the world, also plays a key role in facilitating this kind of litigation.<sup>194</sup> Plaintiffs' attorneys are able to enter into attractive contingency fee arrangements that enable them to take up suits, but such arrangements are not the norm in many countries and are not available in a large number of them.<sup>195</sup>

In addition, the notice pleading system and discovery rules in the United States are so liberal that they allow plaintiffs to bring suits based on minimal facts with ample room to flesh them out later. This system works to a plaintiff's advantage. The burden is on the defendant to produce relevant documents or materials in his or her possession or control, which the plaintiff can use to boost his or her case.<sup>196</sup> The class action vehicle, generous punitive damages, and the use of jurors, who often tend to sympathize with ordinary folks whom they view as helpless victims of the Godzilla-like corporations, to determine liability and damages are also attractive features.<sup>197</sup> Another useful observation that can be made here is that the United States has a long tradition of using "public law litigation"<sup>198</sup> to affect social issues or affect social reform. This legal culture is quite at home with lawsuits that seek to improve the way corporations do business and provide justice for victims.<sup>199</sup> It is little wonder that the United States is considered a "plaintiff's paradise" given the many advantages that it bestows on plaintiffs without attendant risk, while saddling the defendant with enormous costs, financial and otherwise.<sup>200</sup>

Apart from these structural advantages, lawsuits in the United States generate enormous publicity and provide opportunities for the exposure of human rights violations abroad that would ordinarily attract only scant attention.<sup>201</sup> This publicity,

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194. *Id.* at 411.

195. Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 394 (2001).

196. Stephens, *supra* note 190, at 412.

197. Mattei & Lena, *supra* note 195, at 394-95.

198. The late Professor Abram Chayes coined this expression almost thirty years ago. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

199. Stephens, *supra* note 190, at 413.

200. Mattei & Lena, *supra* note 195, at 393. For additional discussion of the unique, attractive features of the American legal system, see Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 8 (2002).

201. Slaughter & Bosco, *supra* note 123, at 106.

in turn, comes with a number of potential or real advantages. With the intense publicity generated by the lawsuits, the pressure on abusive governments to reform their practices may be increased.<sup>202</sup> Public disclosure could also serve as a deterrent against the commission or perpetration of human rights abuses by State officials in the countries involved or elsewhere.<sup>203</sup> Officials may also be confronted with the reality that they will not be able to use the United States as a safe haven in the future, making them reflect deeply before violating the rights of fellow citizens.<sup>204</sup>

It is in light of the foregoing facts that I make the following additional proposals. I proceed on the understanding that there is general agreement that genocide, war crimes, and other grave international law violations are wrong and that corporations should not be participating in or encouraging them. The remaining issue then is how to ensure that corporations which deviate from the norm are held properly liable, but in a manner that imposes the least cost on all.

### 1. *Strengthening Legal Institutions in Other Countries*

Litigation to hold companies accountable could proceed in countries where the alleged violations took place, if adequate institutions are available. Often, they are not. This factor and others explain the attractiveness of U.S. courts. When some of the benefits of this type of litigation are made available in other countries or host country forums become more attractive, corporate accountability litigation can take place there. This approach was recently adopted in the case brought by Ecuadorian citizens against ChevronTexaco.<sup>205</sup> After years of litigation in federal courts in New York, the Court of Appeals dismissed the cases, subject to ChevronTexaco accepting the jurisdiction of Ecuador's courts.<sup>206</sup> To strengthen the process, judgment obtained from these foreign courts can also be enforced in the United States.<sup>207</sup>

This approach has a host of benefits. First, thousands of litigants who cannot journey to New York or afford the costs of

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202. Bradley, *supra* note 15, at 459.

203. *Id.*

204. *Id.*

205. See Juan Forero, *Texaco Goes on Trial in Ecuador Pollution Case*, N.Y. TIMES, Oct. 23, 2003, at W1.

206. *Id.*

207. *Id.*

litigating in a U.S. forum will now have their day in court. The Ecuadorian cases will also likely incorporate environmental claims, which are generally not cognizable under the ATS.<sup>208</sup> Finally, litigation in Ecuador will present opportunities for native legal institutions and the legal profession to further develop and function more effectively. There is, of course, the concern as to whether Ecuadorian law and institutions are equal to this task. The U.S. government ought to embrace the move toward corporate liability litigation outside the United States and provide support to build the capacity of existing institutions in foreign countries.

## 2. *International Regulation of Multinational Corporations*

Notwithstanding the advantages the U.S. legal system provides, ATS litigation still may not be the most effective means of promoting human rights and checking corporate abuses in various parts of the world. ATS litigation is riddled with a number of bottlenecks that a potential plaintiff must confront.<sup>209</sup> Some of these hurdles include the requirements of standing and personal jurisdiction over the defendant, *forum non conveniens*,<sup>210</sup> and the doctrine of comity.<sup>211</sup>

Further, subject matter jurisdiction under the statute is limited to a small number of norms of customary international law and *jus cogens*, and does not cover *all* human rights and environmental abuses.<sup>212</sup> In particular, courts have been reluctant

208. See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (holding that the environmental violations in reference did not constitute violations of the law of nations).

209. For an extensive discussion of these obstacles, see FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 794–818 (3d ed. 2001).

210. It should be noted, however, that while the doctrine of *forum non conveniens* can be a major obstacle to a plaintiff, “any defendant seeking dismissal in favor of a foreign forum bears a substantial burden of proof,” which may be difficult to satisfy in order to justify the dismissal of a suit. Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1577 (1998) (reviewing *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* (Lance A. Compa & Stephen F. Diamond eds., 1996)).

211. Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 146 (1999) (“[*Forum non conveniens*] and the doctrine of comity have a powerful hold on U.S. federal courts and have frequently been held to be sufficient grounds for dismissal of foreigners’ complaints.”).

212. *Id.* at 146, 154.

to extend the ATS to environmental harms.<sup>213</sup> Foreign claimants must explore other bases for subject matter jurisdiction, even when human rights and environmental abuses are involved.<sup>214</sup> The importance of environmental claims is highlighted by the fact that many of the allegations of corporate misdeeds center on environmental abuses. Some scholars believe that the ATS should cover environment-related cases on the grounds that a right to a clean environment exists in international law.<sup>215</sup> Even cases that fit the ATS rarely make their way to U.S. courts because of financial costs and other constraints. Thus, many victims are left without an effective remedy.

Moreover, concentrating litigation in the United States obviously exacts a cost on the U.S. judicial system, which could potentially overwhelm the courts and impose costs on taxpayers. Such consequences could be grounds for potential backlash.<sup>216</sup> Other countries may see the United States as assuming the role of the world's attorney and judge, and may resent such a posture.<sup>217</sup>

In view of the foregoing, it may be useful to consider "uniformalizing and internationalizing regulations and sanctions in relation to multinational corporations."<sup>218</sup> Through the international legal system, multinational corporations can be regulated.<sup>219</sup> Clearly defined rights and corresponding responsibilities

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213. See *supra* note 122 and accompanying text; see also *Flores v. S. Peru Copper Corp.*, 343 F.3d at 140.

214. See *Rosencranz & Campbell*, *supra* note 211, at 146.

215. *Wagner*, *supra* note 122.

216. At the moment, the courts have been able to manage the caseload and the number of lawsuits has not risen to overwhelming numbers. See Hon. John M. Walker, *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 539 (1997) ("It is safe to say that, quantitatively, international human rights law is not a major, or even a minor, component of the business of federal courts: it is a miniscule part of what we do."); see also Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 491 n.22 (2001). If the current trend continues, however, the possibility of an avalanche of cases is not remote.

217. See South African President Thabo Mbeki's statement before his country's Parliament on April 15, 2003: "We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation." *Rosen*, *supra* note 135, at 11 (quoting President Thabo Mbeki).

218. *DURUIGBO*, *supra* note 19, at 204.

219. The authors of *Awakening Monster* also support some form of international regulation through enforceable codes of conduct with a cap on punitive damages. But they say that the possibility of such an arrangement soon becoming a reality is

ties will be attached to them and breaches of their obligations would be actionable in domestic courts of the plaintiff's choice. This arrangement, which could be under a treaty, would mandate parties to streamline their judicial systems to have some of the attractive features of the U.S. legal system, while dropping the bottlenecks and limitations that are inherent in or associated with U.S. practice.

The import of this proposal is a restructuring of the international legal system. The current structure of international law is States-centric.<sup>220</sup> At least since the nineteenth century, States have occupied a central role in the international sphere and were viewed as the only subjects of international law.<sup>221</sup> Over the years, the dominance of the State has been whittled down and non-State actors, including international organizations<sup>222</sup> and individuals (to a limited extent)<sup>223</sup> have been accepted as subjects of international law. This expansion of the subjects of international law, however, has not reached multinational corporations.<sup>224</sup> There is a growing clamor for a change in this area and recently, the United Nations Sub-Commission on Human Rights introduced a set of norms to govern the activities of corporations in relation to labor rights, human rights, and environmental protection.<sup>225</sup> There are questions as to whether these changes go far enough. It is likely that there will continue

quite remote. HUFBAUER & MITROKOSTAS, *supra* note 6, at 53.

220. See J.L. BRIERLY, *LAW OF NATIONS* 1 (Sir Humphrey Waldock ed., 6th ed. 1963); Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534 (1956).

221. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (4th ed. 2003).

222. See *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178-79 (Apr. 11) (advisory opinion).

223. See L. OPPENHEIM, *INTERNATIONAL LAW* 639 (H. Lauterpacht ed., 8th ed. 1955); Hersch Lauterpacht, *The Subjects of the Law of Nations*, 64 LAW Q. REV. 97, 117-19 (1948).

224. See generally BROWNLIE, *supra* note 106, at 67; CHRIS N. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY* (1974); IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* (1987); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (1994).

225. Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=7440](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=7440) (last visited Sept. 25, 2004). For a commentary on the Norms, see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

to be calls for direct or quasi-regulation of MNCs in international law.

While there is little likelihood that the Nation-state will disappear in the foreseeable future,<sup>226</sup> there needs to be an acknowledgement of the fact that the influence of MNCs in the global scheme has grown exponentially. The rise of MNCs has diluted the power of States.<sup>227</sup> A large number of States lack the ability, capacity or inclination to control the activities of MNCs in their territory,<sup>228</sup> making a supranational structure to handle these issues necessary. This would be a win-win solution, as the investment interests of MNCs should also be given adequate legal protection under this arrangement. Nevertheless, there may be obstacles to accomplishing this, such as deference to the notion of sovereignty.<sup>229</sup> The ability of the international community to navigate through these constraints and establish a new order that ensures that international business is not conducted in a way that places an unbridled pursuit of profits above everything else may be one of the closely watched issues of the twenty-first century.

## CONCLUSION

*Awakening Monster* is well written in a language that flows and is easy to follow. The arguments are carefully presented and the points are cogently made. However, the authors do not undertake a deep exploration of the legal arguments that presently pervade the subject of ATS litigation.<sup>230</sup> Nevertheless,

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226. Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 22 (1998).

227. See Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1, 37 (2000) (attributing the weakening of nation-states to the phenomenon of globalization).

228. See Emeka Duruigbo, *Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry*, 7 ANN. SURV. INT'L & COMP. L. 101, 139 (2001); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 902-03 (2003).

229. For a discussion of the obstacles to direct or quasi-regulation of MNCs in international law, see DURUIGBO, *supra* note 19, at 202-03.

230. Apart from the arguments examined herein, another area of great controversy is whether customary international law is part of federal common law. If customary international law is not, it calls into serious doubt the ability of the federal courts to continue to apply that body of law through ATS litigation. For the divergent positions on this issue, see generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Fed-*

what the book lacks in rigorous legal analysis, it compensates for in economic analysis and policy prescription. The economic arguments are based on publicly verifiable data, although the conclusions drawn from the data are somewhat conjectural and quite speculative. Some of the policy changes recommended are reasonable but, realistically speaking, have little chance of receiving the wide acceptance that would be helpful in translating them into law.

It bears mentioning, however, that the book is a fairly one-sided—verging on the polemical—attack on the ATS, a fact that is clearly conveyed by the title. Although the authors make use of public data, it is important to note that there is no *direct* data from which one could infer the effects the book bemoans, as suits against corporate defendants are too recent and too few to produce any clearly observable facts. The data on which the authors rely seem to be a fairly ungrounded prediction, based in part on dubious analogies to other economically chilling developments, and in part on the authors' own speculation. One must therefore sound a strong cautionary note for the reader as consumer of this data.

ATS litigation has been a revolutionary development in this epoch. The implications are huge. ATS litigation “provides one possible solution to the present day inability to hold an MNC accountable for human rights violations.”<sup>231</sup> Even if the cases do not succeed, they will have succeeded in making the companies expend substantial resources to fight the lawsuits and burnish their public image. Their stock could also experience a drop in the capital markets if bad publicity or risk of liability grows. Indeed, with the specter of suits looming, or cases actually proceeding, corporations have had a major incentive to work with human rights groups in order to change their practices.<sup>232</sup>

The suits have also provided a measure of satisfaction to those who ascribe to a number of fundamental principles, in-

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*eral Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997); Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187 (2001); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393 (1997).

231. Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 937 (1998).

232. *A Needed Human Rights Law*, Editorial, N.Y. TIMES, June 2, 2003, at A16.



cluding the notions of justice for all and equality before the law.<sup>233</sup> Allowing corporations and State officials to escape liability for their acts simply because they occurred in countries without adequate legal structures to address them does damage to the concept of Rule of Law<sup>234</sup> and defeats the whole idea that where there is a breach of a legal right, a remedy must attach.<sup>235</sup> Similarly, even where there are no monetary damages or such damages are not collectible, or the judgment is not enforceable, a favorable judgment emanating from a U.S. court may be a source of moral vindication and psychological redress for victims of human rights abuses and other atrocities.<sup>236</sup>

For countries from which these cases originate, it represents an indictment on their legal systems and institutions. This may prompt them to improve. It also holds implications for public international law in the sense that it gives teeth to international legal provisions. A major criticism of international law is the lack of enforcement of its dictates.<sup>237</sup> ATS litigation provides some form of enforcement mechanism, even when the enforcement is not directly against the primary subjects of international law, States, but against arguably non-legal persons in international law.<sup>238</sup>

Nevertheless, ATS litigation has limitations that lessen its effectiveness as a tool for redressing wrongs to victims of human rights and environmental abuse. The U.S. government and the business community should focus less on weakening the ATS

233. See James E. Post, *Global Codes of Conduct: Activists, Lawyers, and Managers in Search of a Solution*, in *GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME* 103 (Oliver F. Williams, ed., 2000) ("We have sought to make a difference in our organizations, our communities, and our professions. Our commitments may have stemmed from frustrations, recognition of an injustice, or issues so fundamental to our beliefs and values as human beings that we felt compelled to act.").

234. The idea of equality before the law is a component of the doctrine of rule of law. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 198 (8th ed. 1915).

235. The principle of *ubi ius ibi remedium* is an honored one in Anglo-American jurisprudence. 3 WILLIAM BLACKSTONE, *COMMENTARIES* 109 (1765) cited in *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("For it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress."); see also Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 *CHAP L. REV.* 1, 13 (2001); Reinhard Zimmermann, *Roman-Dutch Jurisprudence And Its Contribution To European Private Law*, 66 *TUL. L. REV.* 1685, 1696 (1992).

236. Bradley, *supra* note 15, at 459.

237. See generally Emeka Duruigbo, *Reforming the International Law and Policy on Marine Oil Pollution*, 31 *J. MAR. L. & COM.* 65, 79–80 (2000) and sources cited therein.

238. See DURUIGBO, *supra* note 19, at 189–95.

and concentrate more on policy changes that would strengthen legal institutions in host countries and encourage corporate regulation in international law. These changes would ensure justice while removing or reducing unwanted competitive disadvantages and other avoidable economic costs currently associated with alien tort litigation.

