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APPLYING INTERNATIONAL HUMAN RIGHTS NORMS IN THE UNITED STATES: HOLDING MULTINATIONAL CORPORATIONS ACCOUNTABLE IN THE UNITED STATES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS UNDER THE ALIEN TORT CLAIMS ACT

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I. INTRODUCTION

Our current international system is composed of both state actors and a variety of non-state actors. While the classic definition of international law is the law governing states, this definition has drastically changed in the last century due to the evolution of the current international system. International law has adapted to changes within our system in response to the needs of the global order. Consequently, modern international law recognizes that non-state actors, including individuals, are capable of breaching international law. The international

1 More than 350 years ago, The Peace of Westphalia led to the establishment of the classic system of international law. This system centered exclusively on sovereign states with defined territories which are theoretically equal. States created international law and were accountable to each other in meeting international legal obligations. Edith Brown Weiss, Invoking State Responsibility in the Twenty-First Century, 96 AM. J. INT'L L. 798, 798 (2002). See Lucy Reed, Great Expectations, Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law? 96 AM. SOC'Y INT'L L. PROC. 219, 221 (2002), wherein the author explains that public international law is traditionally defined as the law governing relations only between states. It is noteworthy that the crimes of piracy and slave trade were long prohibited under international law and could be committed by individuals. However, the sovereignty norm was the dominant theme of international law up until the end of World War II. See Beth Stephens, The Amorality of Profit: Transnational Corporations and Human Rights, 20 BERKELEY J. INT'L L. 45, 75 (2002), which notes that international law historically prohibited piracy and slave trading, crimes which private individuals could violate.

2 See generally Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) (recognizing that private individuals may be held accountable for war crimes and other international
human rights norms that acknowledge the accountability of non-state actors for violations of human rights and recognize state responsibility for protecting human rights of individuals were established in response to the atrocities of World War II.\(^3\) States acknowledged their responsibility over the human rights of individuals and were found to have a duty in promoting and protecting the human rights of their citizens.\(^4\) Individuals were also found to be accountable under international law for violations of human rights.\(^5\)

Globalization has been a further catalyst in the expansion of the structure of our current international system.\(^6\) Globalization has facilitated transactions between states and non-state actors; consequently, allowing such transactions to cross state boundaries with relative ease.\(^7\) At times, these increased contacts
between developed and developing nations have created negative consequences in developing countries. Globalization has also brought forth the dominance of one particular non-state actor into the system, the modern multinational corporation (MNC). MNCs are in economically powerful positions within the international system. Currently, fifty-two MNCs compose one hundred of the largest economies in the world. Wal-Mart, for example, is worth more than 161 countries in the world. MNCs


See Shelton, supra note 9, at 273 wherein the author states that "components of what has come to be known as globalization—have led to the emergence of powerful non state actors who have resources sometimes greater than those of many states." See Douglass Cassel, International Security in the Post-Cold War Era: Can International Law Truly Effect Global, Political, and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution?, 19 FORDHAM INT'L L.J. 1963, 1963 (1996) for the point that the end of the Cold War has possibly brought forth "a second human rights revolution" involving expanded responsibility in MNCs to protect human rights and the opinion that MNCs are "more powerful than most national governments." Additionally, it has been argued that multinational enterprises are the most powerful phenomena arising from capitalism. See Kojo Yelpaala, In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies, 7 NW. J. INT'L L. & BUS. 208, 224 (1985).

See discussion infra Part IV (detailing existence of MNCs in global economy); see also Exxon is Bigger than Pakistan, JOURNAL (Newcastle, UK), Apr. 14, 2002, at 25 (reporting that the Exxon corporation is worth more than the entire national economy of Pakistan); Sarah Anderson & John Cavanagh, Top 200: The Rise of Global Corporate Watch, CORPORATE WATCH 2000 (noting that MNCs outnumber countries in the top 100 largest economies in the world), available at http://www.globalpolicy.org/scecon/cnmc/top200.htm. (last visited Apr. 17, 2004).

See id. (stating that Wal-Mart is worth more than 161 countries in the world); see also Michael Olesker, $1.9 million McDonald not in touch with reality, SUN (Baltimore), August 10, 1997, at 1B (reporting that Wal-Mart's sales are "bigger than 161 countries, including Israel, Poland and Greece"). See generally Nicholas Thompson, Netflix Uses
have become important actors in the international system because of their economic dominance, particularly in their relations with developing countries.\textsuperscript{13} Their economically dominant position gives them a bargaining chip in their interactions with developing countries because of the potential wealth they can bring to such countries.\textsuperscript{14} Foreign direct investment enables MNCs to contract with developing countries for use of resources, cheap labor, land, and military protection over MNC projects.\textsuperscript{15} Unfortunately, these relations have involved contracting with countries that are known for their disregard for human rights and have consequently led to issues within international human rights law.\textsuperscript{16} For example, there have been incidences of the use of child labor and worker's rights

\textit{Speed to Fend Off Wal-Mart Challenge, N.Y. TIMES, Sept. 29, 2003, at C1} (mentioning that Wal-Mart has sales of about $244 billion per year).


\textsuperscript{14} See Barnaby J. Feder, \textit{Talking Business, From Tobacco to Insurance, N.Y. TIMES, Aug. 14, 1984, at 2} (calling MNCs "wealth generators" in the context of both developed and developing countries); see also Louis Uchitelle, \textit{International Business; Globalization Marches On, as U.S. Eases Up on the Reins, N.Y. TIMES, Dec. 17, 2001, at C12} (noting that MNCs more effectively produce wealth when properly regulated). \textit{But see} William J. Broad, \textit{Gas Leak is Expected to Reduce Investment in the Third World, N.Y. TIMES, Dec. 12, 1984, at A8} (explaining that certain events incite developing countries to reject MNC advances).


\textsuperscript{16} See Paul Redmond, \textit{Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance, 69 INT'L LAW. 102, 178 (2003) (explaining how globalization is "antithetical to the systemic goals of human rights protection"). See generally Anderson, \textit{supra} note 13, at 468 (arguing that corporations have no right to profit from human rights violations); Kelly, \textit{supra} note 8, at 355 (suggesting that some developing countries view strict human rights regulations over MNC involvement as an impediment to wealth acquisition).
abuses by MNCs in developing countries. Additionally, foreign military, known to have had a history of violating human rights, have committed human rights violations while in working for MNCs. MNCs argue they are not responsible nor should be found liable for such atrocities because they did not directly commit the violations nor ordered such violations to occur. Arguably, developing host countries have not sought claims against MNCs for human rights abuses for fear of losing foreign direct investment. Unfortunately, international legal procedures whereby MNCs are held directly accountable for human rights violations are non-existent.


18 See, e.g., Stephens supra note 1, at 52 (discussing British Petroleum's contracting with Colombian military forces who committed human rights abuses); see also Bloomberg News, Court Tells Unocal to Face Rights Charges, N.Y. Times, Sept. 19, 2002, at C13 (exploring Unocal's liability for human rights abuses by the Myanmar military that the corporation had hired as security); Shell Game in Nigeria, N.Y. Times, Dec. 3, 1995, at 4–14 (editorializing on the role of Shell in the execution of those who opposed their corporate expansion in India).

19 See Brad J. Kieserman, Comment, Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Torts Claim Act, 48 Cath. U.L. Rev. 881, 882 (1999) (stating MNCs argue "they are not responsible for the abusive conduct of their foreign host governments"); see also Andy Rowell, Shell Shocked: Did the Shell Petroleum Company Silence Nigerian Environmentalist Ken Saro-Wiwa?, Village Voice, Nov. 21, 1995, at 20 (reporting Shell's claims that it could not get involved in the affairs of a sovereign state and refused to exercise its influence over the Nigerian military junta to prevent the execution of activist Ken Saro-Wiwa). See generally Paul Lewis, Rights Groups Say Shell Oil Shares Blame, N.Y. Times, Nov. 11, 1995, at 1–6 (discussing backlash against Shell by human rights groups who believed Shell either affirmatively encouraged Saro-Wiwa's execution or could have done more to prevent it).

20 See Lena Ayoub, Nike Just Does It—And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad, 11 DePaul Bus. L.J. 395, 422 (1999) (recognizing economic constraints that hold developing countries back from enforcing labor laws to protect labor rights of citizens); see also Maria Ellinikos, American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?, 35 Colum. J.L. & Soc. Probs. 1, 26 (2001) (blaming the risk host countries face of losing MNCs business for their failure in preventing MNC behavior). See generally Kieserman, supra note 19, at 910–11 (describing symbiotic relationship between host governments and MNCs).

As previously stated, the accountability of non-state actors for human rights violations is an international human rights norm. International law is recognized by states through the internalization of these international norms, such as application through domestic legislation. The United States has internalized the norm of holding non-state actors accountable for violations of international law through the enforcement of the two hundred year old statute, the Alien Torts Claim Act (ATCA). In the last two decades, U.S. federal courts have heard numerous suits brought forth under the ATCA claiming human rights violations abroad. The rise in this litigation has been attributed to the Second Circuit's landmark holding in Filartiga v. Irala-Pena. There, the ATCA was interpreted as granting (arguing for increased role of international organizations in handling problems with MNCs).

22 See Koh, supra note 4, at 2358–59 (emphasizing that international law norms have application beyond states); see also Reed, supra note 1, at 223 (recognizing development of international norms to hold private actors responsible for human rights violations). See generally Fain, supra note 3, at 171 (noting role of customary international law in establishment of human rights on international stage).


24 See Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1556 (1984) (noting that a "state ordinarily finds it necessary or convenient to incorporate international law into its municipal law to be applied by its courts"); see also Oona A. Hathaway, The Cost of Commitment, 55 Stan. L. Rev. 1821, 1830–31 (2003) (describing treaty ratification as one process through which states internalize international norms); Levit, supra note 23, at 281 (reporting Argentina's incorporation of international norms through its constitution).


27 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (finding Paraguayan police officer liable for violating the law of nations for committing torture upon Paraguayan citizen while acting under color of law); see Bradley, supra note 26, at 457 (signaling Filartiga decision as corresponding with rise of "human rights litigation in US courts");
plaintiffs a cause of action and federal courts jurisdiction over cases arising under violations of the law of nations. Since Filartiga, U.S. federal courts have expanded the ATCA's jurisdiction to encompass a broad range of categories of violations of international law. Additionally, the category of defendants liable under ATCA has evolved to include state officers, individuals, and most recently MNCs. This Note argues that use of the ATCA is consistent with modern international law because it internalizes an accepted norm, which is subject to universal jurisdiction. Use of the ATCA against MNCs is further justified in light of their status within the global order making them the equivalent of states.

The evolution of the ATCA litigation is consistent with the expansion of the structure of the international system and the evolution of international law. Accordingly, the application of
the ATCA upon MNCs is consistent with their present role in our current international system and accepted international human rights norms. Self regulation among MNCs is not necessarily the best answer. For example, some MNCs have implemented their own corporate codes of conduct in response to claims against them for allowing such violations to occur. However, such codes have not proven effective in ending human rights abuses because they are often vague or lack enforcement mechanisms.

This Note sets forth an explanation of how the ATCA is applied to MNCs and why it is justified in the enforcement of international human rights norms. Part II will delineate a brief history of the origins and use of the ATCA prior to Filartiga. Part II will also discuss the international legal setting following World War II prior to Filartiga. Part III will analyze Filartiga and then outline the development of the ATCA's application by federal courts. A discussion of the evolution of categories of defendants for violations of international law will follow, culminating in the latest application of the ATCA upon MNCs. Part IV will summarize possible applications upon MNCs in light of current ATCA interpretation. Part V will conclude the current interpretation by federal courts of the ATCA is applicable. Lastly, it will explain the justification of the ATCA's application upon MNCs for human rights violations.

justification of private actor liability under the ATCA has been developing international norms along the same lines).

34 See Ayoub, supra note 20, at 403 (noting development of "codes of conduct"); see also Jorge F. Perez-Lopez, Promoting International Respect for Workers Rights Through Business Codes of Conduct, 17 FORDHAM INT'L L.J. 1, 5 (mentioning use of voluntary "codes of conduct" in U.S. corporations); Nike Code of Conduct, at http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance&sub cat=code (last updated Jan. 2004) (giving Nike's standards that are meant to guide facility decisions).

II. EARLY HISTORY OF THE ATCA: PRE-FILARTIGA

A. Enactment and Application

The ATCA was originally enacted during the first session of the U.S. Congress in 1789. Minimal legislative history exists to aid in identifying Congress’ original intent in enacting the statute. The ATCA specifically grants district courts “original jurisdiction over 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.” Professor Ann-Marie Slaughter posits Congress purposely chose the exact words of the statute to further our nation’s self-interest; to protect our nation from other nations’ retaliation for not abiding by international law. Secondly, Congress wanted to promote trade within our country by enabling foreign merchants to have the opportunity to bring civil claims in our courts. Lastly, the United States would have been viewed as a legitimate player within the international

37 See id. at 196 n.53 (citing to the statute); see also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) (stating that the ATCA “has no formal legislative history”); Joshua Ratner, Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act, 35 COLUM. J.L. & SOC. PROBS. 83, 121 (2002) (recognizing “paucity of legislative history” for the ATCA).
39 Professor Slaughter is formerly known as Ann-Marie Burley and was the author of The Alien Tort Statute and the Judiciary Act of 1789, an extensive study of the ATCA.
40 See Burley, supra note 36, at 481 (detailing the interests that foreign governments and individuals had in seeing justice, or compensation, dealt out fairly); see also Anthony D’Amato, Comment, The Alien Tort Statute and the Founding of the Constitution, 82 A.J.I.L 62, 64–65 (1988) (explaining that the ATCA was an important national security interest in 1789). See generally THE FEDERALIST NO. 80, at 500–01 (Alexander Hamilton) (stating the standard support the ATCA).
system in 1789 with the enactment of the ATCA by acknowledging the rule of international law. After the ATCA was enacted, it was seldom cited or used and jurisdiction under the ATCA was only upheld twice prior to Filartiga. The first was the 1795 case of Bolchos v. Darrell. There, the court found jurisdiction existed under the ATCA because a treaty existed that dealt with the property rights of slaves seized as prizes of war - the main issue in the case. The next case to find jurisdiction under the ATCA did not arise until 1961. In Adra v. Clift, the plaintiff claimed his former wife and her new husband violated international law when they concealed the name and identity of his daughter on an Iraqi passport attempting to evade handing her over to the plaintiff. This clearly fell under the definition of a tort as required under the ATCA. Both cases were therefore relatively simple applications under the ATCA. One involved looking to a treaty while the other involved a tort which had occurred within the United States.

The historical events of the 1940s and 1950s led to substantial changes within the structure of the international system and framework of international law. By its nature, international

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44 Id. (stating that because original case arose at sea admiralty law applied though seizure occurred on land).

45 Id. at 810 (stating treaty with France alters the “law of nations” and states that property of friends found on ships of enemies must be forfeited).


47 Id. at 863 (stating under Lebanese law, the father is entitled to the custody of his daughter).

48 Id. at 862 (stating facts of case).

49 See Bolchos v. Darrell, 3 F.Cas. 810, 811 (D.S.C. 1795) (mentioning treaty with France); see also Adra, 195 F. Supp. at 861 (noting various facts of case which occurred in the United States); Stephens, supra note 43, at 7 (examining both cases in turn).

50 See Shelton, supra note 9, at 281 (noting change in international law due to Nazi acts); see also Elisabeth Zoller, The “Corporate Will” of the United Nations and the Rights
law is not static; it adapts over time based on interactions between states and their responses in internalizing and externalizing norms.\textsuperscript{51} International law is also affected by developments within international society.\textsuperscript{52} Hence, it is important to assess the historical setting prior to Filartiga which influenced modern interpretation of the ATCA.

\textbf{B. International Law after World War II}

1. The Recognition of Non-State Actor's Liability Under International Law

The atrocities of World War II led to the development of international human rights law.\textsuperscript{53} Human rights law developed to apply to both individuals and states.\textsuperscript{54} International human rights law further recognized that states owe a duty to their citizens.\textsuperscript{55}


\textsuperscript{52} See Cohen, \textit{supra} note 51, at 298–99 (noting changes after 9/11 on international law and customs); \textit{see also} Shelton, \textit{supra} note 9, at 281 (detailing changes after the Nazi atrocities). \textit{See generally} Tiunov, \textit{supra} note 51, at 916 (noting changes to international law after international events).

\textsuperscript{53} See MICHAEI FREEMAN, HUMAN RIGHTS 33 (Polity Press ed., Blackwell Publishers Inc. 2002) (stating “the immediate cause of the human rights revival, however, was the growing knowledge of Nazi atrocities in the Second World War”); \textit{see also} Shelton, \textit{supra} note 9, at 281 (noting human rights law the international community response to the atrocities of WWII). \textit{See generally} Koh, \textit{supra} note 4, at 2358–59 (stating end of WWII “dispelled the myth that international law is for states only, re-declaring that individuals are subjects, not objects, of international law”).

\textsuperscript{54} See \textit{id.} at 2359 (stating “[t]hereafter, private citizens, government officials, nongovernmental organizations and multinational enterprises could all be rights holders and responsible actors under international law...”); \textit{see also} Stephens, \textit{supra} note 1, at 89 (noting her conclusion that “that core human rights norms apply to corporations as well as to states and individuals”). \textit{See generally} Aceves, \textit{supra} note 26, at 262 (arguing that state sovereignty may conflict and lose against \textit{jus cogens} norms, such as the right to life and prohibition against genocide).

Human rights developed when states cooperated to implement numerous international organizations, such as the United Nations (UN), to ensure that human rights were respected. The UN Charter establishes human rights as the objective of the organization by listing its third purpose under Article 1. The standard for human rights is also exemplified in the Universal Declaration of Human Rights ("UDHR") adopted by the United Nations General Assembly of on December 10, 1948. The UDHR codified the view that all people are entitled to human rights. The text specifically refers to the respect and promotion of human rights by "every individual, and every organ of society." It concludes stating that "nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth.

\textit{Law,} 97 AM. J. INT'L L. 38, 49 n.65 (2003) (arguing that "the affirmative responsibilities of states with respect to the realization of human rights should not be limited to their own citizens or territorial jurisdiction, but should extend to a duty of solidarity and cooperation with other states for the creation and maintenance of an international order in which human rights are realized"). See generally Surya P. Subedi, \textit{Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism}, 30 CAL. W. INT'L L.J. 45, 68 (1999) (stating that "it is the duty of the State to promote and protect the rights of its citizens").


See \textit{id.} (noting the end of WWII led to a legal order based on institutions); see also Luke T. Lee, \textit{The Right to Compensation: Refugees and Countries of Asylum}, 80 AM. J. INT'L L. 532, 541 (1986) (stating "all members of the United Nations all legally bound to observe and respect human rights"). See generally Cox, supra note 56, at 571 n.17 (quoting the United Nations charter).

See generally Lee, supra note 57, at 541–42 (calling attention to the Charter itself).

See Universal Declaration of Human Rights, GA Res. 217 III (A) (1948) [hereinafter "Universal Declaration"] (creating uniform human rights standards); see also HENRY J. STEINER & PHILIP ALSTON, \textit{INTERNATIONAL HUMAN RIGHTS IN CONTEXT} 150–51 (Oxford University Press 2000) (noting the significance of the Universal Declaration). See generally Mary Ann Glendon, Rights from Wrongs, ch. 9 (forthcoming 2004 manuscript) (detailing the increased protections afforded by the Universal Declaration).

See Universal Declaration, supra note 59, at III(A) (emphasizing the broad applicability of the Universal Declaration); see also STEINER & ALSTON, supra note 59, at 150–51 (detailing the "universal" aspects of the Universal Declaration). See generally Glendon, supra note 59, at ch. 9 (indicating the broad sweep of the Universal Declaration).

Components of the UDHR are now viewed as customary international law by many nations.\textsuperscript{63} Human rights law was applied to individuals after World War II through “transnational public law litigation.”\textsuperscript{64} Transnational public law litigation occurred through the enforcement of human rights norms in the international arena in the Nuremberg war crime tribunals.\textsuperscript{65} There, German soldiers were held accountable for participating in acts of genocide on behalf of Germany.\textsuperscript{66} Their claims of acting under government orders were unjustified in light of the egregious violations they had committed upon the Jewish populations.\textsuperscript{67}

The aftermath of the war incorporated non-state actors into the international legal system.\textsuperscript{68} It led to the recognition of individual and state accountability for violations of human

\textsuperscript{62} Id. at art. 30.


\textsuperscript{64} See Koh, supra note 4, at 2348–49 (defining transnational public law litigation as involving suits brought by individuals, government officers, and nation states, who in turn sue one another or are sued in domestic courts or other judicial fora and in these suits, the parties involved bring claims under both domestic and international law, otherwise called “transnational” law); see also Louis B. Sohn, \textit{The New International Law: Protection of the Rights of Individuals Rather than States}, 32 AM. U. L. REV. 1, 6 (1982) (indicating the application of transnational public law litigation after World War II). See generally STEINER & ALSTON, supra note 59, at 142–45 (detailing the advancement of human rights law through transnational public law litigation).

\textsuperscript{65} See Koh, supra note 4, at 2358–2361 (describing the Nuremberg and Tokyo war crime tribunals as “piercing[ing] the veil of state sovereignty and dispelling[ing] the myth that international law is for states only, re-declaring that individuals are subjects not just objects, of international law”); see also Aceves, supra note 26, at 266 (citing the Charter of the International Military Tribunal to exemplify the normative development of “individual responsibility for human rights abuses”). See generally STEINER & ALSTON, supra note 59, at 115–21 (noting the role of transnational public law litigation in war crimes tribunals).

\textsuperscript{66} See Koh, supra note 4, at 3258 (discussing Allied powers view of international law after WWII); see also Louis Henkin, \textit{International Law: Politics, Values, and Functions}, 216 COLLECTED COURSES OF THE HAGUE LAW ACADEMY OF INTERNATIONAL DROIT 208 (Vol. IV, 1989) (indicating the accountability of German soldiers). See generally STEINER & ALSTON, supra note 59, at 115–21 (noting the then contemporary view of war crimes).

\textsuperscript{67} See Koh, supra note 4, at 3258 (noting the unsuccessful defense of acting under orders); see also Henkin, supra note 66, at 208 (indicating the liability of German soldiers). See generally STEINER & ALSTON, supra note 59, at 115–21 (noting the failure of any defense related to acting under orders).

\textsuperscript{68} See Sohn, supra note 64, at 6 (noting the post-war involvement of non-state actors); see also Henkin, supra note 66, at 208 (detailing the post-war human rights landscape). See generally STEINER & ALSTON, supra note 59, at 115–21 (surveying the role of non-state actors after World War II).
rights.69 States were required to respect their citizens' human rights under international human rights law.70 Human rights were also to be respected by non-state actors.71 Consequently, these events defined the human rights norms in place today.

2. Globalization and MNCs in Our International System

Globalization existed intermittently over centuries72 but expanded at a more rapid pace at the end of World War II.73 The proliferation of globalization was in part due to increased cooperation between nations to recoup from the war.74 The Allied nations came together in an attempt to ease the economic devastation by creating the World Bank, the International Monetary Fund, and the General Agreement on Tariffs and Trade, now known as the World Trade Organization.75 These international organizations were implemented to liberalize trade across state boundaries.76 An open market was expected as

69 See Shelton, supra note 9, at 282 (detailing individual responsibility for human rights violations); see also Sohn, supra note 64, at 10–11 (noting the dual accountability of both states and individuals). See generally Henkin, supra note 66, at 208 (indicating the application of human rights norms to individuals).

70 See Shelton, supra note 9, at 282 (indicating the state's responsibility); see also Sohn, supra note 64, at 10–11 (detailing the role of states in protecting human rights). See generally Henkin, supra note 66, at 208 (noting the new functions of states within the human rights context).

71 See THEODOR MERON, HUMAN RIGHTS LAW MAKING IN THE UNITED NATIONS 60 (Oxford University Press 1986) (detailing the accountability of non-state actors); see also STEINER & ALSTON, supra note 59, at 211–14 (noting the responsibility of non-state actors). See generally Shelton, supra note 9, at 322 n.8 (describing the roles and responsibilities of non-state actors).

72 See id. (noting that some have noted globalization may have existed prior to the 15th century); see also MERON, supra note 71, at 60 (detailing the historical trends in globalization). See generally STEINER & ALSTON, supra note 59, at 211–14 (indicating the historical development of globalization).

73 See Shelton, supra note 9, at 322 n.8 (explaining the emphasis on international human rights law began with the entrance of globalization as a result of the greater trade between nations at the end of the 19th century and the ramifications of industrialization upon working conditions); see also MERON, supra note 71, at 60 (detailing the rapid post-war globalization). See generally STEINER & ALSTON, supra note 59, at 1351–53 (indicating the increased trend towards globalization following World War II).

74 See Freeman, supra note 53, at 160 (noting the increased inter-cooperation among nations following World War II); see also Shelton, supra note 9, at 287 (detailing the post-war interdependent nature of globalization). See generally STEINER & ALSTON, supra note 59, at 1351–53 (noting the development of post-war globalization).

75 See Freeman, supra note 53, at 160 (discussing the creation of the Bretton Woods institutions); see also Shelton, supra note 9, at 287 (detailing the development of post-war non-state actors). See generally STEINER & ALSTON, supra note 59, at 1308–09 (noting that the World Trade Organization resulted at the end of the Uruguay Round agreements).

76 See Shelton, supra note 9, at 284 (detailing the development of the World Trade Organization); see also STEINER & ALSTON, supra note 59, at 1334–42 (indicating the
resulting in greater economic wealth to all in the international system.77

The MNC is not a new phenomenon. The predecessor to the modern MNC dates back to the 15th century.78 The modern MNC grew in numbers after the establishment of lenient trade regulations at the end of World War II.79 In response to the imposition of an open global market, MNCs extended their initiatives into developing countries where abundant resources and cheap labor existed.80 This expansion into developing countries resulted in substantial profits and growth.81 As a result, MNCs accumulated considerable economic power.82 The


77 See Shelton, supra note 9, at 284 (discussing the objective of economic globalization as “improv[ing] economic well being through efficient market exchanges”); see also The World Bank Group, at www.worldbank.org (stating mission as fighting poverty and improving living standards for those in developing world) (last visited April 17, 2004); The International Monetary Fund, at http://www.internationalmonetaryfund.org/external/about.htm (stating organization was founded to promote international monetary cooperation, foster economic growth, and high levels of employment) (last visited April 13, 2004).


79 See Stephen G. Wood & Brett G. Scharffs, American Law in a Time of Global Interdependence: U.S. National Reports to the XVIIth International Congress of Comparative Law: Section IV: Applicability of Human Rights Standards to Private Corporations: An American Perspective, 50 AM. J. COMP. L. 531, 538 (2002) (arguing a “fundamental change” occurred after WWII when international trade increased “resulting in the emergence of a new private corporation, the transnational corporation (‘TNC’) or the multinational enterprise (‘MNE’)”); see also Stephens, supra note 1, at 56 (explaining that the modern MNC rapidly expanded after WWII because it transgressed international borders to produced and exchange goods and services). See generally Deva, supra note 13, at 6 (discussing criteria of what constitutes a MNC).

80 See Ayoub, supra note 20, at 401 (discussing MNCs expansive role in lesser developed countries in the 1970s); see also Deva, supra note 13, at 8 (discussing human rights violations that MNC’s have been accused of violating). See generally Westfield, supra note 78, at 1077 (noting focus in last two decades on MNC’s rather then host countries in addressing human rights violations).

81 See Ayoub, supra note 20, at 401 (stating higher profits resulted from paying workers very little while keeping prices high); see also Paul Redmond, International Company and Securities Law: Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance, 37 INT’L LAW. 69, 75 n.33 (2003) (discussing possibility of SEC requiring disclosure of social and environmental conditions of over seas operations). See generally Stephens, supra note 1, at 52 (discussing profits of MNC’s).

82 See Wood & Scharffs, supra note 79, at 539 (noting the gross sales of several MNCs was much more than GDPs of countries); see also Stephens, supra note 1, at 52 (listing examples of MNCs that are financially worth more than states). See generally Ayoub,
The total number of MNCs is now near 35,000 in the world.\textsuperscript{83} Thus, MNCs established themselves as dominant actors in international society.

**III. THE EVOLUTION OF THE ATCA**

The Second Circuit's landmark interpretation of the ATCA in *Filartiga*\textsuperscript{84} in 1980 is viewed by many as opening the doors to ATCA litigation.\textsuperscript{85} Since *Filartiga*, the majority of suits under the ATCA have primarily involved allegations of violations of international human rights.\textsuperscript{86} ATCA litigation has evolved considerably over the last twenty years. Its application has expanded upon the class of defendants and by broadening interpretations of the definition of violations of the law of nations.\textsuperscript{87}

This Note argues the development of the ATCA is consistent with the historical context after 1980. The end of the Cold War brought forth further globalization and increased trade between MNCs and states.\textsuperscript{88} MNCs in turn gained more economic power within the international system from their interactions with

\textsuperscript{83} See Wood & Scharffs, supra note 79, at 538–9 (noting that there may be between 35,000 to 37,000 multinational corporations as of early 1990s); see also Ayoub, supra note 20, at 402 (discussing vast influence MNC's play in developing countries because of economic constraints).

\textsuperscript{84} 630 F.2d 876 (2d Cir. 1980).

\textsuperscript{85} See *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 104 (2d Cir. 2000) (noting litigants more frequently are seeking redress under ATCA with increased concerns for international human rights); Koh, supra note 4, at 2366 (calling *Filartiga* the “*Brown v. Board of Education*” for transnational public law litigants). See generally Stephens, supra note 43, at 6 (stating *Filartiga* court held official torture is “prohibited by the law of nations” and therefore triggers jurisdiction under the ATCA”).

\textsuperscript{86} See *Wiwa*, 226 F.3d at 88 (stating suit involved immigrants suing two foreign holding companies alleging human rights violations against them in retaliation for political opposition to companies' practices); Stephens, supra note 43, at 6 (discussing series of decisions since 1980 which develop jurisdictional reach under ATCA); see also Bradley, supra note 26, at 57 (noting ATCA suits predominantly involve claims of human rights violations).


\textsuperscript{88} See Shelton, supra note 9, at 278 (explaining the ramifications of globalization upon international human rights law); see also Engle, supra note 13, at 105 (noting a number of industries, such as “flowers, textiles, oil, and diamonds” present themselves to labor exploitation). See generally Westfield, supra note 78, at 1077 (noting multinational enterprises often are operating in places where actually adjust their laws to entice foreign direct investment).
developing countries. Their investments in such states resulted in human rights violations. Inevitably, they too would be swept under ATCA litigation.

A. Filartiga v. Pena-Irala: The Landmark Decision

On March 29, 1976 Joelito Filartiga was kidnapped and tortured to death by Americo Norberto Pena-Irala in Asuncion, Paraguay. Pena-Irala was Inspector General of Police in Paraguay at the time. Joelito’s torture and killing, was argued, took place as revenge for his father’s political beliefs. The Filartigas attempted to bring claims against Pena-Irala in Paraguay but were unsuccessful. In 1978, after moving to the United States, the Filartigas learned of Pena-Irala’s arrival in the United States, and filed suit in the Eastern District of New York. The Filartigas brought a wrongful death action under the

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89 See Ayoub, supra note 20, at 401 (noting expansion into developing countries allows MNC’s to pay their workers “a pittance”); see also Engle, supra note 13, at 105 (stating “companies exploit third world labour because exploitation is profitable”). See generally Westfield, supra note 78, at 1079 (suggesting accountability for violations should lie in both the company’s headquarters government as well as host country).

90 See Ayoub, supra note 20, at 402 (noting once international media became aware of such practices, things had to change); see also Engle, supra note 13, at 105 (listing typical violations as indentured servitude, child labour, and slave labour). See generally Westfield, supra note 78, at 1081 (noting companies rationalize production abroad by taking advantage of varying costs of labor, capital and raw materials).

91 See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding whenever an alleged torturer is found and served with process by an alien within US borders §1350 provides jurisdiction); see also Filartiga v. Pena-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) [hereinafter “Filartiga II”] (reviewing facts of case on remand from Second Circuit). See generally Stephens, supra note 43, at 6 (stating 17 year old Filartiga was tortured in killed because of father’s political beliefs).

92 See Filartiga, 630 F.2d at 878 (stating body of Filartiga was shown to his sister at Inspector General’s home); see also Filartiga II, 577 F. Supp. at 861 (stating Pena-Irala was former Inspector General). See generally Stephens, supra note 43, at 6 (discussing facts of case).

93 See Filartiga, 630 F.2d at 878 (stating Filartiga’s sister was chased after and harassed by Pena-Irala after being shown the body); see also Filartiga II, 577 F. Supp. at 861 (stating torture and killing was due to father’s opposition to President Alfredo Stroessner’s government). See generally Stephens, supra note 43, at 6 (noting Filartiga’s father was opposed to country’s military dictatorship).

94 See Filartiga, 630 F.2d at 878 (explaining Filartiga’s attorney was arrested and brought to police headquarters after commencing criminal action and shackled to a wall); see also Filartiga II, 577 F. Supp. at 861 (explaining jurisdiction of Court of Appeals). See generally Stephens, supra note 43, at 6 (discussing facts of case).

95 See Filartiga, 630 F.2d at 879 (stating Pena was served while being held for immigration purposes at Brooklyn Navy Yard after overstaying visitors visa); see also Filartiga II, 577 F. Supp. at 861 (stating after remand back to Eastern District, Pena took no further action, leading to a default judgment after which question of damages was referred to Magistrate John L. Caden, which Plaintiffs filed objections to, bringing this matter to this court for determination). See generally Stephens, supra note 43, at 6 (stating Filartiga’s father and sister sued for Pena for his torture and death).
ATCA. The Filartigas claim under the ATCA was dismissed by the Eastern District for lack of jurisdiction. The court also held that a violation of the law of nations did not include the law governing a state's own treatment of its citizens.

On appeal, the Second Circuit reversed the district court's dismissal and found that the ATCA both granted federal courts jurisdiction and presented the Filartigas with a cause of action. The court initially analyzed whether official torture violated international law. For this determination, it noted that it was relevant to examine current international law rather than the international law that existed when the ATCA was first enacted. In deciding whether acts of torture committed by government officials were violations of "customary international

96 See Filartiga, 630 F.2d at 878 (discussing how the "Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala ... forwrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito"); see also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000) (bringing a claim under the Alien Tort Claims Act, the plaintiff alleged wrongful death among with other state tort claims). See generally Lu, supra note 33, at 534 (stating that the "Second Circuit's reversal of Filartiga in an opinion authored by Judge Irving R. Kaufman represents the birth of the ATCA as a means for alien plaintiffs to assert jurisdiction in U.S. courts for human rights violations worldwide").

97 See Filartiga, 630 F.2d at 878 (stating that the district court dismissed the action for want of subject matter jurisdiction); see also Filartiga II, 577 F. Supp at 861 (stating district courts reasoning for believing it lacked jurisdiction). See generally Stephens, supra note 43, at 6 (stating procedural history of case).

98 See Filartiga, 630 F.2d at 868 (noting courts reasoning); see Filartiga II, 577 F. Supp at 880 (discussing how the district judge "felt constrained by dicta contained in two recent opinions of this Court, ... to construe narrowly 'the law of nations,' as employed in §1350, as excluding that law which governs a state's treatment of its own citizens"). See generally Stephens, supra note 43, at 6 (stating court's reasoning).

99 See Filartiga, 630 F.2d at 885 (discussing jurisdictional question); see also Filartiga II, 577 F. Supp. at 890 (stating that the court's holding gives effect to the jurisdictional provision of the First Congress). See generally Stephens, supra note 43, at 7 (stating basis for courts jurisdiction).

100 See Filartiga, 630 F.2d at 880 (stating that the "threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations"); Ratner, supra note 37, at 95 (noting that "[t]he Filartiga court extensively inquired into "the sources from which [Customary International Law] is derived" in deciding whether or not torture constituted a violation of the law of nations"). See generally Lu, supra note 33, at 534 (discussing how the critical issue was to define the "law of nations" under the ATCA).

101 See Filartiga, 630 F.2d at 881 (stating that "[c]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"); see also Alan Frederick Enslen, Note, Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with Its Decision in Kadic v. Karadzic, 48 ALA L. REV. 695, 704-05 (1997) (analyzing the opinion in Kadic v. Karadzic, the author noted that "[t]he court once again relied on Filartiga, ... in determining what constitutes 'international law,' one should base his judgment upon the law's evolution to date—and not upon a staunchly originalist viewpoint which may freeze the definition at a point in the past"). See generally Ratner, supra note 37, at 94 (noting that "the Filartiga court affirmed that specific norms of the law of nations are fluid and evolve over time").
law," the court surveyed various sources of international law. Upon examining the practice of nations, judicial opinions, and the works of legal scholars, the court concluded that customary international law prohibited state sponsored torture of its citizens. Therefore, Pena-Irala, acting under color of law, committed a violation of the law of nations under the ATCA and the Filartigas were entitled to compensatory and punitive damages.

B. Elements of an ATCA Claim Post-Filartiga

The Filartiga court's interpretation and analysis of the ATCA led to increased litigation under the ATCA, particularly in the area of human rights. Consequently, suits were brought under similar situations as in Filartiga, involving claims of customary international law violations by state officers.

102 See Filartiga, 630 F.2d at 880 (discussing how different international law has analyzed whether torture constituted violations); see also Filartiga II, 577 F. Supp. at 861 (reviewing findings of Second Circuit). See generally Stephens, supra note 43, at 4 (stating that standard under Filartiga has been failed to have been recognized).

103 See Filartiga, 630 F.2d at 878 (holding that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties"); see also Ratner, supra note 37, at 94 (discussing how the Filartiga court elaborated that a violation must be one of international concern, and not simply a norm that happens to be outlawed by several independent nations). See generally Lu, supra note 33, at 534-45 (mentioning the various sources analyzed by the Supreme Court, it was concluded that although the Court noted that proof of the "general assent of civilized nations" needed to demonstrate a violation of the law of nations had to meet a stringent standard, the Filartiga court concluded that official torture satisfied this standard).

104 See Filartiga II, 577 F. Supp. at 860. On remand, the district judge awarded judgment for plaintiff Dolly M. E. Filartiga in the amount of $5,175,000 and for plaintiff Joel Filartiga in the amount of $5,210,364, a total judgment of $10,385,364. Id. at 867. The landmark decision in this case attracted virtually no attention until the mid 1990's. See generally Stephens, supra note 43 at 17.

105 See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (analyzing how Judge Bork examines that there is a minority view that argues ATCA does not grant federal courts jurisdiction and a cause of action); see also Curtis A. Bradley & Jack L. Goldsmith, III, Human Rights On the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Current Illegitimacy of International Human Rights Litigation, 66 FORDHAM L. REV. 319, 320-332 (1997) (discussing how in recent times, it is argued that federal courts cannot ascertain customary international law because the United States political branches have not determined the correct definition of customary international law. Therefore, courts cannot label their findings as equivalent in status to federal common law). See generally Ratner, supra note 37, at 97 (noting that "[t]he majority of ATCA decisions have followed Filartiga's adoption of the [Customary International Law] of human rights as the appropriate standard for adjudicating alleged violations of the law of nations").

Plaintiffs subsequently brought suits against a variety of state defendants, including former heads of state and, although generally unsuccessful, foreign states. The definition of "the law of nations" was also broadened to include a variety of torts claimed as violations of the law of nations. The following section outlines the basic ATCA claim against state officers.

1. Customary International Law Violations and State Action

As discussed above, the Filartiga court held that torture committed by state actors was a violation of customary international law. Customary international law is defined as law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Federal courts have defined customary international law in the same manner that the Second Circuit employed in Filartiga. They have analyzed treaties, conventions, state practice, and opinions


107 See In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 495 (9th Cir. 1992) (discussing how plaintiff brought suit against Ferdinand Marcos, former dictator of the Philippines); see also Republic of Philippines v. Marcos, 806 F.2d 344, 346-47 (2d Cir. 1986) (discussing plaintiff's appeal from grant of a preliminary injunction in favor of the Republic of the Philippines and the Former President and First Lady of the Philippines); Tachiona v. Magube, 234 F. Supp. 2d 401, 405 (S.D.N.Y. 2002) (analyzing how plaintiffs, citizens of Zimbabwe, brought suit against the Zimbabwe President and other Zimbabwe government officials).

108 See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 380 (7th Cir. 1985) (affirming the decision to dismiss plaintiff's suit against the U.S.S.R.); see also Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995) (dismissing plaintiff's suit under the Alien Tort Statute against defendants including Abu Dhabi). See generally Argentine Republic v. Amerida Hess Shipping Corp., 488 U.S. 428, 431 (1989) (holding the Foreign Sovereign Immunities Act was the only basis for obtaining jurisdiction over a foreign state in U.S. courts).

109 See, e.g., Xuncax, 886 F. Supp. at 168 (discussing how the plaintiffs brought claims for wrongful death, assault and battery, false imprisonment, and intentional infliction of emotional distress). But see Frolova, 761 F.2d at 370 (holding in favor of defendant against plaintiff's claims for mental anguish, physical distress, and loss of consortium). See generally Kadic, 70 F.3d at 238-39 (discussing how to determine international law).

110 See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding that deliberate torture by official authority violates universally accepted norms of international law).

111 See Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 307-08 (2d Cir. 2000) (citing Restatement (Third) Foreign Relation Law § 102(2)).

112 See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (examining how to recognize international law); see also Kadic, 70 F.3d at 238 (stating that "[b]ecause the Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of §1331"). See generally Ratner, supra note 37, at 85 (noting that "States must not only generally abide by the norm in practice, but must also feel constrained by international consensus not to deviate from this practice").
of legal commentators to arrive at the definition of current international law. Thus, courts have recognized torture, arbitrary detention, disappearance, and sexual assault as violations of customary international law when acted upon by state officials.

The Filartiga court also noted customary international law violations require proof of "state action" in order for a sufficient

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113 See Filartiga, 630 F.2d at 881. One of the primary ways that international law is determined is by looking to Article 38 of the Statute of the International Court of Justice (ICJ). There, the Court lists what the universal understanding of what is customary international law. The Statute requires the ICJ to look to sources such as international conventions, international customs, and general principles of law, judicial decision, and the works of legal commentators. Thus, the federal courts seem to apply Article 38 in their analyses. See also Ratner, supra note 37, at 95 wherein the author states that "[t]he Second Circuit's methodology mirrored the Supreme Court's approach to ascertaining whether a norm had attained the status of the law of nations, and relied on numerous international agreements for positive evidence of general international assent." But see In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) where the Ninth Circuit accepted Judge Bork's conclusion from Tel-Oren that no private cause of action can be implied from customary international law and instead municipal tort law should be applied.

114 See Filartiga, 630 F.2d at 884 (stating that "having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists, we conclude that official torture is now prohibited by the law of nations."); see also Kadic, 70 F.3d at 240 (noting that "[w]e had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in Filartiga purports to preclude such a result"). See generally Ratner, supra note 37, at 95-6 (discussing in detail how the Second Circuit has cited many sources when have determined torture to be a violation of the law of nations).

115 See Alvarez-Machain v. United States, 266 F.3d 1045, 1052 (9th Cir. 2001) (stating that the ATCA reaches violations of customary international law, including arbitrary detention); Martinez v. City of L. A., 141 F.3d 1373, 1384 (9th Cir. 1998) (affirming the international prohibition against arbitrary detention); see also De Sanchez v. Banco Cent. de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (explaining that international law recognizes the right not to be arbitrarily detained).


117 See Doe v. Unocal Corp., Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *28-29 (9th Cir. Sept. 18, 2002) (recognizing that rape violates international law), vacated and reh'g en banc granted, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003); Kadic, 70 F.3d at 242-3 (explaining that rape committed in the course of hostilities violates international law); In re Extradition of Suarez-Mason, 694 F. Supp. 676, 682 (N.D. Cal. 1988) (describing rape as torture and a violation of international law).

118 See Beanal, 969 F. Supp. at 373-374 (noting that with the exception of genocide, state action must be present in order for liability to fix for certain human rights abuses). See generally Kadic, 70 F.3d at 239 (expanding liability for some violations of international law from state actors to non-state actors); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794-795 (D.C. Cir. 1984) (observing that while most crimes require state action for ATCA liability to attach, there are several for which individual actors can be liable).
cause of action under the ATCA.119 Federal courts have interpreted the "state action requirement" for violations of customary international law by looking to our domestic "color of law" jurisprudence.120

Acting under "color of law" occurs when one "acts together with state officials or with significant state aid."121 Under this jurisprudence, federal courts utilize four different tests in determining whether state action exists under the ATCA: (1) the nexus test, (2) the public function test, (3) the symbiotic relationship test, or (4) the joint action test.122 The nexus test requires proof of a substantially close "nexus" between the state and the alleged conduct in order for the court to trace the action back to the state.123 The public function test is applicable where "a private entity performs a function traditionally the exclusive prerogative of the State."124 The symbiotic relationship test may be used where the state has so far insinuated itself into a position of interdependence with a private actor, that "it must be recognized as a joint participant in the challenged activity."

119 See Filartiga, 630 F.2d at 880 (finding that acts of torture committed by state officials against one held in detention violates established norms of the international law of human rights and the law of nations). See generally Kadic 70 F.3d at 239 (explaining that liability for violations of international law applies to state, and in some instances, non-state actors); Beanel, 969 F.Supp. at 371 (discussing acts violative of international law when committed by state actors).

120 See Kadic, 70 F.3d at 245 (calling "color of law" jurisprudence under § 1983 relevant to whether defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Claims Act); see also Beanel, 969 F. Supp. at 380 (applying all four § 1983 tests of state action to analyze conduct of corporate defendants under the ATCA); Doe v. Unocal Corp., 963 F. Supp. 880, 890-891 (C.D.Cal. 1997) (discussing applicability of § 1983 tests of state action to ATCA claims).

121 Kadic, 70 F.3d at 245 (holding that subject-matter jurisdiction exists and that defendant may be found liable for genocide, war crimes, and crimes against humanity in his capacities as both private individual and state actor).

122 See Johnson v. Rodrigues, 293 F.3d 1196, 1202 (10th Cir. 2002) (discussing four tests used to determine whether private parties should be deemed state actors); Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (describing four tests under the state action doctrine); see also Beanal, 969 F. Supp. at 376-377 (E.D. La. 1997) (considering four tests used to determine whether private actors have engaged in state conduct for purposes of § 1983).

123 See Johnson, 293 F.3d at 1203 (explaining that under the nexus test, plaintiff must demonstrate a sufficiently close nexus between the government and the challenged conduct); Gallagher, 49 F.3d. at 1447-1448 (describing the nature of the inquiry in the nexus test); see also Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (outlining the contours of the nexus test).

124 Beanal, 969 F. Supp. at 379 (noting that state action can exist when private entities performs functions traditionally the exclusive prerogative of states).

125 Id. at 378 (noting that state action can be established under the symbiotic relationship test if the state "has so far insinuated itself into a position of interdependence" with private parties that "it must be recognized as a joint participant in the challenged activity").
Lastly, the joint action test is met where an individual is a "willful participant in joint action with the state or its agents." 126

Federal courts were next confronted with the issue of whether individuals acting in their individual capacities could be liable under modern international law. 127 At first, federal courts were hesitant to extend the ATCA’s application to private actors, 128 but they soon redefined their interpretation of international law to adapt to the norm of non-state actor liability for certain breaches of international law. 129

2. Non-State Actors and Violations of Jus Cogens Norms

In *Kadic v. Karadzic*, plaintiffs brought suit against Karadzic, leader of the self-proclaimed and non-recognized Srpska republic, located within Bosnia-Herzegovina. 130 The plaintiffs claimed to have suffered the torts of torture, rape, and murder as part of a genocidal campaign by Serbian military forces at the order of Karadzic. 131 The Southern District of New York dismissed for

126 Id. at 379 (quoting Dennis v. Sparks, 449 U.S. 24, 27 (1980)).


128 See Tel-Oren, 726 F.2d at 792-793 (holding that the Palestine Liberation Organization was not a state actor and thus not liable for torture under international law). See generally De Sanchez v. Banco Cent. de Nicaragua, 770 F.2d 1385, 1396-1397 (5th Cir. 1985) (observing that despite erosion of distinctions between injuries to states and to individuals, incorporation of human rights standards into the law of nations remained limited); Doe v. Karadzic, 866 F. Supp. 734, 739-740 (S.D.N.Y. 1994) (discussing the evolution of applications of international law to encompass acts by private actors against individuals), rev’d, 70 F.3d 232 (2d Cir. 1995).

129 See Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (holding that certain forms of conduct violate the law of nations whether undertaken by those acting under auspices of states or as private individuals; Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 309-319 (S.D.N.Y. 2003) (surveying application of international law to state actors, individual actors, and corporations); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 12-13 (D.D.C. 1998) (following Kadic in applying international law to private actors).


131 See Kadic, 866 F. Supp. at 736 (describing torts allegedly inflicted by Bosnian-Serb military forces under the command of defendant); Enslen, supra note 101, at 699 (outlining crimes and injuries allegedly committed at the direction of defendant); Isenberg, supra note 131, at 1059-1060 (describing claims for which plaintiffs sought relief).
lack of subject matter jurisdiction based on a finding that private actors could not violate the law of nations.\footnote{See Karadzic, 866 F. Supp. at 744 (dismissing § 1331 claim for lack of subject-matter jurisdiction actions absent an express right of action granted by Congress); Enslen, supra note 101, at 701 (describing district court's dismissal based on lack of subject matter jurisdiction under the ACTA); Isenberg, supra note 131, at 1060-1061 (analyzing reasons for district court dismissal for lack of subject matter jurisdiction).}

On appeal, the Second Circuit reversed and found that individuals could be liable for certain violations of international law.\footnote{See Kadic, 70 F.3d at 241 (quoting judicial categorization of claims presented before Second Circuit).} The Court first categorized the plaintiffs' claims into three categories: "genocide, war crimes, and other instances of inflicting death, torture and degrading treatment."\footnote{See id. at 241-43 (examining post-World War II conventions and treaties regarding requirements for genocide and war crimes under international law}; see also Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988) (specifying that "whoever" commits genocidal acts is punishable by statute without requiring person to be private or state actor); Flores v. S. Peru Copper Corp., 343 F.3d 140, 150 (2d Cir. 2003) (reiterating that war crimes and genocide violate international law whether committed by state actors or private individuals). The court, analyzing international treaties and conventions, concluded that genocide and war crimes were \textit{jus cogens} norms, which by definition could not be derogated by states or private individuals.\footnote{See Kadic, 70 F.3d at 243 (holding that international law requires torture to be committed by state actors); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (finding that torturous acts carried out by state officials only will be violative of international norms); see also Flores, 343 F.3d at 150 (following Kadic holding that customary law is violated when executed by state actors).} Further, the court reinforced the \textit{Filartiga} holding that torture only violates international law if committed by state officers or those acting under color of law according to customary international law.\footnote{See Kadic, 70 F.3d at 244 (clarifying that although acts are torturous under customary international law, case must be remanded to determine if all statutory elements satisfied). See generally Demian Betz, Note, \textit{Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad}, 14 DEPAUL BUS. L.J. 163, 173 (2001) (mentioning how appellate court found Karadzic's actions torturous under international law); Enslen, supra note 101, at 695 (noting Kadic decision and its expansion on torture in realm of international law).} It concluded Karadzic was liable for torture even though he was not a state officer because the claimed acts were committed in pursuit of genocide and war crimes.\footnote{See id. at 241-43 (examining post-World War II conventions and treaties regarding requirements for genocide and war crimes under international law); see also Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988) (specifying that "whoever" commits genocidal acts is punishable by statute without requiring person to be private or state actor); Flores v. S. Peru Copper Corp., 343 F.3d 140, 150 (2d Cir. 2003) (reiterating that war crimes and genocide violate international law whether committed by state actors or private individuals).}
Thus, the ATCA was further broadened in scope by the Second Circuit to comply with modern international law. The court recognized genocide and war crimes as \textit{jus cogens} norms under international law. \textit{Jus cogens} norms are defined as non-derogable norms that may be violated by both states and individuals. This interpretation of the ATCA was consistent with the Nuremberg trials, which imposed individual liability upon German soldiers for committing acts of genocide. Present treaties and conventions also acknowledge that individuals may be accountable for violations of \textit{jus cogens} violations under international law. Accordingly, modern international law was consistently defined by the Second Circuit in finding Karadzic liable. The holding in \textit{Kadic} is also important for it is the basis of accountability used to find the next class of defendants accountable under the ATCA in the early 1990s, MNCs.

\hspace{1cm} \textsuperscript{138} "The \textit{Karadzic} decision was also groundbreaking in that the court held that certain international human rights norms were applicable to private actors as well as public actors." Ramasastry, supra note 15, at 120. The \textit{Kadic} decision has since been cited in numerous federal courts cases that came after it. See, e.g., Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 439 (D.N.J. 1999); Beanal v. Freeport-McMoRan, 969 F.Supp. 362, 371 (E.D. La. 1997).

\hspace{1cm} \textsuperscript{139} See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 697, 1155 U.N.T.S. 332, 344 [hereinafter "V.C.L.T."]. The V.C.L.T. defines a \textit{jus cogens} norm as "a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Some legal scholars and courts have defined \textit{jus cogens} norms to prohibit acts of genocide, piracy, slave trade, and crimes against humanity. See, e.g., Alvarez-Machain v. United States, 331 F.3d 604, 613 (9th Cir. 2003); see also \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES}, § 404 (1994).

\hspace{1cm} \textsuperscript{140} See Carl E. Bruch, \textit{The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict}, 25 VT. L. REV. 695, 730 (2001) (noting that Nuremberg courts rejected idea of sovereign immunity as protection from personal liability for genocidal acts). \textit{See generally} Collingsworth, supra note 21, at 191 (commenting on principle developed by Nuremberg tribunal that private individuals can be liable); James McHenry, \textit{Justice for Foca: The International Criminal Tribunal For Yugoslavia's Prosecution of Rape and Enslavement as Crimes Against Humanity}, 10 TULSA J. COMP. & INT'L L. 183, 188-89 (2002) (listing crimes that were charged at Nuremberg including war crimes and crimes against humanity).

\hspace{1cm} \textsuperscript{141} See V.C.L.T, supra note 139, at 344 (adopting standard for nations involved that private individuals are responsible for \textit{jus cogens} violations, such as genocide or war crimes); \textit{see also} International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., para. 4, U.N. Doc. S/RES/955 (1994) (creating agreement that individuals responsible for war crimes or genocide in Rwanda are accountable and must surrender). \textit{See generally} United States v. Yousef, 327 F.3d 56, 94 (2d Cir. 2003) (acknowledging that customary international law may "vitiates" treaty that directly violates \textit{jus cogens} norms).

\hspace{1cm} \textsuperscript{142} See William J. Aceves, \textit{International Decision}: Doe v. Unocal, 92 AM. J. INT'L L. 309, 312-13 (1998) (recognizing importance of \textit{Kadic} decision on account of emergence of MNCs worldwide); Kieserman, supra note 19, at 881-82 (noting how MNCs refuse to accept responsibility for horrendous acts of host nations by claiming inability to become socially
IV. MNC ACCOUNTABILITY UNDER THE ATCA

A. Application to MNCs

Application of the ATCA against an MNC was not successfully employed until the Ninth Circuit decided Doe v. Unocal. Through their subsidiary, Unocal partook in a natural gas extraction project by setting up a pipeline in Myanmar. Because the project was not welcomed by local population near the area, security was required and Unocal allowed the Myanmar military to be hired to provide security over the project. Unocal was also aware of prior forced labor practices exercised by the Myanmar military. The plaintiffs were villagers from the adjacent area where Unocal’s pipeline project was based. The plaintiffs brought suit against Unocal under the ATCA for claims of forced labor, rape, murder, and torture they had been subjected to by the Myanmar military. The involved; see also Ramasastry, supra note 15, at 95 (identifying issue of accountability on part of MNCs for their involvement or support of acts that violate customary international norms, such as genocide or war crimes).

Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *1 (9th. Cir. 2002), reh’g granted, 2003 U.S. App. LEXIS 2716, at *1 (9th Cir. 2003).


See Unocal, 2002 U.S. App. LEXIS 19263, at *6 (specifying exact region of Myanmar that Unocal and its accompanying partners were to lay down pipeline); Unocal, 963 F. Supp. at 885 (discussing in detail all aspects of extraction project and pipeline installation throughout Myanmar). See generally Aceves, supra note 142, at 310 (discussing Unocal’s project in Myanmar, including development of natural gas fields and installing pipeline throughout country).

See Unocal, 2002 U.S. App. LEXIS 19263, at *6 (recognizing Unocal’s rationale in hiring Myanmar military for security in region where pipelines were being laid down). See generally Betz, supra note 137, at 167-68 (discussing role of Myanmar military as security measure due to village opposition of regional labor practices); Alex Markels, Showdown for a Tool in Rights Litigation, N.Y. TIMES, June 15, 2003, § 3, at 11 (stating how Unocal needed to pay military for protection while building pipelines).


See Unocal, 2002 U.S. App. LEXIS 19263, at *12 (listing grounds under which plaintiffs brought suit pursuant to ATCA); Unocal, 963 F. Supp. at 883 (noting claims of villagers in class action suit on behalf of all who suffered grave atrocities). See generally Markels, supra note 146, at 11 (highlighting threats and atrocities by Myanmar military towards villagers who eventually brought suit).
California district court granted Unocal’s motion for summary judgment because it did not find that plaintiffs had shown Unocal had “actively participated” in the forced labor.149

The Ninth Circuit reversed and found Unocal could be liable for “aiding and abetting” the Myanmar military in committing violations of international law.150 The court’s analysis first began by defining forced labor as a violation of modern international law.151 The court then cited to Kadic in explaining specific situations where private actors could be liable under the ATCA for violations of jus cogens norms, thereby not requiring proof of state action.152 It determined forced labor was the modern day equivalent of slavery and, therefore, a violation of a jus cogens norm.153 The court subsequently turned to international criminal law to define the aiding and abetting standard as “knowing, practical assistance, or encouragement that has a substantial effect on the perpetration of the crime.”154 Applying this aiding


150 See Unocal, 2002 U.S. App. LEXIS 19263, at *55 (concluding that aiding and abetting is identifiable here as to Unocal, but genuine issues of material fact exist as to elements of claim for lower court to resolve); cf. Barrueto v. Larios, 205 F.Supp.2d 1325, 1333 (S.D. Fla. 2002) (noting that conspiracy to aid and abet is also violative of customary international norms). See generally Symeon C. Symeonides, Choice of Law in the American Courts in 2002: Sixteenth Annual Survey, 51 AM. J. COMP. L. 1, 49-50 (reiterating Ninth Circuit’s decision to remand aiding and abetting claim to district court).


152 See Unocal, 2002 U.S. App. LEXIS 19263, at *30 (recognizing Kadic as source for holding private actors liable for jus cogens violations); see also supra note 135 and accompanying text (discussing Kadic holding). See generally Aceves, supra note 142, at 312-13 (specifying how court expanded Kadic holding to private corporations in addition to private individuals).

153 See Unocal, 2002 U.S. App. LEXIS 19263, at *32 (finding forced labor does not require state action); see also Weidenfeller v. Kidulis, 380 F. Supp 445, 450 (E.D. Wis. 1974) (stating forced labor of particular classes of people constitutes thirteenth amendment violation). See generally Pollack v. Williams, 322 U.S. 4, 17 (1944) (explaining purpose of Thirteenth amendment was to implement market of “completely free and voluntary labor throughout the United States”).

154 See Unocal, 2002 U.S. App. LEXIS 19263, at *35-36. The court determined that the standard for aiding and abetting in our domestic tort law was similar to that under international criminal law. It noted how several district courts had looked to international criminal law in determining which standard to use when analyzing international human
and abetting standard, evidence existed to create a material question of fact as to whether forced labor had been used in connection with the pipeline project.\textsuperscript{155} The court did not find proof of "state action" was required in proving acts of murder and rape because these acts were committed in furtherance of forced labor, a \textit{jus cogens} norm.\textsuperscript{156} However, the court did note Unocal would only be liable for the crime of torture with a showing of "state action"\textsuperscript{157} as required under the \textit{Filartiga} holding. Thus, the international norm of individual responsibility was held to extend to MNCs.\textsuperscript{158}

The \textit{Unocal} decision is viewed as a step forward for human rights activists who have long advocated for corporate accountability for violations of human rights law.\textsuperscript{159} Since the \textit{Unocal} decision, other corporations have yet to be found accountable under the ATCA.\textsuperscript{160} This decision has placed

rights law under the ATCA. \textit{Id.} at 44-45. The court then looked to the decisions of the International Criminal Tribunal for Rwanda in determining the correct standard used in international law. \textit{Id} at 45.


\textsuperscript{156} See \textit{Unocal}, 2002 U.S. App. LEXIS 19263, at *36-57 (concluding "active participation" standard inappropriate in this situation); \textit{see also} Kadic \textit{v. Karadzic}, 70 F.3d 232, 240 (2d Cir. 1995) (holding state action is not requirement for liability pursuant to the ATCA); Malone, \textit{supra} note 155, at 368 n.2 (explaining complaint based on the ATCA is exception to state action requirement in federal court).


\textsuperscript{158} See \textit{Alvarez-Machain v. United States}, 266 F.3d 1045, 1050 (9th Cir. 2001) (stating jus cogens violation is not mandatory to satisfy standard); Natalie L. Bridgeman, \textit{Human Rights Under the ATCA as a Proxy For Environmental Claims}, 6 YALE HUM. RTS. & DEV. L.J. 1, 8 n.27 (2003) (explaining holding in \textit{Unocal} extends to violations of current international standards that are not jus cogens violations); \textit{see also} Free, \textit{supra} note 157, at 472 (concluding ATCA claims are important components of corporate liability for human rights violations).

\textsuperscript{159} See Malone, \textit{supra} note 155, at 365 (noting human rights activists can provide remedy for human and environmental damages); \textit{see also} Bridgeman, \textit{supra} note 158, at 2 (stating that the ATCA has developed into feasible method for liability abroad with human rights violations); Free, \textit{supra} note 157, at 472 (explaining human rights activists have sued MNCs under the ATCA).

\textsuperscript{160} See generally Aldana \textit{v. Del Monte}, No. 01-3399, 2003 U.S. Dist. Lexis 24343, at *2 (S.D.Fla 2003) (dismissing ATCA claim filed by Guatemalan citizens against defendants
corporations on notice because of the likelihood further suits will be filed against them in light of the ongoing human rights violations in countries with which they or their subsidiaries continue to contract with.\footnote{61}

**B. Possible Applications to MNCs**

Current application of the ATCA makes MNCs potentially liable for violations of international law under two standards: violations with proof of "state action" or violations of *jus cogens* norms. Legal commentators have also stated MNCs may be found to violate customary international law through the notion of "corporate complicity."\footnote{62} Corporate complicity occurs when MNCs are found acting as accomplices to violations of international law acted upon by the host states.\footnote{63} These commentators have identified three categories of corporate complicity,\footnote{64} which include direct complicity, indirect complicity, alleging human rights violations). *But see* Bangor v. Citizens Commun. Co., No. 02-183-B-S, 2003 U.S. Dist. LEXIS 16667, at *6 (D. Me. 2003) (recommending court deny motion to dismiss claim against third party defendant for lack of personal jurisdiction); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 314 n.24 (S.D.N.Y. 2003) (concluding that even though *Unocal* decision was ordered for rehearing, there is "overwhelming precedent" for proposition that corporations are liable under the ATCA).

\footnote{61} *See* Talisman, 244 F. Supp. 2d at 314 n.24 (noting many courts have upheld claims of human rights violations under ATCA against multinational corporations); Bridgeman, *supra* note 158, at 4 (stating the ATCA is viable method for bringing claims against corporations for environmental abuses); *see also* Free, *supra* note 157, at 473 (commenting on expert predictions of increased litigation against corporations following *Unocal* decision).


\footnote{63} *See* Ramasastry, *supra* note 15, at 100 (defining corporate complicity); *see also* Talisman, 244 F. Supp. 2d at 296 (stating plaintiff's claim alleging defendant's complicity with government); Forcese, *supra* note 162, at 509 (noting courts have found corporate complicity in situations similar to "color of law" matters).

\footnote{64} *See* Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, (Mar. 21, 2001), available at http://www.business-humanrights.org/Home (outlining and explaining three categories of corporate complicity); *see also* Bridgeford, *supra* note 149, at 1028 n.91 (noting direct complicity depends on whether corporation "knowingly benefits from human rights abuses"). *See generally* Ramasastry, *supra* note 15, at 101 (explaining categories Clapham and Jerbi have noted in their article on corporate complicity).
and “mere presence in the country, coupled with complicity through silence or inaction.”

1. *Jus Cogens* Violations

MNCs may be accountable for violations of *jus cogens* norms through direct complicity or by directly committing such violations under the *Kadic* holding. There are a limited group of *jus cogens* norms, which exist under international law and are recognized by federal courts. Such recognized *jus cogens* norms are those prohibiting acts of piracy, war crimes, genocide, crimes against humanity, and slavery.

As was noted, the *Unocal* redefined forced labor as the modern day equivalent of slavery, thereby expanding the possible application to MNCs in light of their use of labor abroad. It has been established that during World War II, MNCs profited from slave labor that occurred in their manufacturing plants abroad. Further, *Unocal* holds that plaintiffs could bring suits

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165 Ramasastry, *supra* note 15, at 101 (listing this as the third category of corporate complicity).

166 See *Kadic* v. *Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (holding state action is not requirement for liability pursuant to ATCA); Bridgeford, *supra* note 149, at 1028 n.91 (explaining direct complicity is based on foreseeable detrimental effects caused by assistance); see also Ramasastry, *supra* note 15, at 100 (specifying ways corporation may be liable for violating international law).

167 See *Restatement (Third) of Foreign Relations Law* § 404 (1994) [hereinafter “Restatement”] (listing *jus cogens* norms as those which states may exercise universal jurisdiction over); see also *Kadic*, 70 F.3d at 239, 240 n.3 (reviewing list of violations of international law); *Free*, *supra* note 157, at 471 (noting that since *Filartiga*, courts have allowed various abuses that constitute violations).

168 See *Restatement, supra* note 167 (listing *jus cogens* norms as those which states may exercise universal jurisdiction over); see also *Kadic*, 70 F.3d at 239, 240 n.3 (reviewing list of violations of international law); *Free*, *supra* note 157, at 471 (noting that since *Filartiga*, courts have allowed various abuses that constitute violations).

169 Doe v. *Unocal Corp.*, Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th. Cir. Sept. 18, 2002), at *32 (finding forced labor does not require state action), vacated and *reh’g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003); see also *Weidenfeller v. Kidulis*, 380 F. Supp 445, 450 (E.D. Wis. 1974) (stating forced labor of particular classes of people constitutes thirteenth amendment violation). *See generally* Pollack v. Williams, 322 U.S. 4, 17 (1944) (explaining purpose of thirteenth amendment was to implement market of “completely free and voluntary labor throughout the United States”).

170 *See In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 942-3 (N.D. Cal 2000). The district court dismissed the suit finding the 1951 Treaty of Peace with Japan settled any claims of reparations Allied nationals had against Japan and therefore waived any claims plaintiffs held. *Id.* at 949. In *re World War II* was decided prior to *Unocal* and plaintiffs did not invoke the ATCA because they were U.S. citizens. Arguably, foreign nationals of the Allied nations could bring forth suit under the ATCA in the Ninth Circuit against foreign corporations involved in such practices during WWII. *See also* Stefan A. Riesenfeld, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 74 n.162 (2002), for a discussion regarding
against MNCs for such forced labor violations. This concept can further be extended to MNCs who use child labor in their foreign production plants if federal courts choose to interpret child labor under the definition of forced labor. Moreover, MNCs may also be directly liable for committing violations of customary international law like torture, committed in furtherance of any *jus cogens* norms. It is doubtful MNCs have directly committed violations of *jus cogens* norms since it is the host governments with whom they contract who are directly involved in the actual commission of violations. However, it is possible that such regimes could commit a genocidal campaign while under contract with MNCs and therefore pass on liability to MNCs under the Kadic finding of individual accountability for acts committed in the furtherance of *jus cogens* violations.

pharmaceutical industry involvement. For discussion about Japanese corporations use of forced labor, see Haberstroh, *supra* note 162, at 254-5.

171 See *Unocal*, 2002 U.S. App. LEXIS 19263, at *83 (reversing district court judgment which granted summary judgment in favor of corporation for ATCA claims); see also *Talisman*, 244 F. Supp. 2d at 314 n.24 (concluding that even though *Unocal* decision was ordered for rehearing, there is "overwhelming precedent" for proposition that corporations are liable under ATCA); *Free*, *supra*, note 157, at 473 (commenting on expert predictions of increased litigation against corporations following *Unocal* decision).


173 See *Kadic*, 70 F.3d at 239 (disagreeing that laws of nation confine their reach only to state action); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOR. AFF. 81, 87 (1999) (discussing trend in recent cases stating MNCs may be held directly liable for violating norms of customary international law); see also Ramasastry, *supra* note 15, at 150 (listing types of crimes for which an MNC can be directly liable).

174 See Ramasastry, *supra* note 15, at 92 (classifying most MNCs as accomplices to the host government); see also Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. & POL'Y REV. 401, 404 (2002) (explaining how in recent civil actions, acts complained of were usually joint ventures between MNCs and foreign host governments). *See generally* Zia-Zarifi, *supra* note 173, at 86-87 (discussing interplay between MNCs and host governments).

2. Customary International Law Violations and State Action

MNCs may violate customary international law under all three categories of complicity. MNCs may be accountable for aiding a foreign government and, therefore, acting as an accomplice or as a joint actor complicit in "state action" violating customary international law.\textsuperscript{176} Proof of "state action" was successful under the joint action test in \textit{Unocal}.\textsuperscript{177} Consequently, plaintiffs may find it easier to prove "state action" under this test to show complicity.

One major obstacle for plaintiffs bringing suits against MNCs under the ATCA is pleading a recognized violation of international law.\textsuperscript{178} For example, plaintiffs have been unsuccessful pleading claims of environmental harm as a violation of the law of nations. The Fifth Circuit has not found environmental law claims to have reached the status of customary international law in \textit{Beanal v. Freeport McMoRan}.\textsuperscript{179} Similarly, "cultural genocide" has yet to achieve the status of customary international law.\textsuperscript{180} Arguably, because customary international law is continually evolving in light of state practice,

\textsuperscript{176} See Ramasastry, supra note 15, at 100 (discussing ways in which MNCs may be accountable for violations). \textit{But see} Gary Clyde Hufbauer & Barbara Oegg, \textit{Reconciling Political Sanctions With Globalization and Free Trade: Economic Sanctions: Public Goals and Private Compensation}, 4 CHI. J. INT'L L. 305, 327 (2003) (positing that MNCs could end up not investing in business in developing countries if they find themselves punished from their liability); Lucinda Saunders, Note, \textit{Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds}, 24 FORDHAM INT'L L.J. 1402, 1454 (2001) (claiming evidence of MNCs' participation in violations of international law can be hard to obtain).


\textsuperscript{178} See \textit{Beanal v. Freeport-McMoRan Inc}, 969 F. Supp. 362, 384 (E.D.La. 1997) (affirming district court's dismissal), \textit{aff'd}, 197 F.3d 161 (5th Cir. 1999); Saunders, \textit{supra} note 176, at 1453-54 (describing plaintiffs as having to plead "high factual threshold" to have continuation of case under the ATCA); \textit{see also} Zia-Zarifi, \textit{supra} note 173, at 123 (noting ATCA plaintiffs encounter steep factual barriers to recovery).

\textsuperscript{179} 969 F. Supp. 363, \textit{aff'd}, 197 F.3d 161 (5th Cir. 1999).

such violations may eventually be recognized as valid violations of international law.\(^\text{181}\)

Successful claims of violations against MNCs of economic, social, and cultural rights are likely to come under the Universal Declaration of Human Rights (UDHR).\(^\text{182}\) The UDHR, which specifically sets forth the principle that non-state actors are liable for violations of human rights,\(^\text{183}\) has existed for over forty years, and parts of it are viewed as customary international law.\(^\text{184}\) In light of state practice and the length of time it has existed, courts could arguably find the principles set forth under the UDHR are \textit{jus cogens norms} or at the very least customary international law.\(^\text{185}\) Further proof of the status of economic, social, and cultural rights as customary international law is exemplified in the International Covenant on Cultural and


\(^{182}\) See Universal Declaration, supra note 59, at pmbl. (recognizing inherent dignity of members of “human family”); see also Rhoda E. Howard, \textit{Capitalism and Human Rights}, 5 BUFF. HUM. RTS. L. REV. 283, 288 (1999) (exhibiting why multinational enterprises must behave with regard to human rights); Ramasastry, supra note 15, at 95-96 (stating MNCs have important role in protecting human rights).


Political Rights (ICCPR). The CESC\r\n\r\n\nestablishes all people as having the right to paid labor and sanitary working conditions. It has been noted that some MNCs' foreign factories operate under dangerous working conditions or pay low salaries. Federal courts may use the CESC as evidence of customary international law against low wages or poor working conditions and apply it to MNCs based on Unocal's holding and the general trend of proscribing labor and human rights violations.

V. A JUSTIFICATION FOR MNC ACCOUNTABILITY UNDER THE ATCA

While it is evident that MNCs can be liable for violations of international human rights law, this Note further argues that it

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See ICESCR, supra note 186, at art. 7 (articulating such rights of people); see also Yuri I. Luryi, Legal Problems of Vocational and Professional Training During the Soviet Period of Stagnation, 42 CLEV. ST. L. REV. 607, 616 (1994) (quoting work rights mentioned in ICESCR); Neil A. Friedman, Comment, A Human Rights Approach to the Labor Rights of Undocumented Workers, 74 CAL. L. REV. 1715, 1729 (1986) (mentioning work rights and labor standards guaranteed in ICESCR).

See Stephens, supra note 1, at 52 (noting that investigations have found Disney, Nike, and Levi Strauss have factories where abuses such as "unpaid overtime, child labor, illegally low wages and dangerous working conditions" exist); Borg, supra note 177, at 609 (detailing unfair labor practices MNCs are accused of committing); see also Ryan P. Toftoy, Note, Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?, 15 ARIZ. J. INT'L & COMP. L. 905, 905-06 (1998) (setting forth international labor abuses in which MNCs engage).
is justified for MNCs to be held accountable under the ATCA for international law violations. The ATCA may only be applied when federal courts have jurisdiction over defendants. Consequently, the United States is not crossing its jurisdictional boundaries.\textsuperscript{190} Additionally, the ATCA has been held to give plaintiffs a cause of action.\textsuperscript{191} Also, as above, plaintiffs must plead a violation of international law.\textsuperscript{192} Thus, certain activities have not been deemed violative international law norms. Consequently, the application of the ATCA will be persistent with current international law.\textsuperscript{193} In applying the ATCA, federal courts are therefore not stepping outside of jurisdictional boundaries.\textsuperscript{194} This is the legal justification; however, there are additional societal justifications for why MNCs should also be held accountable under the ATCA.

\textsuperscript{190} See generally Zia-Zarifi, supra note 173, at 146 (opining that “while no American court has yet found an MNC liable under ATCA, I believe that such an outcome is certain in the near future”); Logan Michael Breed, Note, Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad, 42 VA. J. INT’L L. 1005, 1013-14 (2002) (stating U.S. courts only recognize limited claims under ATCA, leaving many human rights violations of MNCs outside its scope); 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, 930 (1998) (claiming MNCs must be held liable for human rights violations and move towards such liability should be made under ATCA).


\textsuperscript{192} See id. (stating that there must be a “violation of the law of nations); Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (noting that plaintiffs must plead violation of “international norms”); Hilao v. Estate of Marcos, 25 F.3d 1468, 1475 (9th Cir. 1994) (explaining that “actionable violations of international law must be of a norm that is specific, universal, and obligatory”).


\textsuperscript{194} See Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1131 (C.D. Cal. 2002) (noting jurisdictional elements under ATCA); Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 548 (D.D.C. 1981), aff’d, 726 F.2d 774 (D.C. Cir. 1984) (listing three elements that must be present for jurisdiction to vest under § 1350, namely that the claim must be made by an alien, it must be for a tort, and the tort must be in violation of the law of nations or the treaties of the United States); see also 28 U.S.C. 1350 (conferring jurisdiction on district courts).
First, MNCs possess enormous power in terms of their wealth and size, exerting formidable control over host countries. They are in the best position to see that human rights norms are followed. Furthermore, their stature equates them to that of states. Second, MNCs' conduct abroad is not governed by any international organization or host states. In addition, voluntary corporate codes of conduct are inefficient as is evidenced with the presently continuing human rights abuses. Lastly, MNCs as legal persons and global citizens, have moral and ethical duties in international society. Consequently, the federal courts' application of the ATCA is a justified internalization of current international human rights norms upon MNCs.


196 See Developments in the Law: International Criminal Law v. Corporate Liability for Violations of International Human Rights Law, 114 HARV. L. REV. 2025, 2045 n.129 (2001) (suggesting setting up an international civil court to adjudicate human rights claims against MNCs); see also Paul, supra note 195, at 286–90 (contrasting United States lack of participation in international tribunals with marked increase of private plaintiffs seeking redress against multinational corporations in domestic courts). See generally Carella, supra note 193, at 122 (noting that while United States is not a member of International Criminal Court, they do recognize the international law doctrine of universal jurisdiction).

197 See Shirley Lung, Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers, 34 LOY. U. CHI. L.J. 291, 312 n.165 (2003) (discussing failure of voluntary codes); Saunders, supra note 176, at 1436–37 (noting lack of serious standards to deal with MNCs); see also Steven Greenhouse, Groups Reach Agreement for Curtailing Sweatshop, N.Y. TIMES, Nov. 5, 1998, at A20 (summarizing code of conduct set up to curtail sweatshops).

198 See Jacques de Lisle, Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Ambushes Abroad, 52 DEPAUL L. REV. 473, 492 (2002) (noting corporate responsibility and "human rights duties"); see also Anderson, supra note 13, at 468 (commenting that while a moral duty cannot be forced on a corporation, they should have a legal duty to respect human rights); Ratner, supra note 55, at 461–66 (discussing need for corporate responsibility for protecting human rights).
A. The Economic Power of MNCs

The end of the Cold War further opened the doors to globalization.\textsuperscript{199} Trade liberalization led to MNCs further investing in newly independent states and lesser-developed countries.\textsuperscript{200} MNCs are enormously wealthy and at times economically more powerful than developed countries.\textsuperscript{201} In a recent survey comparing revenues of states and MNCs, only seven countries had larger economies than General Motors.\textsuperscript{202} Such wealth arguably places MNCs at a huge advantage in their relations with developing countries.

A “liberal view” defines MNCs as powerful entities controlling the relations of developing countries.\textsuperscript{203} Consequently, developing countries

\textsuperscript{199} See Freeman, supra note 53, at 149 (stating “[t]he end of the Cold war was a victory of liberal capitalism over authoritarian socialism...”); see also Reed, supra note 1, at 221 (arguing the end of the Cold War has accelerated “the globalization of commerce and telecommunications”). See generally Ratner supra note 55, at 458 (discussing expansion of globalization after at the end of the Cold War).

\textsuperscript{200} See Ellinikos, supra note 20, at 1 (noting American MNCs expanded operations to countries in Asia, Latin America and Eastern Europe); see also Reed, supra note 1, at 224–25 (discussing the growth and role of MNCs since the end of the Cold War). See generally Ruti G. Teitel, Theoretical and International Framework: Transitional Justice in a New Era, 26 Fordham Int’l L.J. 893, 895–97 (2003) (discussing nation building after the cold war).

\textsuperscript{201} Unilever-Best has an annual turnover that exceeds the gross domestic product of most countries, including Kenya and Ecuador. See Branson, supra note 195, at 131. According to United Nation statistics, multinationals are wealthier than over one hundred twenty nation members of the United Nations. See Bruce Mazlish, Perspectives on Globalization from Developing States: A Tour of Globalization, 7 IND. J. GLOBAL LEG. STUD. 5, 11–12 (1999). The Corporate Globalization Fact Sheet notes that Venezuela’s gross domestic product is less than Royal Dutch Shell’s total revenues and that Walmart’s revenues are also larger than Indonesia’s gross domestic product. See Corporate Globalization Fact Sheet, Corporate Watch, Mar. 22, 2001, available at, http://www.corpwatch.org/issues/PID.jsp?articleid=378 (last visited Mar. 5, 2004) (Hereinafter “Fact Sheet”).

\textsuperscript{202} See Global Policy Forum, Comparison of Revenues Among States and TNCs, May 10, 2000 (showing that only seven countries, United States, Germany, Italy, the United Kingdom, Japan, France, and the Netherlands have larger economies than General Motors as of May 10, 2000), available at http://www.globalpolicy.org/socecon/tncs/tncstat2.htm (last visited Mar. 4, 2004); see also Stephens, supra note 1, at 57 n.59 (citing to Global Policy Forum). See generally Cassel, supra note 10, at 1979 (quoting fact that “Ford’s economy is larger than Saudi Arabia’s and Norway’s”).

countries find MNC investment appealing in the hopes of bringing wealth to their countries. To attract foreign direct investment, these governments strive to offer the cheapest labor and natural resources to MNCs. They may also feel obligated to relax labor standards and are less likely to reprimand violators of human rights laws for fear of losing MNC investment. While these host states have a duty to enforce human rights norms, they will unlikely become involved in litigation that would detract foreign direct investment. However, the absence of action against MNCs for violations of human rights law by host states does not detract from MNCs' duties under international law.

As a result of their power in relations with developing countries, MNCs can have a significant impact on human rights. MNCs are influential in ensuring countries they contract with abide and respect international law because they hold the power

204 The dominant neo-liberal ideology has meant that developing countries are now more open than ever to foreign direct investment by MNCs...Developing countries, in order to attract foreign investment, come under pressure not only to reduce public expenditure but also to reduce the burden on MNCs in such areas as workplace safety and environmental protection.

Freeman, supra note 53, at 156; see also Reed, supra note 1, at 226; Kieserman, supra note 19, at 911.

205 See Ellinikos, supra note 20, at 1 (arguing that American MNCs look for foreign states that are "willing to subject their people to slave and forced labor and exploit these foreign labor sources to reap large profits"); see also Ping Lu, Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising, 38 Colum. J. Transnat'l L. 603, 604 (2000) (commenting that as transnational corporations gain more power and influence, national governments lose power); Erin Elizabeth Macek, Globalization, Governance, and Multinational Enterprises Responsibility: Corporate Codes of Conduct in the 21st Century, 11 Minn. J. Global Trade 101, 103 (2002) (noting that transnational corporations exercise "greater power and influence within certain countries than the respective national governments").

206 See Shelton, supra note 9, at 295 (noting states' inclination to "ease labor standards, modify tax regulations, and relax other standards to attract foreign direct investment"); see also Branson, supra note 195, at 133 (observing that multinationals may seek to set up operations in countries with cheaper labor costs and low or no minimum wage requirements); Benjamin N. David, Note & Comment, The Effects of Worker's Rights Protection in United States Trade Laws: A Case Study of El Salvador, 10 Am. U. Int'l L. & Pol'y 1167, 1176 (1995) (discussing "low-wage" internationalism).

207 See Ellinikos, supra note 20, at 26 (discussing the reasons why host governments will not enforce international labor laws against MNCs for fear of losing much of their investments); see also Ratner, supra note 55, at 460 (discussing how the desire for foreign direct investment has led developing countries to adjust domestic laws); Ayoub, supra note 20, at 422 (noting that due to economic constraints, developing countries will not enforce international or domestic labor laws on MNCs).

208 See Collingsworth, supra note 21, at 184 (stating that host states governments are "corrupt, unreliable, or non-functioning"); DeVa, supra note 13, at 1-2 (observing that there is a problem when a MNC is more interested in foreign investment than in human rights); Bridgeford, supra note 149, at 1017-18 (noting that ATCA suits could impede foreign investment by multinational corporations).
of choosing where to invest. They can forewarn developing countries that foreign direct investment will either be withdrawn or never take place unless human rights norms are respected. MNCs have the option of simply pulling out states that commit human rights violations.

B. Lack of Effective Governance of MNC Conduct Abroad

1. The Ineffectiveness of Codes of Conduct

Codes of conduct arose as attempts to comply with international law norms. Voluntary codes of conduct passed by international organizations became popular in the mid-1970s. The United Nations attempted an international code of conduct with the U.N. Code of Code for Transnational Corporations in the 1980s. However, the Code was not adopted because of problems faced in developing procedures governing enforceability and

209 See Diane F. Orentlicher & Timothy A. Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China, 14 NW. J. INT'L L. & BUS. 66, 101 (stating that “transnational business practice can, and often does, have a direct and substantial impact on human rights conditions in a host country”). But see Freeman, supra note 53, at 157 (stating that MNCs are not in the business of human rights). See generally Engle, supra note 13, at 107 (noting MNCs worldwide economic influence).

210 See Cassel, supra note 10, at 1973-74 (discussing several corporations’ leaving Burma because of child labor violations); see also Stephens, supra note 1, at (noting “that transnationals have an ongoing, and at times devastating, impact on human rights around the world”). See generally Orentlicher & Gelatt, supra note 209, at 125 (discussing minimum standards of conduct for the areas to which they send investment funds).


212 See Cassel, supra note 10, at 1969-1971 (noting the attempts of passing corporate codes of conduct by international organizations in the early 1970s); see also Jorge F. Perez-Lopez, supra note 34 (discussing various codes of conduct which were proposed in the 1970s); Breed, supra note 190, at 1024 (discussing voluntary codes of conduct proposed in the 1970’s and 1980’s).

213 See Ayoub, supra note 20, at 420 (noting the codes’ lack of teeth in the event that member states fail to comply); see also Klaus A. Sahlgren, Emerging Standards of International Trade and Investment: Multinational Codes and Corporate Conduct, 80 AM. J. INT'L L. 253, 257 (1986) (noting the slow negotiations process which took place during the formulation of the UN code). See generally Astid Boos-Hersberger, Transboundary Water Pollution and State Responsibility: The Sandoz Spill, 4 ANN. SURV. INT'L & COMP. L. 103, 129 (1997) (discussing the Code and its attempted regulation of MNCs in an environmental pollution context).
monitoring compliance. A legally-binding international code applicable to MNCs does not yet exist. Arguably one will probably never come to fruition because of the difficulty in writing a code that a majority of MNCs would agree to sign.

Corporate codes recently became popular with MNCs as a response to criticism from the public and from non-governmental organizations for their practices abroad, but have not proven effective in regulating human rights violations. Corporate codes do not carry the threat of sanctions nor are they steadily enforced. Typically, these codes do not require an independent monitoring body to oversee compliance. Though numerous

214 See Ayoub, supra note 20, at 420-421 (discussing the failed United Nations Code of Conduct on Transnational Corporations); see also Boos-Hersberger, supra note 213, at 130 (noting the lack of "enforcement mechanisms" which made the U.N. Code ineffective); David Weissbrodt & Muria Kruger, Current Development: Norms On The Responsibilities Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights, 97 AM. J. INT'L L. 901, 907 (2003) (discussing the need for further development of enforcement mechanisms in such codes, in a human rights context).

215 See Barbara Frey, The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights, 6 MINN. J. GLOBAL TRADE 153, 177-80 (1997) (listing examples of corporations that have set out standards for their contracting partners regarding labor conditions and worker rights); see also Laura Ho & Catherine Powell & Leti Volpp, 31 HARV. C.R.-C.L. L. REV. 383, 401-03 (1996) (noting manufacturers such as Wal-Mart and Lev's have implemented corporate codes of conduct). See generally Ayoub, supra note 20, at 402-04 (discussing the advent of corporate codes of conduct as a result of public criticism).

216 See Wood & Scharffs, supra note 79, at 557-58 (noting commentators have argued corporate codes are "flawed in terms of content; they are flawed in terms of implementation; and they are flawed in terms of enforcement"); see also Macek, supra note 205, at 113 (stating that corporations who do not adopt codes from goodwill or because of worrying about image do not have the reasons to adopt or abide by codes). See generally Weissbrodt & Kruger, supra note 214, at 907 (discussing development of government-set industry "Norms" as an alternative to individual MNC codes to protect human rights).

217 See Ayoub, supra note 20, at 403-04 (arguing codes of conduct do not have the effect of obliging subsidiaries and subcontractors of MNCs to abide by requirements); see also Saunders, supra note 176, at 1460 (noting that corporate codes of conduct are generally unenforceable as a result of their voluntary nature). But see Ayoub, supra note 20, at 420 (showing that a government-created UN code has similar enforcement problems).

218 See, e.g., Bob Ortega, Conduct Codes Garner Goodwill for Retailers, But Violations Go On, WALL ST. J., July 3, 1995, at A1 (discussing codes implemented by J.C. Penney, Wal-Mart, and Levi Strauss in the apparel industry that have not stopped labor violations from occurring in Central America because contracting foreign companies do not monitor for violations as required). See generally Sacharoff, supra note 190, at 936-37 (discussing self-regulation by MNC's and its necessarily arbitrary, ultimately ineffective nature); Saunders, supra note 176, at 1437 (noting that the codes of conduct are "generally voluntary and rarely enforced").

219 See e.g., Nike Code of Conduct, at http://www.nike.com/nikebiz/nikebiz.jhtml page=25&cat=compliance&subcat=code (last updated Jan. 2004) (setting for the company's compliance monitoring and assessment code, but failing to mention that an independent monitoring board is required under its code) (last visited Apr. 26, 2004); see also Sacharoff, supra note 190, at 936-37 (noting that the corporate codes of conduct are generally subject to approval only of the host nation, as such their structure is generally arbitrary). See generally Borg, supra note 177, at 643 (recognizing the flaws of current
corporate codes exist involving compliance with human rights, because they are voluntary, many America MNCs have yet to implement such codes.\textsuperscript{220} Furthermore, MNCs do not find corporate codes appealing for fear other MNCs may not have enacted them.\textsuperscript{221} A corporate code would place them at an economic disadvantage by possibly leading to a loss in profits from lost contracts with developing states.\textsuperscript{222} Because the best and primary interests of corporations are shareholder profits, such decisions may logically result in avoiding implementation of corporate codes of conduct if an end result would be loss to shareholders and the corporation.

2. The Lack of International Governance Over MNC Conduct

International organizations governing MNCs conduct within human rights law do not exist.\textsuperscript{223} For example, the International Monetary Fund (IMF) views its function in international law to be governed by economic issues only and not human rights.\textsuperscript{224} voluntary MNC corporate codes, and arguing for new law providing for monitoring and enforcement).


\textsuperscript{221} See generally Michael A. Sontoro, Defending Labor Rights: On the Barricades and In The Boardroom, at 307 (noting that increased labor costs would have to be passed to consumers, forcing the company to choose between ethics and profits), available at http://www.watsoninstitute.org/bjwa/archive/9.2/essays/santoro.pdf (last visited Apr. 26, 2004); Tofroy, supra note 189, at 906 (discussing pressures on MNCs that effectively discourage developments in labor rights in foreign direct investment situations); Robert J. Liubicic, Corporate Codes Of Conduct And Product Labeling Schemes: The Limits And Possibilities Of Promoting International Labor Rights Through Private Initiatives, LAW AND POLICY IN INTERNATIONAL BUSINESS, Sept. 1998, at 111 (discussing the negative indirect effects of enacting Codes of Conduct).

\textsuperscript{222} See id. (proposing that American MNCs that adopt 'costly' labor standards may find themselves at a disadvantage in competition against non-US MNCs that do not adopt such standards); see also Liza Featherstone & Doug Henwood, Economists vs. Students, THE NATION, Feb. 2001, at 6 (arguing that the lost profits are generally easily recovered by these businesses, and that consumers generally do not mind increased price in exchange for labor rights for workers). See generally Redmond, supra note 81 (discussing the conflict between concerns of "profit maximization and those of human rights").

\textsuperscript{223} See Douglas M. Branson, Corporate Social Responsibility Redux, 76 TUL. L. REV. 1207, 1211 (2002) (noting how WTO may have to play increasing role in regulating MNCs); Weissbrodt and Kruger, supra note 214, at 907 (advocating for the development of mandatory human rights labor codes), See Cassel, supra note 10, at 1969-1974 (discussing various "attempts" at putting international standards into place).

\textsuperscript{224} See Shelton, supra note 9, at 291 (discussing how IMF guidelines only deal with economic issues and do not mention human rights); see also William H. Meyer & Boyka
Similarly, the International Labor Organization (ILO), an agency of the United Nations, can only bind state members which ratify their conventions.\textsuperscript{225} The ILO therefore cannot be viewed as influential in guiding MNC conduct because of its lack of enforcement power on MNCs.\textsuperscript{226} MNCs are not bound to any such guidelines. The lack of international sanctions permits MNCs to continue investing in developing countries without fear of apprehension by international organizations.\textsuperscript{227} Unless MNCs are taking criminal action, they will not be accountable under international human rights law.\textsuperscript{228}


\textsuperscript{225} See generally Michael J. Dennis, CURRENT DEVELOPMENT: Newly Adopted Protocols to the Convention on the Rights of the Child, 94 AM. J. INT'L L. 789, 794 (2000) (noting that countries which are not party to the ILO's conventions are not bound to it); Charles J. Morris, A Blueprint For Reform Of The National, 8 ADMIN. L.J. AM. U. 517, 524-5 (1994) (discussing the ILO's labor rights policies to which member nations are bound); Rupneet Sidhu, Child Laborers: The World's Potential Future Labor Resource Exploited and Depleted, 15 HASTINGS WOMEN'S L.J. 111, 115 (2004) (noting that the ILO became “the first specialized agency of the United Nations”).


\textsuperscript{228} See Sacharoff, \textit{supra} note 190, at 938 (discussing the “obstacles” preventing the holding of MNCs liable under international law, noting that many MNCs are often “above the law”). But see 42 U.S.C. § 1983 (2004) (providing for a cause of action for deprivation of civil rights against a private actor who acts “under color of law”, applicable in this sense to MNCs which can be considered de-facto state actors); Alien Tort Claims Act, 28 U.S.C. § 1350 (providing civil remedies against MNCs in these situations); Sacharoff, \textit{supra} note 190, at 954-55 (discussing the possibility of holding MNCs liable as de-facto state actors in § 1983 actions).
C. The Ethical Duties of MNCs as Global Citizens

MNCs, as global citizens, are members of international society. Their interactions with states and individuals have ramifications. As global citizens, and from these interactions, MNCs owe ethical duties particularly in the area of human rights. Proponents of foreign direct investment argue that MNCs bring economic wealth and further human rights through economic stability. Indeed, MNCs are substantially responsible for increasing revenue in developing markets, but at times it has been at the expense of the rights of citizens. By increasing gross domestic products of developing countries, MNCs do not abrogate their duty to abide by international law norms. It is illogical to argue the simple creation of an economic right negates respecting an individual’s human rights.

Some commentators argue MNCs have one duty: to make a profit. In turn, MNCs will adapt to "socially responsible

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229 See generally Betz, supra note 137, at 188-89 (discussing how human rights organizations are using federal courts to compel MNCs to either control the behavior of their military security forces or cease entering into such ventures all together); Stephens, supra note 1, at 46 (noting harsh ramifications of IBM's involvement with Nazi party); Breed, supra note 190, at 1008 (pointing out that the economic power and geographic scope enjoyed by American MNCs provides them with frequent opportunities to interfere with the enjoyment of a broad range of human rights).

230 See de Lisle, supra note 198, at 492 (noting multinational corporations, and not just governments or individual international criminals, have human rights duties); see also Sydney M. Cone, III, The Multinational Enterprise as Global Corporate Citizen, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 3 (2001) (stating expressly that multinational enterprises are part of civil society). See generally Anderson, supra note 13, at 466 (discussing the adoption and subsequent impact of corporate ethical policies).


232 See generally Tara Bunker, Environmental Upgrade: The Potential for Chile to Use Market Incentives in Preparing for NAFTA Accession, 8 COLO. J. INT'L ENVTL. L. & POLY 165, 192-93 (1997) (acknowledging that the presence of MNCs in Chile and the large amount of foreign capital invested there tend to favor a market incentive system, helping Chile to generate more revenue); deLisle, supra note 198, at 492 (discussing MNCs and their operation under international law); Dennis, supra note 225, at 390-81 (discussing whether there is a "right to development" and the UN's role in targeting official development assistance).

233 See Stephens, supra note 1 (noting Milton Friedman's essay which referred to business's social responsibility as increasing its profits); see also Redmond, supra note 81 (stating the economic objective of the business corporation is the maximization of corporate profit and shareholder gain). See generally P.W. Singer, Peacekeepers, Inc.,
behavior” as a response to criticism that may hurt their end profit. Nevertheless, it is doubtful MNCs would argue they are not bound to respect the same human rights norms, which govern states and individuals. MNCs are aware of the effects they have on human rights. If they were not aware, voluntary corporate codes would never have arisen because consumers would not have known human rights violations were committed. Why MNCs adapt their behaviors is irrelevant because they are aware of their duties within international society and must adapt in order to comply with these duties. If they did not have duties under international law, then such backlash to their behaviors abroad would never have arisen.

POL’Y REV., Jun. 1, 2003, at 59 (examining proposals for privatized peacemaking and recognizing that security goals of clients are often in tension with private firms’ aim of profit maximization, resulting in considerations of the good of the private company that are not always identical with the public good).

234 See Stephens, supra note 1 (discussing William Safire’s argument of corporate motivations behind “socially responsible behavior” are based on responses to potential profit gains or losses); see also Joel L. Hodes & Ellen M. Bach, Corporate America’s Response to the AIDS Crisis: What Price Glory?, 61 ALB. L. REV. 1091, 1110-12 (theorizing that if profit is a critical motivator of American businesses, then a goal of policymakers should be to demonstrate to those businesses how HIV/AIDS will affect their profit margins). See generally Abagail McWilliams & Donald Siegel, Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?, 21 STRATEGIC MGMT. J. 603, 603-07 (May 2000) (examining the issues concerning the relationship between corporate social responsibility and economic performance).

235 See Breed, supra note 190, at 1009-12 (discussing the broad scope of corporate human rights violations). See generally Cassel, supra note 10, at 1970-71 (noting the concept of self-imposed corporate responsibility in the form of a code of conduct was first popularized in the 1970s and 1980s as a response to the movement to end apartheid in South Africa through divestiture) (emphasis added); Barbara A. Frey, The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights, 6 MINN. J. GLOBAL TRADE 153, 157-59 (1997) (noting corporate awareness stemming from recent consumer pressure on U.S. companies to ensure that they do not market the products of forced, convict, or child labor demonstrate the increasing sensitivity of companies and the public to significant human rights problems present in many of the countries in which TNCs operate).

236 See Glen Kelley, Note, Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations, 39 COLUM. J. TRANSNAT’L L. 483, 485 (2001) (examining the human rights implications of the activities of large MNCs, arguing that related concerns must be addressed effectively to avoid a growing societal backlash against foreign investment in both developed and developing states); see also L. Kim Tan, Critics Slam China Status, BOSTON HERALD, Nov. 29, 1999, at 28 (discussing the WTO protests in Seattle and the argument that the WTO should be stopped because it has consistently ruled in favor of multi-national corporations and against environmental, health, safety and labor laws). See generally Larry Rohter, Hondurans in ‘Sweatshops’ See Opportunity, N.Y. TIMES, July 18, 1996, at A1 (noting that while under Honduran law children may begin working at 14, most garment factories dismissed all workers under 16 due to a fear of U.S. consumer backlashes).
VI. Conclusion

International law by nature must continually evolve as a response to interactions between both state and non-state actors. Since World War II, the international legal structure has expanded to include states, international organizations, non-governmental organizations, individuals, and MNCs. All of these actors are now subject to international law. International law norms are externalized and internalized by interactions between all actors in the international system. Human rights norms have been externalized since the enactment of the UDHR and later state practices respecting such rights. The United States has recently taken part in furthering such norms by internalizing them through application of the ATCA. Holding MNCs accountable under the ATCA will aid in furthering the goals of international law, particularly human rights norms.

237 See Reed, supra note 1, at 222 (recognizing states have certain duties with respect to its citizens under international law); see also Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 CALIF. L. REV. 1823, 1830 (2002) (arguing that absent an incentive toward compliance, resources devoted to the creation and maintenance of international legal structures are wasted); Raj Aggarwal, The Finance and Taxation Decisions of Multinationals, J. INT'L. BUS. STUD., Mar. 22, 1990, at 170 (noting the myriad number of regulations, legal constraints, and public policies such as direct or derivative capital controls set up by capital-exporting or capital-importing countries, price controls and other legal constraints, in support of the theory of an expansive international legal structure).


239 See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (finding that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations); see also Koh, supra note 4, at 2386 (noting huge impact Filartiga had on international rights). See generally Beth Stephens, Problems of Proving International Human Rights Law in the U.S. Courts: Litigating Customary International Human Rights Norms, 25 GA. J. INT'L & COMP. L. 191, 192 (1995/1996) (noting the Filartiga court's holding that torture by a state official against one held in detention "violates established norms of the international law of human rights" and thus constitutes a tort "in violation of the law of nations," actionable under the Alien Tort Claims Act).

240 See generally Betz, supra note 137, at 164, 169-85 (examining the history of ATCA litigation and how MNCs have become targets of the statute); Collingsworth, supra note 21, at 196 (noting potential of "advancing human rights law by using the ATCA aggressively"); Breed, supra note 212, at 1006 (acknowledging many human rights
The United States is internalizing a norm that came into existence over forty years ago. It is the United States' duty to respect the human rights of citizens. When egregious human violations occur against citizens, and if the United States has federal jurisdiction against the violators of such rights, then application of the ATCA is justified.

MNCs are some of the most powerful actors within international society.\textsuperscript{241} This is primarily a result of globalization. Globalization has enabled MNCs to transgress international borders and profit from their relations with developing countries.\textsuperscript{242} Unfortunately, human rights abuses occurred at the hands of the military regimes of such countries, and MNCs did not take action to stop such violations from taking place for fear of losing profits.\textsuperscript{243} However, the aftermath of World War II established individual liability for violations of international law.\textsuperscript{244} Consequently, under this norm, MNCs can

advocates believe the current trend of litigation under the ATCA is the proper method of controlling American MNCs).

\textsuperscript{241} See Shelton, supra note 9, at 273 (discussing rising power of non-state actors and decrease in power of governments); see also Duke, supra note 172, at 362 (noting the future of human rights protections seems to include a shift in the focus of human rights responsibility from state actors to the increasingly more powerful corporate actors); Breed, supra note 212, at 1008 (stating MNCs power and control over resources in developing countries combine to turn MNCs into powerful ambassadors for the United States, who frequently interact with both the governments and the populations of developing countries).

\textsuperscript{242} See Teitel, supra note 6, at 357-58 (discussing globalization and international law); see also Ayoub, supra note 20, at 397 (pointing out that as a result of increased economic globalization during the last quarter century, many MNCs locate their manufacturing plants in economically developing regions, searching for cheap labor and low regulatory costs in order to produce their products at the lowest cost available, thereby maximizing their sale profits). See generally Duke, supra note 172, at 340 (opining that Developing countries entice MNCs with low wages and an increasingly more skilled and productive workforce).

\textsuperscript{243} See Stephens, supra note 1, at 46 (noting IBM's involvement with Nazi party was based on profits and didn't require human rights violations to be a factor in decision making process); see also Kelley, supra note 236, at 508 (hypothesizing that MNC trading practices have put money into the hands of brutal and undemocratic military regimes, and even provide funds that rebel forces use on weapons, prolonging bloody civil wars). See generally, e.g., Lucien J. Dhooeg, A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations, 24 N.C. J. INT'L L. & COM. REG. 1, 57-59, 66-68 (1998) (describing the dependence of Myanmar's military leadership on direct foreign investment to fund their illegitimate and highly repressive regime).

\textsuperscript{244} See Koh, supra note 4, at 2359 (noting expansion of international law to various actors); see also Thames, supra note 33, at 153 (examining whether a court can find private individual liability via the ATCA for a claim of forced labor). See generally Tina Garmon, Comment, Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act, 11 TUL. J. INT'L & COMP. L. 325, 340-44 (discussing the development of the notion of individual liability under international law).
be held accountable for doing absolutely nothing to stop such atrocities from taking place.\textsuperscript{245}

MNCS have the power to effect change because of their dominant role within international society and in the domestic relations of developing countries.\textsuperscript{246} If MNCS only view relations in terms of profit, they should be hesitant to allow violations to go unaddressed for fear of having to pay out large sums of money under the ATCA. It would be much simpler for MNCS to ensure such violations no longer take place by taking matters into their own hands. MNCS may therefore require compliance with corporate codes of conduct and require outside inspectors to ensure compliance.\textsuperscript{247}

By finding MNCS accountable under the ATCA, MNCS will be forced to react to the possible legal implications for their conduct abroad. Application of ATCA is just one step in ensuring respect for human rights. It is a further step in enforcing international law, a law that applies to all peoples, states, and non-state actors.

\textsuperscript{245} See generally Deva, supra note 13, at 45 (advocating the requirement of \textit{mens rea} be satisfied both by act or omission; "either intention or knowledge to violate human rights, or the failure to take reasonable steps to avoid such a violation, should be sufficient to impose criminal liability on MNCS"); Ramasastry, \textit{supra} note 15, at 104-05 (asserting Human Rights Non-Governmental Organizations' (NGOs) argument that when MNCS become aware of systematic or continuous human rights abuses, they have an affirmative obligation to raise these issues with the government and to attempt to exert influence); Pia Zara Thadhani, \textit{Regulating Corporate Human Rights Abuses: Is Unocal The Answer?}, 42 WM. & MARY L. REV. 619, 632 (2000) (criticizing courts that stretch acceptable bounds by fitting corporate inaction under "color of authority," especially in \textit{Unocal}, where the corporations were only passively involved in human rights violations).

\textsuperscript{246} See Shelton, \textit{supra} note 9, at 273 (noting rising power of non-state actors); see also Breed, \textit{supra} note 190, at 1008 (describing MNCS as powerful ambassadors for the United States, who frequently interact with both the governments and the populations of developing countries). See generally Duke, \textit{supra} note 172 (examining the shift in the focus of human rights responsibility from state actors to the increasingly more powerful corporate actors).

\textsuperscript{247} See Michael S. Baram, \textit{Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development}, 24 ENVTL. L. 33, 43 (1994) (examining various codes of corporate conduct and their efficacy). See generally Cassel, \textit{supra} note 10, at 1964 (noting development of corporate codes of conduct in the 1970's); Breed, \textit{supra} note 190, at 1024 (acknowledging the concept of self-imposed corporate responsibility in the form of a code of conduct was first popularized in the 1970s and 1980s as a response to the movement to end apartheid in South Africa through divestiture).