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Searching for a Corporate Liability Standard Under the Alien Tort Claims Act in *Doe v. Unocal*

> The documents we celebrate this week—the Bill of Rights, the Universal Declaration of Human Rights, and the more recent Helsinki accords—derive their value and promise from the timeless, immutable truths they contain and our solemn commitment to upholding them. As we reflect on the historic significance of these documents, let us vow to ensure that they remain meaningful guarantees of individual dignity and liberty.
>
> - George Bush, President of the United States[1]

> I call upon the people of the United States to honor the legacy of human rights passed down to us from previous generations and to resolve that such liberties will prevail in our Nation and throughout the world.
>
> - George W. Bush, President of the United States[2]

Adhering to the Universal Declaration on Human Rights is paramount to achieving the Executive Branch's determination to promote human rights throughout the world. Accordingly, this requires "progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[3] There are many international instruments aimed at establishing human rights; the United States is a signatory to only a few of them.[4]

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[1] Proclamation 6238-Human Rights Day, Bill of Rights Day, and Human Rights Week, 26 WEEKLY COMP. PRES. DOC. 2016, 2017 (Dec. 10, 1990) (promising to uphold the U.N. Declaration of Human Rights).

[2] Proclamation No. 7634, 67 Fed. Reg. 76,667, 76,669 (Dec. 9, 2002).

[3] *See* G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810. pmbl. (1948).

[4] BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE,

These well-intentioned human rights conventions and resolutions remain basically unenforceable, however, leaving enforcement up to the individual states.[5] Domestic measures enforcing basic human rights standards are therefore essential to the overall development of a universal international human rights law.

The Alien Tort Claims Act (ATCA)[6] is currently at the forefront of United States law providing civil redress to victims of international human rights violations. Under the ATCA, an international law violation is actionable in a U.S. district court as a tort when committed against an alien.[7] Most ATCA international law violations are related to human rights abuses, likely because respect for human rights is a basic tenant of western legal systems and most civilized nations, and it is therefore natural for the United States to penalize violators of such rights.[8] Furthermore, to maintain foreign relations, the United States arguably has a duty to take action when one of its own citizens is involved in the international law violation.

Enforcing international law violations through a national legal system raises many novel challenges. Due to the relatively short history of ATCA jurisprudence, courts are confronted with many difficult questions of first impression. For example, may a U.S. corporation be held liable under the ATCA for its indirect involvement in human rights abuses and, if so, what is the correct substantive law to determine liability?

This Comment discusses the ATCA and applies it to a U.S. corporation in a joint venture with the military government of a developing nation that uses forced labor in connection with the establishment of a gas pipeline. Based on the facts of *Doe v. Unocal Corp.*,[9] this Comment argues that once there is subject

2000 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES app. c (2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/app/654pf.htm.

[5] For a discussion of the difficulty surrounding the enforcement of international human rights instruments, see Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 183 (2002). States are not bound to enforce international instruments domestically, but may choose to do so. *Id.*

[6] 28 U.S.C. § 1350 (2000).

[7] "Per se" is used to define cases where the defendant is liable under the ATCA as the direct perpetrator of the international law violation. *See*, *e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[8] The phrase "international law violations" will be used interchangeably with "human rights violations" throughout this Comment. The Universal Declaration on Human Rights is modeled in large part after the U.S. Bill of Rights.

[9] Doe v. Unocal Corp., 963 F. Supp. 880, 884-86 (C.D. Cal. 1997), *dismissed*, 27 F.

matter jurisdiction, a liability standard for indirect violations of international law under the ATCA should be adopted from tort principles embodied in our federal common law. Furthermore, it argues that the use of domestic tort principles will likely aid in the development of an international human rights law without implicating foreign relations or improperly imposing liability. Part I of this Comment presents the facts surrounding Unocal's relationship with the Myanmar Military. Part II gives a brief overview of ATCA jurisprudence. Part III examines the *Unocal* litigation to date. Part IV interprets the ATCA and then applies it to the facts of the *Unocal* case. Lastly, this Comment concludes by discussing the benefits of applying domestic law principles to remedy international law violations under the ATCA and briefly addresses some of the arguments against that approach.

I

BACKGROUND OF THE *UNOCAL* LITIGATION

In 1988, an authoritarian military regime, called the State Law and Order Restoration Council (the Myanmar Military), took control of Burma and renamed the country Myanmar.[10] Since its overthrow of the Burmese Government, the Myanmar Military has ruled by decree, without a constitution or legislature, and has systematically violated human rights.[11] Despite attempts at multiparty elections in which voters overwhelmingly supported the opposition party, the Myanmar Military—through the use of military force—refuses to hand over power.[12]

The Myanmar Military began its regime by promulgating a for-

Supp. 2d 1174 (C.D. Cal. 1988), *rev'd in part*, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002), *reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Sept. 8, 2003). As this Comment was going to publication, arguments were heard by the en banc panel on July 17, 2003.

[10] BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BURMA 2000 (2001), http://www.state.gov/g/drl/rls/hrrpt/2000/eap/678pf.htm [hereinafter COUNTY RE-PORTS]. In 1997, the junta reorganized itself and changed its name to the State Peace and Development Council. *Id.*

[11] *Id.* (including, but not limited to, extrajudicial killing, torture, rape, forced relocation, and forced labor); *see also Unfinished Mission*, BOSTON GLOBE, Dec. 10, 2002, at A26.

[12] COUNTY REPORTS, *supra*, note 10. In 1990, the opposition party, National League for Democracy (NLD), commanded more than sixty percent of the popular vote and eighty percent of the parliamentary seats. *Id.* The Myanmar military, however, constantly imprisons political adversaries. *See Myanmar Jails Three Democracy Activists*, AGENCE FRANCE PRESS, May 24, 2003, *available at* LEXIS, News

eign investment law to promote the development of a national economy, a basic principle of which is to attract foreign investment for the exploitation of natural resources.[13] The Myanmar Military also established Myanmar Oil and Gas Enterprise (Myanmar Oil), a state-owned enterprise, to run the nation's oil and gas exploration and production activities.[14] Currently, Myanmar Oil contracts with thirteen foreign multi-national oil companies, from eight different countries, to assist in the country's natural gas development.[15] United States-owned oil companies, however, are restricted from exporting to Myanmar out of concern for the country's human rights record.[16] In 1992, a French oil company, Total, S.A. (Total), entered into a joint venture agreement with Myanmar Oil to construct a gas pipeline through the Tenasserim region of Myanmar (the Project).[17] Under the agreement, the Myanmar Military was responsible for providing labor, materials, and security, while Total funded, organized, and monitored the project.[18] A year after this agreement, and prior to the U.S. export ban, Unocal, a United States corporation, formally agreed to participate in the Project.[19]

In 1996, a group of villagers from the same region of Burma where the Project was being developed brought a class action suit against Unocal, Total, Myanmar Oil, the Myanmar Military, and

Library, AFP File; *World Briefing Asia: Myanmar: Amnesty Reports on First Visit*, N.Y. TIMES, Feb. 11, 2003, at A12.

13 Union of Myanmar Foreign Investment Law, State Law and Order Restoration Council Law, No. 10/88 (1988) (Myan.), http://www.energy.gov.mm/Incentive_1.htm.

14 ENERGY PLANNING DEP'T OF THE MINISTRY OF ENERGY, MYANMAR OIL AND GAS ENTERPRISE (2001), *at* http://www.energy.gov.mm/MOGE_1.htm (last visited Oct. 1, 2003).

15 ENERGY PLANNING DEP'T OF THE MINISTRY OF ENERGY, MYANMAR OIL AND GAS ENTERPRISE (2001), *at* http://www.energy.gov.mm/MOGE_2.htm (last visited Oct. 1, 2003). The countries operating in Myanmar include Australia, Indonesia, Canada, the United Kingdom, Korea, Malaysia, and France. *Id.*

16 On May 20, 1997, President Clinton issued Executive Order 13047, which imposes three basic prohibitions on transactions with Burma: (1) it bars all "new" investment in that country initiated by a U.S. person, including contracts or other activities for the development of Burmese resources; (2) it prohibits the approval or other facilitation by a U.S. person of any transaction by a foreign person with Burma if the transaction would have been prohibited had it been entered into by a U.S. person directly; (3) the Order voids any action by a U.S. person that evades or avoids either of the first two prohibitions. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997).

17 Doe v. Unocal Corp., 963 F. Supp. 880, 884-85 (C.D. Cal. 1997).

18 *See id.* at 885.

19 *Id.*; *see also* Exec. Order No. 13047, *supra* note 16.

Unocal's President and Chief Executive Officer.[20] The case was initiated in the United States District Court for the Central District of California.[21] The villagers alleged that Unocal, through the Myanmar Military, used—and continues to use—violence and intimidation to relocate villages, enslave laborers, and steal property, causing the villagers to suffer forced labor, death of family members, assault, rape, torture, and the loss of their homes and property in violation of state, federal, and international law.[22] The villagers based their claim on the ATCA and sought monetary damages as well as injunctive and declaratory relief for the harms they suffered.[23] Approximately seven years have passed since the villagers from Myanmar filed suit, and it is still uncertain whether the ATCA provides them a remedy for the egregious human rights abuses they have suffered.

II

The Alien Tort Claims Act

Originally enacted as part of the first Judiciary Act in 1789,[24] the ATCA as currently codified provides U.S. district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[25] Over the statute's first 191 years, it was "largely ignored, rarely cited, and relied upon in only two cases."[26] In 1980, however, the Second Circuit gave the statute meaning in *Filartiga v. Pena-Irala*,[27] and an era of ATCA jurisprudence commenced.[28] In *Filartiga*, the court held that torture

[20] *Id.* at 883.

[21] *Id.* at 880.

[22] *Id.* at 883-85.

[23] *Id.* at 883-834.

[24] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2000)).

[25] 28 U.S.C. § 1350 (2000).

[26] Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L. 1, 7 (2002) (citing Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795)).

[27] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[28] In addition to an increase in ATCA claims filed, the decision also set off a wave of scholarly research primarily into the history and purpose of the ATCA. Beth Stephens & Michael Ratner, International Human Rights Litigation in U.S. Courts 12 (1996). Most scholars agree that the drafters of the Judiciary Act considered federal jurisdiction over actions involving aliens to be very important for the following two reasons: (1) it was generally thought that actions involving aliens

perpetrated under the color of state authority violates international law, regardless of the nationality of the parties.[29]

The *Filartiga* decision was groundbreaking in the development of the ATCA in two respects. First, the decision defined international law for ATCA purposes not as it was at the time of the statute's passage, but rather "as it has evolved and exists among the nations of the world today."[30] Relying on the U.S. Supreme Court's instruction that international law is derived, in the absence of controlling authority, by consulting the works of jurists and commentators,[31] the court concluded—after consulting primarily the Universal Declaration of Human Rights—that torture is universally condemned and therefore prohibited by international law.[32] The court further stated that "international law confers fundamental rights upon all people vis-a-vis their own governments"; the scope of which is a "subject for continuing refinement and elaboration."[33] This statement reinforces the state-centeredness of international law and allows international law under the ATCA to develop as certain forms of conduct become universally condemned.[34]

Second, the *Filartiga* decision suggests that the ATCA provides a substantive right to a tort action under federal law upon

would tend to affect foreign affairs; and (2) federal jurisdiction was necessary to hold the United States, and its citizens, responsible for injuring aliens. An alien could be denied justice if the state failed to "provide redress for an injury inflicted on the alien by some private person—for example, a failure of the state to provide judicial remedies to an alien on whom physical or economic injury has been inflicted by a resident of the state." Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 175, 179-86 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (quoting L. HENKIN ET AL., INTERNATIONAL LAW 685-87 (1980)).

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

30 *Id*. at 881.

31 *Id*. at 880-81 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

32 *Id*. at 884. The court also considered various treaties, national constitutions, and U.S. policy to support its holding. *Id*. Under the ATCA, the "law of nations," as currently understood, consists of "universal, obligatory, and definable" norms. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

33 *Filartiga*, 630 F.2d at 885.

34 Since *Filartiga*, ATCA violations of international law now include genocide, Kadic v. Karadzic, 70 F.3d 232, 241-43 (2d Cir. 1995); cruel, inhuman or degrading treatment, Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995); Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994); summary execution, Xuncax, 886 F. Supp. at 184; arbitrary detention, *id*.; causing disappearance, *Forti*, 694 F. Supp. at 709-11; and war crimes, *id.*; Doe v. Islamic Salvation Front FIS, 993 F. Supp. 3, 8 (D.D.C. 1998).

the showing of a violation of international law.[35] This right is evidenced in the court's statement that the ATCA is construed "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[36] The Second Circuit reasoned that, under Article III of the U.S. Constitution, Congress may vest federal courts with subject matter jurisdiction over international law violations because international law has always been part of federal common law.[37] The court's assessment that international law has the status of federal common law is significant because it acknowledges the existence of a specific body of federal common law and authorizes federal courts to develop the law in that area.[38] This interpretation has generally been followed by courts[39] and even has the endorsement of Congress.[40]

In a later ATCA decision, the Second Circuit in *Kadic v. Karadzic* extended the scope of the ATCA to private actors.[41] In *Kadic*, the defendant argued that international law binds only states and persons acting under the color of a state's law, not private actors.[42] The court held that a private person may be lia-

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[35] 630 F.2d at 880-887. *See also* Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by U.S. Courts*, *in* THE ALIEN TORT CLAIMS ACT, *supra* note 28, at 291-92.

[36] *Filartiga*, 630 F.2d. at 887.

[37] *Id*. at 885-87.

[38] International law as federal common law is supported by the need for federal control over international relations and foreign affairs. This interpretation is termed the "modern position." Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 394 (1997). *See also* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). For a critique of this interpretation, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815 (1997).

[39] *See*, *e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic*, 70 F.3d at 236; Hilao v. Estate of Marcos, 25 F.3d 1467, 1474-75 (9th Cir. 1994). *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984). *See also* Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 405 (2001).

[40] ATCA "claims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered be [sic] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." Torture Victim Prevention Act of 1991, H.R. REP. NO. 102-367, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

[41] 70 F.3d 232, 236 (1995).

[42] *Id.* at 239. This is the state action requirement under the ATCA. *See id.* at 239-40. The status of the individual under international law has been debated for centuries. Initially, the law of nations was universally binding on all mankind. The classi-

ble under the ATCA for violating international law because "the law of nations, as understood in the modern era, [does not confine] its reach to state action" and "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[43] The court relied on the historical application of international law, executive branch support, and the position of the Restatement (Third) of the Foreign Relations Law of the United States in applying universal international law to a private actor.[44] Prior to *Kadic*, a private actor was immune from ATCA jurisdiction. Therefore, the *Kadic* court's recognition that certain international law violations apply to private actors is significant because it allows future ATCA plaintiffs who allege universal international law violations to circumvent the private/public actor debate.[45]

Over the past twenty-three years, the ATCA has been used with increased frequency against direct perpetrators of human rights abuses.[46] These cases typically involve state officials who commit human rights violations while acting under the color of law, then subsequently leave their positions and can be found in the jurisdiction of the United States.[47] A few cases have even extended liability up the chain of command to officers for human rights violations committed by those subject to their command.[48] In one ATCA case, claims were made against a U.S. corporation operating during World War II that directly employed slave labor.[49] All of these cases reaffirm the notion that a defendant

cal view, however, is that international law governs the relationship among states, not individuals. Marc Rosen, Note, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 6 CARDOZO J. INT'L & COMP. L. 461, 469-72 (1998).

[43] *Kadic*, 70 F.3d at 239. These certain forms of conduct refer to *jus cogens* norms, which are defined as "peremptory norms of general international law accepted" and recognized by the international community of states as a whole as norms from which no derogation is permitted. Vienna Convention on the Law of Treaties, May 23, 1969, 53 U.N.T.S. 39/27, 8 I.L.M. 679, 698-99; *see also* Alan Frederick Enslen, 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, 723 n.166 (1997).

[44] *Kadic*, 70 F.3d at 239-41.

[45] *See* Enslen, *supra* note 43, at 702.

[46] Collingsworth, *supra* note 5, at 188.

[47] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 878-80 (2d Cir. 1980); *see also supra* note 7.

[48] *See, e.g.*, *Kadic*, 70 F.3d 232.

[49] Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 431-32 (D.N.J. 1999). For a full

who is the direct perpetrator of a universal international law violation may be held liable per se under the ATCA. When the defendant is not the direct perpetrator or commander of the international law violation, however, it is difficult to hold the defendant responsible under the same per se standard of liability. This difficulty lies at the heart of properly applying the ATCA to the facts of *Unocal* and is evidenced in the various opinions handed down in the litigation to date.

III

THE *Unocal* Litigation

Over the past seven years, there have been three decisions and four differing views regarding how the law should judge Unocal's actions. Although Unocal did not directly employ the use of slave labor, the company is arguably liable to some degree for its relationship with the Myanmar Military and for its knowledge of human rights abuses being carried out in furtherance of the project. Yet, the novelty of the issue and lack of precedent in this area make it difficult to determine whether Unocal's actions rise to a level that justifies imposing civil liability on the company. For these reasons, it should not seem too uncharacteristic for the confusion among the district and appellate court decisions.

In 1997, in the first of two district court decisions, the District Court for the Central District of California dismissed the claims against the Myanmar Military and Myanmar Oil under the Foreign Sovereign Immunities Act (FSIA);[50] in 1998, the court dismissed the claims against Total for lack of personal jurisdiction.[51] However, the court found that subject matter jurisdiction was available under the ATCA against the Unocal defendants.[52] Interpreting the ATCA to require "(1) a claim by an alien, (2) alleging a tort, and (3) a violation of international law," the court held that the plaintiffs pled sufficient facts to prove that Unocal committed a violation of international law.[53] The court reasoned that the villagers' allegations that the Unocal defendants "were

discussion of this case and other similar cases from the Nuremberg Military Tribunal, see Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91 (2002).

[50] Doe v. Unocal Corp., 963 F. Supp. 880, 884-88 (C.D. Cal. 1997).

[51] Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1190 (C.D. Cal. 1998).

[52] *Unocal*, 963 F. Supp. at 884.

[53] *Id.* at 890-91.

and are jointly engaged with the state officials in the challenged activity, namely forced labor and other human rights violations in furtherance of the . . . project" satisfied the state action requirement and therefore were sufficient to support subject matter jurisdiction.[54] Moreover, the court reasoned that Unocal could be liable for slave labor even absent state action, because certain violations of international law do not require state action.[55] For example, Unocal paid the Myanmar Military to provide labor and security for the project, "essentially treating [the Myanmar Military] as an overseer, accepting the benefit of and approving the use of forced labor."[56] Finally, the court dismissed Unocal's act of state argument[57] because it was not apparent that adjudicating this matter would affect U.S. foreign relations with Myanmar, since the executive branch had already denounced Myanmar's human rights abuses.[58] This initial district court decision was the first to acknowledge that a U.S. corporation may be held liable for a violation of international law for its indirect involvement in human rights abuses.

In 2000, under a different presiding judge,[59] the same California district court granted Unocal's motion for summary judgment, holding that the plaintiffs could not show that Unocal was liable for the Myanmar Military's international law violations.[60] The court analyzed Unocal's liability as both a state actor and as a private party.[61] Relying on state action, as defined by section 1983 of the United States Code,[62] the court found that Unocal could not be held directly liable for an international law violation

[54] *Id.* at 891.

[55] *Id.* (citing Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

[56] *Id.* at 892.

[57] *Id.* at 893-94 (explaining that the act of state doctrine precludes courts from sitting in judgment of the actions of other states when foreign affairs are implicated).

[58] *Id.* at 893.

[59] The original district court judge in the *Unocal* case is now seated on the Ninth Circuit Court of Appeals. *Appellate Counsellor Profiles: Profile of Judge Richard A. Paez*, *at* http://www.appellate-counsellor.com/profiles/paez/htm.

[60] Doe v. Unocal Corp, 110 F. Supp. 2d 1294, 1296, 1310 (C.D. Cal. 2000).

[61] *Id.* at 1305-10.

[62] 42 U.S.C. § 1983 (2000). This section allows private individuals to bring civil suits against state actors for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *Id.* Furthermore, a private individual is considered a state actor for purposes of § 1983 if one of the following four judicial tests can be satisfied: public function, state compulsion, nexus, or joint action. Lugar v. Edmonton Oil Co., 457 U.S. 922, 939 (1982). Under this test, the unlawful conduct must be fairly attributable to the state. *Unocal*, 110 F. Supp. 2d at 1305-07.

because it was not a state actor.[63] Furthermore, the court held that Unocal could not be held liable as a private actor because it did not actively participate in forced labor.[64]

Confronted with conflicting district court decisions, the Ninth Circuit granted the plaintiffs' appeal with respect to the forced labor issue and reversed the district court's prior decision.[65] Although all three judges agreed that state action was not required and that Unocal could be held liable for the abuses committed by the Myanmar Military, the judges disagreed primarily over what substantive law should provide the appropriate liability standard.[66] The majority opinion began by concluding as a threshold matter that an international law violation existed because forced labor—and other torts committed in pursuit thereof—is a modern variant of slavery.[67] The court defined forced labor as a *jus cogens* violation, which allowed it to bypass the ATCA's state action requirement.[68] With the state action requirement out of the way, the majority held that Unocal could be liable under the ATCA for "aid[ing] and abett[ing] the Myanmar Military in subjecting [Plaintiffs] to forced labor."[69] Through the same analysis, the court concluded that Unocal could be found liable under the same standard for murder and rape, but not torture.[70] The aiding and abetting standard adopted by the majority was drawn from international law after the court went through a choice of law analysis.[71] Next, the majority applied international aiding and abetting, which it defined as "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime,"[72] to Unocal's actions and held that a reasonable per-

63 *Unocal*, 110 F. Supp. 2d at 1306-07.

64 *Id.* at 1309-10. The court adopted the active participation standard from the Nuremburg Military Tribunal cases.

65 Doe v. Unocal, Nos. 00-56603, 00-57197, 2002 U.S. App. LEXIS 19263, at *3 (9th Cir. Sept. 18, 2002) (the Ninth Circuit consolidated two ATCA cases involving Unocal and villagers from Myanmar).

66 *Id.* at *84.

67 *Id.* at *32 (citing Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) for the proposition that the ATCA provides for relief if the plaintiff can demonstrate "a violation of 'specific, universal, and obligatory' international norms").

68 *Id.* at *32. *Jus cogens* is a mandatory norm of general international law binding on a nation regardless of whether it chooses to recognize it. *Id.* at *40; *see also supra* text accompanying note 43.

69 *Id.* at *35-36.

70 *Id.* at *58.

71 *Id.* at *41.

72 *Id.* at *35-36, *57.

son could find that Unocal's action met this standard and summary judgment was therefore inappropriate.[73] Additionally, the court affirmed the dismissal of the villagers' claims against the Myanmar Military and Myanmar Oil under the FSIA and determined that the villagers' claims were not barred against Unocal by the act of state doctrine.[74]

On the other hand, the concurring opinion in the Ninth Circuit decision disagreed with the majority's decision to adopt a liability standard from international law, and suggested that "traditional civil tort principles embodied in federal common law, rather than [evolving] standards of international law," should provide the standard.[75] The concurrence relied on federal common law as an appropriate basis for its rationale because federal common law is applied in limited circumstances when authorized by Congress.[76] The concurrence then went through the same choice of law analysis as the majority, but came to a different conclusion.[77] The concurrence's choice-of-law inquiry pointed to federal common law as the appropriate body of substantive law to apply, whereas the majority's choice-of-law analysis led to international law.[78] The concurrence also offered and applied three possible liability standards—joint venture, agency, and reckless disregard—and concluded that there was ample evidence to support each.[79] The approach taken by the concurrence highlights yet another way of interpreting and applying the ATCA in the *Unocal* case.

In February 2003, the Ninth Circuit vacated the three-judge panel decision and decided to rehear the case en banc to determine the proper substantive law and legal standard to judge Unocal's actions.[80] The varying opinions, both at the district court and appellate court levels, likely influenced the Ninth Circuit's decision to rehear the case en banc. More importantly, the conflicting opinions illustrate the difficulties of correctly interpreting and applying the ATCA under unique factual settings.

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[73] *Id.* at *36.

[74] *Id.* at *63-64, *77.

[75] *Id.* at *85.

[76] *Id.* at *84-97.

[77] *Id.*

[78] *Id.* at 98-101.

[79] *Id.*

[80] Doe v. Unocal, Nos. 00-56603, 00-56628, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003).

IV

INTERPRETATION AND APPLICATION OF THE ATCA

Once a federal court establishes jurisdiction, the ATCA authorizes courts to "fashion domestic common law remedies to give effect to violations of customary international law."[81] Jurisdiction under the ATCA is established upon the existence of: (1) a claim by an alien; (2) alleging a tort; and (3) in violation of international law.[82] Essentially, the latter two elements of the statute are merged into a so-called "international tort,"[83] and jurisdiction under the ATCA therefore requires no more than an allegation of a violation of international law.[84] Under this construction of the statute, jurisdiction in the Unocal case is appropriate because slave labor is a violation of universal international law.[85] Because jurisdiction is based on the actions of the Myanmar Military, however, Unocal's liability as a third party under the ATCA raises important questions of first impression.[86] First, what is the appropriate body of law to determine whether Unocal may be held liable under the ATCA for the international law violation committed by the Myanmar Military? Second, having consulted this source of law, what circumstances, if any, give rise to liability? This section argues that federal common law and well-estab-

[81] Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 744, 782 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that "the substantive right on which this [ATCA] action is based must be found in the domestic tort law of the United States").

[82] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (citing Judiciary Act of 1789, ch. 20, § 9(b), 28 U.S.C. § 1350 (2000)). For an alternative interpretation of the requisite jurisdictional requirements, see Randall, *supra* note 28. The author suggests that a plaintiff must show a violation of international law and a separate municipal tort to sustain jurisdiction under the ATCA. *Id.* at 195-200. This interpretation would eliminate the need to search for a third-party liability standard under the ATCA because the defendant would be held directly liable for the international law violation through a municipal tort.

[83] BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS IN U.S. COURTS 50-54 (1996).

[84] *Abebe-Jira*, 72 F.3d at 847.

[85] Presumably, the ATCA does not require the defendant to be the actual perpetrator of the international law violations. Furthermore, the ATCA's state action requirement is either satisfied through the action of the Myanmar Military or is not required because slave labor is a *jus cogens* violation. It is therefore unnecessary to meet the requirements of 42 U.S.C. § 1983 (2000). *See* Doe v. Unocal, Nos. 00-56603, 00-57197, 2002 U.S. App. LEXIS 19263, at *32 (9th Cir. Sept. 18, 2002); *see also supra* text accompanying note 40.

[86] There is not yet a consensus in either the cases or the literature as to the law that governs various issues raised in ATCA litigation. *See* STEPHENS & RATNER, *supra* note 28.

lished domestic tort principles should determine whether Unocal is liable for the human rights abuses suffered by the Myanmar villagers.[87] Once it is established that federal common law is the appropriate source, there are a variety of liability standards to choose from. This Comment adopts a "reckless disregard standard" as the proper standard for measuring liability.

The proposition that federal common law should govern Unocal's liability under the ATCA is mandated by the modern position's interpretation of the statute, the purpose and policy behind the statute, and the sources of law available to the court. If one accepts the modern position's interpretation of the ATCA—that the statute grants a right to sue—federal common law is the applicable source of law to determine whether Unocal may be held liable for the human rights abuses committed by the Myanmar Military.[88] In that case, federal courts may develop federal common law, absent congressional authority, and "apply such law 'in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.'"[89] One such narrow area

[87] This argument is adopted, in large part, from the approach taken by the concurrence in the three-judge panel Ninth Circuit decision. *Unocal*, 2002 U.S. App. LEXIS 19263, at *84 (Reinhardt, J., concurring); *see also Abebe-Jira*, 72 F.3d at 848. Although there is no general federal common law, federal law governs suits affecting international relations and is the interpretive source for international law issues. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964). For a discussion of the arguments for applying international law, see Michael Dwayne Pettyjohn, Comment, *"Bring Me Your Tired, Your Poor, Your Egregious Torts Yearning To See Green:" The Alien Tort Statute*, 10 TULSA J. COMP. & INT'L L. 513, 546-48 (2003). According to this approach, the following reasons support applying international law: (1) domestic tort law is often inadequate in addressing human rights abuses; (2) applying domestic tort law would reduce the grave international law aspect of the tort to no more than a garden-variety municipal tort; (3) federal courts are able to fashion a remedy from an amorphous body of international law, as they have successfully in the past; and (4) federal courts would be allowed "to develop a uniform federal common law response to international law. . . ." *Id.* (citing Xuncax v. Gramajo, 886 F. Supp. at 162, 182 (D. Mass. 1995)).

[88] *See supra* note 35 and accompanying text; *see also* STEPHENS & RATNER, *supra* note 28, at 120. If, however, one interprets the statute as a jurisdictional grant only, the controlling body of law is arguably international law supplemented by federal common law where international law is incomplete. *Id.* On the other hand, if the ATCA is only a forum-shifting statute for transitory torts, similar to a diversity jurisdiction statute, the applicable law would be determined by looking at the forum state's choice of law rules. *Id.*

[89] *Unocal*, 2002 U.S. App. 19263, at *92-93 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981)).

given the status of federal common law is international law, because it naturally implicates U.S. relations with foreign states.[90]

Furthermore, Congress traditionally enacts statutes that grant federal courts jurisdiction over a particular class of cases while leaving the courts the task of fashioning remedies that effectuate the federal policies underlying the statute.[91] In such cases, "courts should apply federal common law 'to fill the interstices of federal legislation.'"[92] Although it is clear that Congress' enactment of the ATCA was intended to make a violation of international law a federal tort,[93] the ATCA is silent as to what circumstances give rise to tort liability. In the ATCA cases to date, imposing liability has been straightforward; courts have held direct violators of international law liable per se under the statute by simply referencing the international law violation.[94] Since Unocal is not the direct perpetrator of the human rights abuses, the per se approach proves unworkable and it is therefore necessary to adopt some other liability standard to remedy the international law violation. The applicable source to find such a standard is federal common law.

Although a standard may hypothetically be drawn from international law because international law is a part of our federal common law,[95] there is a difference between substituting international law for federal common law and using international law properly as a part of federal common law.[96] If the court were to adopt an international standard in the *Unocal* case, as in the district court's second decision and the majority in the three-panel Ninth Circuit decision, it would essentially displace "traditional civil tort principles embodied in federal common law" with "evolving standards of international law, such as nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal."[97] Additionally, only international legal principles that

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[90] *Id.*; *see Sabbatino*, 376 U.S. at 421-27.

[91] *Unocal*, 2002 U.S. App. LEXIS 19263, at *93-94 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 100-04 (1972)); *Abebe-Jira*, 72 F.3d at 848 (citing Textile Workers of Am. v. Lincoln Mills, 353 U.S. 448 (1957)).

[92] *Unocal*, 2002 U.S. App. 19263, at *93 (quoting United States v. Kimbell Foods, 440 U.S. 715, 727 (1979)).

[93] *Id.* at *93-94.

[94] *See*, *e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[95] *See supra* text accompanying note 38.

[96] *Unocal*, 2002 U.S. App. LEXIS 19263, at *96.

[97] *Id.* at *90. Both the "international aiding and abetting" and "active participation" standards were drawn from international law. *Id.*

achieve sufficient international acceptance constitute international law and become part of the federal common law.[98] Currently, no third-party civil liability standard has achieved international acceptance, which is evidenced by the Ninth Circuit's reliance on an international criminal aiding and abetting standard.[99] This aiding and abetting standard has yet to attain international acceptance; rather, it is a standard adopted by only two international criminal tribunals.[100] Similarly, Myanmar law does not provide a civil or criminal remedy for violations of international law. Failing to adopt a standard from federal common law and relying on less than adequate international standards or non-existent Myanmar legal standards would frustrate the goals of the ATCA because aliens who suffer international law violations would be denied access to justice and the international law violation would not be properly remedied. In order to achieve the goals of the ATCA, a liability standard must therefore come from well-established domestic tort principles embodied in U.S. federal common law.

Furthermore, drawing an ATCA corporate liability standard from federal common law in the *Unocal* litigation is supported by consideration of the relevant factors in a choice-of-law analysis.[101] First, the needs of the international system point to Unocal's domicile in order to promote consistent treatment of U.S. companies that contribute to violations of international law. Moreover, as mentioned above, federal common law is better situated to provide tort remedies under the ATCA than either international law or the law of Myanmar. Tort law is a traditional common law remedy over which state and federal courts have had a long history developing. Second, the United States also

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98 *Id.* at *104.

99 *See id.* at *36-49.

100 *Id.* (citing Prosecutor v. Furundzija, IT-95-17/1-T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999); Prosecutor v. Musema, ICTR-96-13-T (Jan. 27, 2000), *available at* http://www.ictr.org).

101 See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971), which provides the following factors to be considered in a choice-of-law analysis: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied. The *Filartiga* court suggested that the approach developed in Lauritzen v. Larsen, 345 U.S. 571 (1954), provides the correct choice-of-law analysis. Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980).

has "a significant interest in deterring risky behavior by domiciliaries who cross the border to take advantage of other states [sic] law, and generally has an interest in deterring negligent conduct by its [corporate citizens], wherever that conduct may occur."[102] Third, adopting a corporate liability standard from federal common law protects the justified expectations of both the parties. The Myanmar villagers have a justified expectation to be free from forced labor because it is a universal right, regardless of whether the Myanmar Military chooses to recognize it.[103] Additionally, although there is no precedent for third party liability for torts committed abroad under the ATCA, federal common law has traditionally subjected its corporate citizens to well-known third party liability tort doctrines.[104] Fourth, the basic policy underlying ATCA jurisprudence is to remedy international law violations, which is best achieved by applying well-developed tort principles.[105] Fifth, applying these principles furthers the "ease in the determination and application of the law to be applied" because U.S. courts are well-versed in applying common law tort principles.[106] Finally, "certainty, predictability and uniformity of result" are more likely to be attained by resorting to U.S. law because of the extensive precedent upon which to draw.[107] Based on the foregoing choice-of-law analysis, federal common law is the most appropriate substantive law to apply.

A. A Third Party Liability Standard under the ATCA

Having ascertained that federal common law is the appropriate source of law to find a corporate liability standard, the next step is to adopt a standard that furthers the purpose and policies of the ATCA. Since the ATCA seeks to remedy international law violations through tort actions in federal courts, whichever standard is chosen should meet the goals of tort law and conform to tort principles.[108] At the very least, a corporate liability standard should require some fault on the part of the corporation rather

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[102] EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 17.57 (3d ed. 2000).

[103] *See supra* text accompanying note 40.

[104] *Unocal*, 2002 U.S. App. LEXIS 19263, at *99.

[105] *Id*. at *98.

[106] *Id.* at 100 (quoting In re Vortex Fishing Sys., Inc., 277 F.3d 1057, 1069 (9th Cir. 2002)).

[107] *Id.*

[108] The function of tort law is to compensate individuals for losses they have suffered within the scope of their legally recognized interest. Tort law "is concerned with the allocation of losses arising out of human activities." PROSSER & KEETON

than mere vicarious liability.[109] This would allow corporations to weigh the risk of investment against the risk of liability based on their knowledge of the abuses being committed and their role in furthering those abuses. Federal common law offers a variety of options.

Since the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights,[110] a corporate liability standard under the ATCA based on the common law "reckless disregard" principle seems fitting. The reckless disregard standard consists of two elements: (1) the defendant's conduct must not only create a foreseeable risk of harm to others, it must create a high degree of risk of serious harm; and (2) the defendant must have knowledge of the risk and proceed without concern for the safety of others.[111] A prima facie reckless disregard case in the ATCA context would require both that the defendant have actual knowledge that one's conduct creates a high risk of the occurrence of an egregious human rights abuse and that the defendant must proceed irrespective of that risk without concern for the human rights of others.

B. Unocal under the Reckless Disregard Standard

Applying the reckless disregard standard to the *Unocal* case, there remains an issue of material fact regarding whether Unocal's conduct meets this standard. A reasonable juror could find that Unocal knew that the Myanmar Military would engage in human rights abuses, including forced labor, in connection with the Project, and Unocal consciously disregarded those risks in pursuit of profit without concern for the human rights of the My-

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ON THE LAW OF TORTS § 1 (Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER & KEETON]. .

109 Under any theory of vicarious liability, commonly referred to by its Latin name, *respondeat superior*, a defendant is held liable for the wrong of another person in a strict liability sense because liability is based on the relationship rather than individual fault. Adopting a vicarious liability standard would subject corporations to strict liability for the actions of governments with whom they have a relationship, which would raise a host of implications that are beyond the scope of this Comment. *See* DAN B. DOBBS, THE LAW OF TORTS § 333 (2000). "'The commonest test of a relationship to which the law attaches vicarious liability is control, or general right of control.'" DOMINICK VETRI, TORT LAW AND PRACTICE § 4.06, at 507-08 (2d ed. 2002) (quoting 5 HARPER, JAMES, & GRAY § 26.3, at 10-11). Since it is highly unlikely that a corporation could control the conduct of a government entity, any vicarious liability theory is impracticable.

110 Filartiga v. Pena-Irala, 630 F.2d 876, 890 (E.D.N.Y. 1980).

111 DOBBS, *supra* note 109, at § 27; PROSSER & KEETON, *supra* note 108, § 34.

anmar villagers.[112] The reckless disregard standard comports with the purpose and policies of the ATCA. It provides a remedy, which would otherwise be unavailable, to victims of human rights abuses in violation of international law, and ensures that U.S. entities are held accountable for violating a universal standard of care. Using the reckless disregard standard to enforce human rights domestically fulfills the goals of tort law as well, namely by compensating victims of human rights abuses and allocating the costs to those who are liable and have the best ability to pay and account for the risks. In the *Unocal* case, for example, the threat of a billion dollar suit has not persuaded Unocal to divest from the project.[113] Therefore, it is reasonable to assume that Unocal has weighed the risks and has proceeded irrespective of these risks because it believes profits from the project will be greater than any potential damage award. For these reasons, corporate liability under the ATCA should be based on the reckless disregard for human rights.

In short, the interpretation, purpose, and policies of the ATCA require that federal common law provide the corporate liability standard to judge Unocal's conduct. Traditional common law tort principles offer the best means for remedying international law violations when the defendant is not the actual perpetrator, but rather a culpable third party. A reckless disregard for human rights standard will contribute to the development of both domestic enforcement of international law violations under the ATCA and a universal human rights law.

Conclusion

Any decision in the *Unocal* case will have serious implications in the field of human rights and will significantly shape the future of ATCA jurisprudence. Since *Unocal* is at the forefront of any ATCA litigation involving a defendant corporation, most onlookers are watching intently. The ATCA currently leads the way in enforcing international human rights domestically and offers an avenue to extend civil liability to those who flagrantly disregard basic human rights abroad. If the Ninth Circuit adopts a standard under the ATCA that imposes liability on corpora-

112 *See* Doe v. Unocal, Nos. 00-56603, 00-57197, 2002 U.S. App. LEXIS 19263, at *119-20 (9th Cir. Sept. 18, 2002).

113 *Unocal Affirms Commitment to Myanmar; Asia Central to Strategy*, Int'l Oil Daily, Oct. 21, 2003, *available at* LEXIS, News Library, ALLNWS File.

tions that recklessly disregard basic human rights in pursuit of profit, as it should, the United States' determination and purpose to uphold human rights will be furthered.

Adopting an ATCA corporate liability standard will also aid the development of an international human rights law considerably. It is well established that "general principles of law recognized by civilized nations" are a source of international law.[114] These general principles of national law may be consulted as an independent source of law when there is not sufficient practice by states to give the particular principle the status of customary international law and when the principle has not been legislated by general international agreement.[115] Essentially, general principles of law recognized by civilized nations create the foundation of international law. The core rights guaranteed by international human rights law, for example, resemble the rights protected by the United States Constitution.[116] Another example of international law rooted in national law is the criminal aiding and abetting standard adopted and applied by the majority in the most recent Ninth Circuit decision in *Unocal*.[117] Therefore, domestic recognition of corporate liability for flagrantly disregarding human rights will likely lead to similar international recognition[118] and therefore contribute to the development of international human rights law.

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114 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 reporters' note 1 (1987) (quoting I.C.J. Acts & Docs. 38(1)(c).

115 *Id.* cmt. l.

116 *See* Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2d 365, 366 (1998). The United States law has played a dominant role in creating foundational international human rights instruments such as the Nuremberg Charter, the United Nations Charter, the Universal Declaration, and the Genocide treaty. *Id.*

117 *See Unocal*, 2002 U.S. App. LEXIS 19263, at *35-36.

118 This is not to say that the adoption of a corporate liability standard by the United States alone will further the development of international law, but rather that international law development will be furthered if multiple countries adopt such a standard. *See* Craig Forcese, *Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses,* 31 OTTAWA L. REV. 171, 210 (1999-2000). A Canadian company could face a viable common law tort action in Canadian courts for its relationship with a foreign military government. *Id.*; *see also* André Nollkaemper, *Public International Law in Transitional Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTER-NATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). Dutch civil tort law holds defendants liable for their activities that violate a standard of care, interpreted with reference to international law. *Id.*

This benefit greatly outweighs any of the arguments advanced against applying the ATCA to U.S. corporations.[119] First, it has been suggested that adopting a corporate liability standard under the ATCA "threatens to interfere with U.S. government foreign policy prerogatives and could impose liability on companies for becoming involved in projects that are permitted under U.S. law."[120] Nothing could be further from the truth, however, especially under the facts of *Unocal*. Holding U.S. corporations liable for their reckless disregard of the human rights of aliens would only improve U.S. foreign relations and standing in the international community. One of the underlying premises of the ATCA is to provide aliens with access to justice for wrongs committed by U.S. citizens out of concern for maintaining foreign relations. It is therefore imperative for U.S. courts to impose liability against its own citizens under the ATCA where justified. Furthermore, U.S. corporations have traditionally been subjected to liability for domestic conduct permitted under U.S. law. Thus, it should make no difference simply because liability arises from actions occurring abroad.

Next, it has been argued that imposing liability on U.S. corporations through the ATCA fails to guide future corporate behavior because corporations "will be unable to fully determine what [they] may and may not be liable for. . . ."[121] By relying on traditional tort principles found in federal common law, however, this argument fails because:

> [T]ort rules governing conduct to a large extent reflect social values and norms already in existence in the culture. They do not create new standards imposed by authoritarian judges; they merely enforce what society already believes. This view also explains why tort rules can be announced after the dispute arises; they do not invent a new standard and impose it

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[119] The author's attempt here is to highlight and briefly address some of the arguments being advanced against imposing ATCA liability on U.S. corporations.

[120] Edwin V. Woodsome, Attorney for Unocal, Presentation at the Loyola Law School International Law Symposium (Feb. 8, 2003), *available at* http://www.unocal.com/myanmar/woodsome.htm; *see also* Demian Betz, *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 (2001) (arguing that imposing such liability on U.S. companies amounts to a de facto trade regulation); *see also* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460 (2001) (admitting that costs to U.S. foreign relations are difficult to measure).

[121] Woodsome, *supra* note 120.

> on past conduct but resolve disputes about events in the past in the light of standards we generally share but perhaps have not fully articulated. So in a sense it is not tort rules that we expect to shape conduct. The tort rule confirms or articulates social ideals and perhaps reinforces them by imposing liability.[122]

Tort law imposes liability upon socially undesirable conduct. Since respect for basic human rights is universally required, the "we didn't know" argument is unavailing to corporations that recklessly disregard those rights.

If the United States is intent on upholding human rights and promoting the goals of the Universal Declaration of Human Rights, courts should subject those who consciously disregard human rights to liability, including corporations. Adopting a reckless disregard standard from federal common law under the ATCA is the next step "in the fulfillment of the ageless dream" toward a universal international human rights law.[123]

[122] DOBBS, *supra* note 109, § 16.

[123] Filartiga v. Pena-Irala, 630 F.2d 876, 890 (E.D.N.Y. 1980).