SHARING THE BLAME FOR SEPTEMBER ELEVENTH: THE CASE FOR A NEW LAW TO REGULATE THE ACTIVITIES OF AMERICAN CORPORATIONS ABROAD

Erin L. Borg*

> "They should pay. They can afford it. And they should do it with dignity."
>
> - Archbishop Desmond Tutu[1]

I. INTRODUCTION

Sigqibo Mpendulo, an active critic of the South African apartheid regime, arrived home one morning to find his twin fourteen-year-old boys and their three friends murdered.[2] After the death squad gunned down the boys while they were watching television, the African Defence Force claimed the following day that it had killed five terrorists.[3] In June of 1976, Dorothy Melefi's thirteen-year-old son was killed by police gunfire, triggering an anti-apartheid uprising.[4] A South African death squad also murdered Nyameka Goniwe's husband.[5] Two other women faced abusive treatment including detainment, torture, and banishment.[6] In 2002, these five people filed a lawsuit in the Southern District of New York against an American multinational corporation and Swiss banks.[7]

The suit charges human rights violations committed in South Africa by

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* Candidate for J.D., 2004, University of Arizona James E. Rogers College of Law; B.A., 2001, Indiana University, Bloomington. I would like to thank my fiancé, Brynn Dietz, for his encouragement and love, and my parents, John and Terry, for their unending support in all of my endeavors. Thank you to Vanessa Deans and Talitha Gray for their editorial support, as well as to Professor Kathryn Firmin-Sellers, for her excellence in teaching.

1. Archbishop Desmond Tutu comment on South African apartheid lawsuit, BBC News, *Corporations Sued Over Apartheid*, *at* http://news.bbc.co.uk/2/hi/americas/2183739.stm (August 9, 2002).

2. Anita Ramasastry, *Banks and Human Rights: Should Swiss Banks Be Liable for Lending to South Africa's Apartheid Government?*, *at* http://writ.news.findlaw.com/ramasastry/20020703.html (July 3, 2002); *see also* Claire Keeton, *Apartheid Victims Seek Billions in Compensation: Holocaust Model*, NAT'L POST, Aug. 9, 2002, at A12, *available at* 2002 WL 24860305.

3. Keeton, *supra* note 2, at A12.

4. Melefi's son, Hector Petersen, is one of the most well-known victims of the apartheid regime. *Id*.

5. *Id*.

6. Lungisile Ntsebeza was detained, tortured, and banished, and Themba Maku-bela was banished by South African authorities. *Id*.

7. *Id*.

American defendant Citibank and Swiss defendants Union Bank of Switzerland and Credit Suisse under the Alien Tort Claims Act (ATCA)[8] and the Torture Victim Protection Act (TVPA).[9] The plaintiffs are all individuals who lived in South Africa between 1948 and 1993 and were affected by the apartheid regime.[10] They demand damages for injuries resulting from atrocities such as torture and death squad attacks.[11] The complaint alleges that the banks supported the apartheid regime through their lending practices, thereby aiding and abetting the oppression and violence.[12] While the ATCA has been expanded in application over the past twenty-two years, this is the first suit brought underneath the statute that does not claim direct injury.[13] More accurately, the claim is grounded entirely in claims of indirect injury and harm, and therefore raises important questions about the scope of human rights litigation in the U.S. court system.

This is not the first time banks, particularly Swiss and Austrian banks, have been brought into U.S. federal courts as defendants in ATCA litigation. Several banks were sued in the late 1990s for acting as fences[14] for the Nazis during World War II.[15] The plaintiffs, Holocaust victims and their heirs, claimed the banks facilitated the looting and retention of their wealth when their vaults essentially became warehouses for Nazi plunder.[16] In addition, they claimed that the banks had knowingly accepted stolen currency, valuables, and various other properties that belonged to the interned but were taken from them by the Nazis, and converted those goods.[17] They also claimed the banks had knowledge of and directly caused injury while acting in concert with the State of Germany.[18] The

8. Alien Tort Claims Act, 28 U.S.C. § 1350 (1948). Courts and commentators also refer to this statute as the "Alien Tort Statute" (ATS). *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

9. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992); *see also* Anthony J. Sebok, *Enforcing Human Rights in American Courts When the Injury is Indirect: Will the Lawsuit Based on South African Apartheid Prevail?*, *at* http://www.writ.news.findlaw.com/sebok/20020715.html (July 15, 2001) [hereinafter Sebok Part I].

10. *See* Sebok Part I, *supra* note 9.

11. *See id.*

12. The lawsuit also may add German and British banks, American computer companies, and transportation and oil companies. Ramasastry, *supra* note 2.

13. *See* Sebok Part I, *supra* note 9.

14. *See* Ramasastry, *supra* note 2.

15. *Id.*

16. Plaintiffs' class action alleged that defendant banks cooperated and conspired with the Nazi regime to convert plaintiffs' assets on deposit with defendants and to exploit and profit from slave and forced labor. The settlement agreement was affirmed. D'Amato v. Deutsche Bank, 236 F.3d 78, 81 (2d Cir. 2001).

17. *Id*.

18. *Id*.

case was settled for approximately $1.25 billion,[19] and the settlement provided for the creation of a Historical Commission to ensure the preservation of documentation and information relating to the acts alleged by the plaintiffs.[20] Attorney Ed Fagan was plaintiffs' counsel in this case, as well as the current South Africa apartheid case.[21]

The theme of this new lawsuit is becoming all too common: multinational corporate defendants are profiting from acts that violate internationally-recognized human rights standards or acts that violate the laws of the country in which they operate. General accusations by human rights organizations and watchdog groups accuse American multinational corporations (MNCs)[22] operating abroad of engaging in unfair labor practices such as low wages and poor working conditions, employing child labor, destroying the environment, bribing foreign officials, and even supporting terrorists in order to permit smooth operation and increase profit margins.[23] As the activities of American MNCs abroad have grown to great proportions, they have become the new *de facto* ambassadors for America in the twenty-first century.[24] Their actions abroad reflect poorly on American culture and society.[25] More importantly, their often extensive actions and involvement in foreign countries can prove detrimental to U.S. foreign policy interests.[26]

While it is certainly desirable for American courts to have the ability to punish and sanction American multinational corporations for their misdeeds abroad, current statutes and guidelines, including the ATCA, do not provide an appropriate and effective remedy. Voluntary codes of business ethics and United Nations guidelines have proved impotent.[27] In addition, actions under the ATCA have frequently been dismissed for lack of personal or subject matter jurisdiction, forum non coveniens, confusion over how to determine what a violation of international law is and if one has occurred, and over questions about ATCA's

19. Keeton, *supra* note 2, at A12.

20. *D'Amato*, 236 F.3d at 83.

21. *See* Ramasastry, *supra* note 2. Fagan is also bringing another lawsuit to recover damages caused by slavery to all African Americans enslaved in the U.S. between 1619 and 1865. *See* Sebok Part I, *supra* note 9.

22. MNCs may also be referred to as multinational enterprises (MNEs) throughout this note.

23. Stuart Washington, *Make Them Keen to be Green: Campaigners for the Environment and Labor Rights are Starting to Find Receptive Listeners in Business*, BUS. REV. WKLY, Feb. 6, 2003, at 70, *available at* 2003 WL 9851937; Richard Galpin, *Spotlight on Indonesian 'Sweat Shops'*, BBC NEWS (Mar. 7), 2002, *at* http://news.bbc.co.uk/2/hi/asia-pacific/1860217.stm.

24. Logan 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, 1006 (2002).

25. *Id*.

26. *Id*.

27. *Id*. at 1023-24.

state action requirement.[28]

The only way foreign plaintiffs can recover damages by charging indirect harm caused by American multinational corporate defendants under the ATCA would be for the courts to once again expand the application of the statute. An expansion of this kind is inappropriate; emotion and politics must not influence the interpretation of the law. ATCA claims should be analyzed through tort principles, not section 1983 standards.[29] Under American tort law, plaintiffs cannot recover for indirect harm caused by the defendants unless they can prove that the banks acted in concert with the South African government.[30] Since the ATCA is an exercise of American sovereign power, the statute should follow the same guidelines set forth in American tort law.[31]

Instead of expanding ATCA through case law and ignoring the statute's obvious hurdles for plaintiffs, the U.S. Congress must pass a new law which will enable the Department of State, Department of Justice (DOJ), and the Securities and Exchange Commission (SEC) to investigate and prosecute American MNCs in the U.S. court system. As several other approaches have failed to elicit responsible, conscientious acts from American MNCs in foreign countries, the law should allow for criminal and civil sanctions. The new law would not be plagued by ATCA's problems; it would effectively punish and deter corporate misdeeds abroad, and its implementation would be beneficial to American foreign policy goals. Part II of this note outlines an atypical and underreported story of corporate abuse through a history of conflict in Liberia and the actions of an American corporation that knowingly furthered that conflict. The events in Liberia are a striking example of problems ATCA and its case law have failed to address. Part III includes a history of the ATCA and its primary case law, the statute's flaws and shortcomings, and an argument for why courts should analyze ATCA claims under American tort law. The section will place particular focus on the current South African apartheid case filed in the Southern District of New York. Part IV summarizes the various corporate codes of conduct and their lack of effectiveness in curbing or abolishing corporate misconduct. Part V examines the history and success of one law that has been effective in curbing corporate bribery of foreign officials: the Foreign Corrupt Practices Act (FCPA). Finally, Part VI outlines the benefits of having sanctions in the United States to punish American corporate misconduct abroad. It also discusses the feasibility of creating a new law, modeled on the FCPA, that would create enforceable sanctions against American

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28. *See* Deutsch v. Turner Corp., 317 F.3d 1005, 1029-30 (9th Cir. 2003); Abdullahi v. Pfizer, Inc., No. 01 CIV. 8118, 2002 U.S. Dist. LEXIS 17436, at *38 (S.D.N.Y. Sept. 17, 2002).

29. Anthony J. Sebok, *Should American Courts Punish Multinational Corporations for Their Actions Overseas?: More on Indirect Injuries and the Alien Tort Claims Act*, *at* http://writ.corporate.findlaw.com/sebok/20020729.html (Jul. 29, 2002) [hereinafter Sebok Part II].

30. RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876 (1979).

31. Sebok Part II, *supra* note 29.

corporations acting in violation of human rights standards through their activities in foreign countries.

II. LIBERIA AND FIRESTONE TIRE & RUBBER COMPANY

"I want to make Liberia into the Hong Kong of West Africa."
- Charles Taylor[32]

When Americans today think of lawsuits and Firestone Tire and Rubber Company (Firestone), many probably think foremost about exploding SUV tires on the popular Ford Explorer.[33] However, Firestone has perpetrated even greater misdeeds while conducting its business abroad. Throughout the early- to mid-1990s, Firestone financially supported a violent warlord in Liberia so the company could continue to extract rubber from the African nation without incident.[34] Its support of the warlord directly paid for military training and communications that were necessary to stage violent uprisings against the Liberian people and the internationally-recognized Liberian government.[35] These uprisings have created a variety of casualties while further crippling a developing African country.[36] Unlike the plaintiffs in the Firestone products liability settlements and suits, the people of Liberia had virtually no opportunity to bring a lawsuit against the company, let alone recover damages.

A. Brief History of Liberia and Its Political Conflict

Approximately three hundred former slave families from the United States returned to Africa to colonize Liberia in the early nineteenth century.[37] The

32. WILLIAM RENO, WARLORD POLITICS AND AFRICAN STATES 79 (1998) (citing *Interview with Charles Taylor*, WEST AFRICA, Aug. 6, 1990, at 2231). Taylor is the former warlord and former president of Liberia. Charles Taylor was born in 1948 to an Americo-Liberian family in Liberia. He was educated in the United States and returned to Liberia to work for former President Doe's regime in 1980. He was later exiled to the United States and jailed in Massachusetts for embezzling $900,000 in Liberian government funds. He escaped from prison in 1985 and returned to West Africa in 1989 to launch his revolt against Doe's regime. *See* CNN, *Charles Taylor: A Wanted Man* (July 19, 2003), *at* http://www.cnn.com/2003/WORLD/africa/06/10/liberia.taylor/index.html; *see also* Mark Doyle, *Charles Taylor – Preacher, Warlord and President*, BBC NEWS (June 4, 2003), *at* http://news.bbc.co.uk/2/hi/africa/2963086.stm.

33. BBC News, *Firestone Tyre Recall to Cost $30M* (Oct. 5, 2001), *at* http://news.bbc.co.uk/2/hi/business/1579946.stm.

34. RENO, *supra* note 32, at 100.

35. *Id*.

36. Luca Renda, *Ending Civil Wars: The Case of Liberia*, 23 FLETCHER F. WORLD AFF. 59, 62-63 (1999).

37. *Id*.

settlers were referred to as Americo-Liberians[38] and ruled Liberia democratically[39] until a group led by Samuel Doe overthrew the president in 1980.[40] President Doe ruled until 1989, when Charles Taylor led an invasion with the National Patriotic Front of Liberia (NPFL).[41] By mid-1990, Taylor controlled most of the country and began to seize Monrovia; however, the peacekeeping operation known as the Economic Community of West African States Monitoring Group (ECOMOG) blocked his entry into the capital.[42] Doe refused to resign, and Amos Sawyer was named by ECOMOG as the head of the Interim Government of National Unity (IGNU).[43] Essentially, Sawyer acted as the internationally-recognized and official leader of the Liberian nation.

B. Firestone Perpetuates Taylor's Attacks on the IGNU and Monrovia

In January of 1991, Taylor controlled up to ninety percent of Liberia and the surrounding territory, together known as "Taylorland" or "Greater Liberia."[44] However, without the capital, Taylor did not have recognition as head of state and therefore could not sell diplomatic support for aid or investment, attract aid with a promise to hold democratic elections, or receive relief aid of any substance from overseas.[45] Taylor was forced to acquire resources by controlling regional markets to finance his military; he focused on the mining of diamonds, timber, iron ore, and rubber.[46]

Taylor quickly learned he could work easily with Firestone, a long-time presence in Liberia. Firestone began investing and mining in Liberia in 1926.[47] By 1970, Firestone and the Liberian Iron Mining Co. (LIMCO) were providing fifty percent of government revenues.[48] The company assessed and collected taxes, provided employee housing, and enforced local laws – all activities that allowed the previous presidents to finance elite privilege with foreign income while limiting political conflict.[49] In 1991, Taylor and Firestone reached an

38. *Id*. at 63.

39. The Americo-Liberians considered the indigenous people uncivilized and inferior. Although the Americo-Liberians made up only two percent of the total population of Liberia, they quickly dominated the country by establishing an authoritarian oligarchy that suppressed and enslaved the indigenous people. *Id*.

40. *Id*. at 61.

41. *Id.*

42. RENO, *supra* note 32, at 93.

43. Doe was eventually captured and executed by Prince Johnson, leader of the NPFL-offshoot Independent National Patriotic Front of Liberia (INPFL). Renda, *supra* note 36, at 61.

44. *Id.*; RENO, *supra* note 32, at 91.

45. RENO, *supra* note 32, at 93.

46. *Id*.

47. *Id*. at 84.

48. *Id*.

49. *Id*.

agreement under which Taylor's security forces would control workers on the plantation, while Firestone helped the warlord make marketing connections to sell rubber abroad.[50] Firestone paid Taylor $2 million (U.S.) annually for protection, and in 1992, provided communication facilities and a supply base for the NPFL's Operation Octopus,[51] a massive attack on Monrovia which broke a multi-factional ceasefire. The Operation failed miserably, re-ignited civil unrest, and many casualties ensued.[52] In April of 1996, Taylor broke several agreements and instigated more violence in Monrovia.[53] This attack brought several weeks of civil unrest and thousands of casualties.[54] ECOMOG eventually restored order, and general elections were held in July of 1997. Taylor received seventy-five percent of the vote, and international observers certified the fairness of the election.[55]

The Liberian civil war lasted from 1989 to 1997, while Charles Taylor ruled Liberia with warlord tactics and brutality.[56] He was not elected, and he actively worked against the internationally-recognized government. Seven years of fighting displaced 1.5 million of Liberia's 2.8 million people and caused more than 150,000 casualties.[57] Firestone more than simply acquiesced to Taylor's warlord politics; the company directly helped to create that civil unrest and the displacement and deaths of many Liberians.

C. Recent Developments

> "We feel America can bring peace because they are the original founders of this nation, and secondly, they are the superpower of the world."[58]

Since 2000, Taylor has been under fire by rebel forces seeking to overthrow his regime and return Liberia to democratic governance.[59] In June of 2003, the violent battles that had raged between Taylor and the rebels for three years reached an apex of violence and destruction: a four-day artillery siege in the

50. RENO, *supra* note 32, at 100.
51. Renda, *supra* note 36, at 66; RENO, *supra* note 32, at 100.
52. Renda, *supra* note 36, at 62.
53. *Id*.
54. *Id*.
55. *Id*. "Although the polls were probably the most democratic the country has ever seen, Mr. Taylor's critics say he bullied and bought the electorate." Doyle, *supra* note 32.
56. *Charles Taylor: A Wanted Man*, *supra* note 32.
57. Renda, *supra* note 36, at 59.
58. CNN, *Bush May Send 500-1000 Troops to Liberia* (July 2, 2003), *at* http://www.cnn.com/2003/WORLD/africa/07/02/us.liberia/index.html.
59. *Id*.; *see also* U.S. Central Intelligence Agency, World Factbook, *at* http://www.cia.gov/cia/publications/factbook/geos/li.html#Govt (last visited Aug. 19, 2003).

nation's capital killed hundreds and wounded many more.[60] As the mortuaries filled with slain Liberians, citizens were forced to bury their loved ones on Monrovia's Atlantic beaches, sometimes while rockets landed in the sand around them.[61] Taylor cried out for U.S. help, and President Bush answered, demanding that Taylor step down.[62] After much delay and continued fighting, on August 11, 2003, Charles Taylor finally stepped down as President of Liberia.[63] On August 13, U.S. troops entered Liberia as peacekeepers.[64] However, fighting continued in an area northeast of Monrovia, and after just eleven days of peacekeeping, all U.S. soldiers but the Marines guarding the U.S. Embassy were removed.[65] Dismayed by the withdrawal, one Liberian man stated, "They're forsaking us."[66] Today, Charles Taylor is in exile in Nigeria, and a new interim government has been selected to heal the country and guide Liberia away from its war-torn past.[67]

D. Liberia Not Alone

In May 2000, the *Economist* declared the continent of Africa hopeless, torn by internal wars, natural disasters, and foreign exploitation.[68] Liberia is not the only developing country in Africa that has faced problems resulting from the activities of American and European MNCs in its country. DeBeers has been accused of violating several human rights standards and perpetuating conflict in its search for diamonds in Sierra Leone and other diamond-rich countries.[69] The Unocal Corporation, corroborating with a French oil company to build a pipeline in and extract oil from Myanmar, used the Burmese military to force villagers to work on the project under threat of violence.[70] While American apparel

60. CNN, *Taylor's Forces Drive Rebels Out* (June 27, 2003), *at* http://www.cnn.com/2003/WORLD/africa/06/27/liberia.fighting/index.html.

61. *Id*.

62. *Id*.

63. BBC News, *Q & A: Liberia's Conflict*, *at* http://news.bbc.co.uk/2/hi/africa/2975834.stm (last visited Aug. 18, 2003).

64. Tim Weiner, *200 U.S. Marines Land in Liberia to Aid African Force*, N.Y. TIMES, Aug. 14, 2003, at A4.

65. *Id*.

66. *Id*.

67. President Moses Blah succeeded Taylor but will hand over his responsibility in October to the chair of the interim government, Gyude Bryant, a low-profile businessman seen as a consensus builder. CNN, *New Liberian Leader: I Am a Healer* (Aug. 21, 2003), *at* http://www.cnn.com/2003/WORLD/africa/08/21/liberia.leader/index.html.

68. *Hopeless Africa*, ECONOMIST, May 13, 2000, *available at* 2000 WL 8141952.

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

70. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1297-98 (C.D. Cal. 2000). Plaintiffs alleged international law violations including rape, torture, murder, forced labor, and forced relocation, in addition to California state law tort claims including false imprisonment, assault, intentional infliction of emotional distress, and negligence. *Id.* at

manufacturers, such as Nike and Gap, that have violated fair labor standards in third-world countries have been the target of much news media and public interest group protests,[71] these other abuses have gone largely unnoticed throughout the American populace and the world community. A law must be enforced that will punish corporate actors for the full spectrum of abuse, but even the broadest interpretation of the ATCA does not permit such liability.

III. ALIEN TORTS CLAIMS ACT (ATCA)

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[72]

A. History of the ATCA

The ATCA allows a plaintiff who is an alien[73] to bring a suit in the U.S. district court system for an alleged tort that is in violation of the law of nations or treaties of the United States. While this cause of action may seem simple and straightforward, several complications plague the effectiveness and continuity of the law, particularly with regard to the scope of the term "law of nations," which implies a state action requirement, as states enter into the treaties and organizations that create and bind them to international law.[74] The idiosyncrasies of the state action requirement have been largely developed through case law, some of which has been conflicting, splitting the circuit courts.[75]

Congress originally enacted the Alien Tort Claim Act in 1789,[76] but it remained moribund for almost two hundred years until a Second Circuit Court of Appeals decision in 1980.[77] While very little is known about its purpose and the legislature's intent, some have speculated that it was simply meant to protect foreign ambassadors in the United States.[78] Others, however, have argued that Congress intended the ATCA to display America's willingness to advocate and

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1298.

71. *See* Washington, *supra* note 23, at 70.

72. Alien Tort Claims Act, 28 U.S.C. § 1350 (1948).

73. The statute does not define the term 'alien,' but courts have generally interpreted the word to mean persons not of U.S. citizenship.

74. The term "law of nations" is also often referred to as "customary international law." Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L. L.J. 89, 107 (2001).

75. *Id*. at 109.

76. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

77. Filartiga v. Peña-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

78. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 814-15 (D.C. Cir. 1984) (Bork, J., concurring) ("plausible historically").

enforce international laws and standards within the United States.[79] Recent legislative history suggests a modern trend toward support for the latter.[80]

In *Filartiga*, the first ATCA case, the Second Circuit used the statute to grant federal subject matter jurisdiction over a wrongful death action brought by the family of a Paraguayan torture victim.[81] In 1976, decedent Joelito Filartiga was captured and tortured to death by defendant Norberto Peña-Irala, who was Inspector General of Police in Paraguay at that time.[82] Because Peña, the alleged torturer, was found and served within U.S. borders, the ATCA provided federal jurisdiction over him.[83] The court granted subject matter jurisdiction under the ATCA, 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."[84] In the last sentence of the opinion, Justice Kaufman stated his hope for the influence of the decision: "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[85]

The *Filartiga* decision involved action by a "state official" which begged the question whether the statute requires overt state action or action by a person under color of law.[86] The statute is silent as to the actual term, but the issue is implicated by the words "law of nations."[87] Some courts require that a state official or one acting under the color of law commit the alleged tort, but other circuit courts have broadened that concept to include claims against private defendants who acted in concert with foreign states and/or officials.[88] The latter has largely become the impetus for ATCA claims against American MNCs,[89] though no plaintiff has yet secured a judgment against an American MNC.[90]

In 1995, the Second Circuit again decided a landmark ATCA case, *Kadic v. Karadzic*.[91] Plaintiffs, Croat and Muslim citizens of Bosnia-Herzegovina, alleged that they were victims of such atrocities as rape, forced prostitution,

79. Burley, *supra* note 8, at 475.

80. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1948); *see* discussion *infra*, Part III.C.

81. *See Filartiga*, 630 F.2d at 889.

82. *Id*. at 878.

83. *Id*.

84. *Id*.

85. *Id*. at 890.

86. *Filartiga*, 630 F.2d at 878; s*ee also* Breed, *supra* note 24, at 1015.

87. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (1948).

88. Baker, *supra* note 74, at 109.

89. *Id*.

90. Breed, *supra* note 24, at 1015-16; *see also* Gregory Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 418 (1999).

91. 70 F.3d 232 (2d Cir. 1995).

summary execution, and other various forms of torture that were directed by Karadzic and carried out by the military forces he controlled.[92] Karadzic was the self-proclaimed president of an area within Bosnia and did, in fact, exercise control over a large portion of the country.[93] The court held that a private actor can be held liable under the ATCA when human rights abuses are committed in the areas of (1) genocide, (2) war crimes, or (3) slave trade, thus eliminating the state action requirement in those cases.[94] However, if human rights abuses are committed that do not involve any of these three torts, a state actor must be directly or indirectly involved.[95]

In a recent ATCA case, *National Coalition Government of Burma v. Unocal, Inc.*, a California court held Unocal liable because it "knew of, authorized, acquiesced in, or ratified" the Burmese government's human rights abuses.[96] The case further suggests that holding a private actor liable for human rights violations not involving state action would not be inconsistent with the ATCA.[97]

B. Other, Conflicting ATCA Interpretations

Not all cases have ended as positively for ATCA plaintiffs as in *Filartiga* and *Kadic*; *Tel-Oren v. Libyan Arab Republic*[98] encompasses the severe limitations of the ATCA. The case is primarily important due to the extensive, highly academic opinions of the D.C. Circuit judges. The multiple possibilities for limiting recovery in ATCA cases are set forth, discussed, and eventually imposed at the Court of Appeals level by the three concurring opinions of Justices Edwards, Bork, and Robb in *Tel-Oren*.[99] Plaintiffs, mostly Israeli citizens,[100] were survivors and representatives of persons tortured, wounded, and murdered in an armed attack on a civilian bus in Israel by the Palestinian Liberation Organization (PLO).[101] The District Court dismissed the ATCA claim for lack of subject matter jurisdiction,[102] and the Court of Appeals affirmed; however, the three judges had vastly different rationales for the ruling.

Justice Edwards declined to expand the scope of the ATCA to include

92. *Id*. at 236-37.
93. *Id*. at 237.
94. *Id*.
95. Baker, *supra* note 74, at 110; *see also Kadic*, 70 F.3d at 239.
96. 176 F.R.D. 329, 334 (C.D. Cal. 1997).
97. *Id*. at 348-49.
98. 726 F.2d 774 (D.C. Cir. 1984).
99. *See id*.
100. A few of the victims were American and Dutch citizens. *Id*. at 776.
101. *Id.* at 775-76.
102. The District Court dismissed the action against all defendants on the alternative ground that it was barred by the one-year statute of limitations for certain torts. Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981).

liability for non-state actors. He reasoned that without further guidance from the U.S. Supreme Court, the ATCA did not encompass non-state actors not acting under the color of law.[103] In his concurrence, Justice Bork construed the law in even stricter terms by contending that the statute did not create a cause of action for the plaintiffs sufficient to create jurisdiction.[104] He argued that there must be an explicit grant of a cause of action before a plaintiff could be permitted to litigate principles of international law in the U.S. court system.[105] Bork's comments primarily concerned the separation of powers, which he believed the courts must respect. Without a specific cause of action granted by a state, by Congress, or by a treaty, he concurred in the dismissal of the claim.[106]

Justice Robb aired similar concerns in his concurrence, arguing for dismissal on the grounds that the case was nonjusticiable under the political question doctrine.[107] He feared that with numerous federal courts deciding ATCA claims, U.S. foreign policy as determined by the courts may become disjointed and splintered.[108] Finally, Robb took a realistic look at the probable and pejorative effects of opening up federal courts for these types of claims. He asserted that judges were not properly equipped to handle international disputes, and then hypothesized that the trials would become mere forums for political agendas, where victims of international violence would fill the federal court dockets with charges against terrorists all over the world.[109] The Supreme Court denied certiorari to the victims in February of 1985.[110]

C. Congress Reacts: The Torture Victims Prevention Act (TVPA)

> "An individual who, under actual or apparent authority, or color of law, of any foreign nation:
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death."[111]

Congress enacted the TVPA to affirm the *Filartiga* holding and create a

103. *Tel-Oren*, 726 F.2d at 776.
104. *Id*. at 799.
105. *Id*.
106. *Id*.
107. *Id*. at 823; *see* discussion *infra*, Part III.D.3 regarding the political question doctrine and examples of other cases dismissed as nonjusticiable.
108. *See Tel-Oren*, 726 F.2d at 823-24.
109. *Id*. at 826-27.
110. Tel Oren *ex rel.* Tel Oren v. Libyan Arab Rep., 470 U.S. 1003 (1985).
111. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992).

separate cause of action for certain violations.[112] Although the tort violations are limited to torture and summary execution, the TVPA does allow actions brought by U.S. citizens, whereas ATCA plaintiffs must be aliens. In theory, this provision increases the chances that a suit will be filed because attorneys need not find representative plaintiffs in war-torn countries. A legislative report accompanying the statute indicates strong language in support of the ATCA and the *Filartiga* decision.[113] Beyond creating a separate cause of action for certain violations and allowing U.S. citizens to bring suit, the TVPA shows a general willingness to enforce customary international law and protect the citizens of foreign countries from abuse and instability; human rights litigation is therefore further strengthened.

D. ATCA Flaws and Shortcomings

> "Courts ought not to serve as debating clubs for professors willing to argue what is or what is not an accepted violation of the law of nations."
>
> - Justice Robb, *Tel-Oren v. Libyan Arab Republic*[114]

The appeal of the ATCA is apparent: there is a desire to punish human rights violators and provide a remedy for their victims. In fact, the most significant limitation on human rights laws has been the lack of an effective enforcement mechanism in the global community.[115] Furthermore, many victims cannot seek redress from the atrocities in their home countries.[116] As a result, the U.S. courts and the ATCA seem like a reasonable solution to these problems, given the desire to end international human rights violations. However, the ATCA has several flaws that can no longer be ignored.

As hinted by the aforementioned case law, the ATCA's sparse and ambiguous terms have caused much legal and academic controversy. Several conflicting and narrow interpretations present considerable barriers to plaintiffs, both procedurally and substantively. First, ATCA case law has carved out a very limited category of international law violations that will be sufficient to create subject matter jurisdiction in the federal courts. Second, the state action requirement allows MNCs to escape liability for human rights violations that do not rise to the level of war crimes, genocide, or slave trade. Third, several claims have been rejected on constitutional grounds, specifically that determining the issues in the case would force the judiciary to decide political questions, which is

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112. Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 596 (1997).

113. H.R. Rep. No. 102-367, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86.

114. 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring).

115. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 458 (2001).

116. *Id*.

constitutionally impermissible. Fourth, the statute provides inadequate remedies for victims of the actionable violations, such as genocide and slave-trading. By not providing criminal sanctions, the statute attempts to compensate victims of the most heinous crimes through mere monetary, civil remedies. Finally, the statute undermines American sovereignty in two distinct ways: (1) for the purpose of regulating American corporations, by requiring aliens to bring civil suits so the United States can police its corporations' activities abroad, and (2) by subjecting America to customary international law to analyze ATCA claims instead of U.S. tort law.

1. ATCA Subject Matter Jurisdiction is Subject to a Court's Determination of What Constitutes International Law, and Whether or Not a Separate Cause of Action, Apart from the ATCA, is Necessary

As illustrated in the discussion of the *Tel-Oren* case, courts have used the statute's lack of clarity regarding the definition of "the law of nations" to dismiss ATCA claims as lacking a cause of action sufficient to establish jurisdiction.[117] In the circuits that do deign to determine exactly what "the law of nations" is and what constitutes a violation thereof, the courts have held that there is a very high threshold for which violations are actionable. *Filartiga* and *Kadic* stand for the proposition that only genocide, war crimes, and slave trading will be considered actionable against private actors.[118]

2. The State Action Requirement Allows MNCs to Hide Behind the Situs Government to Escape Liability in American Courts

The "law of nations" or international law normally applies only to the conduct of nations and states, not private actors.[119] As a result, the state action doctrine, developed through the aforementioned *Kadic* holding, limits recovery against individual and corporate actors to a very narrow class of crimes. Corporate defendants may only be held liable absent state action when the human rights violation can be characterized as genocide, war crimes, or slave trade.[120] Under the current statute and case law, as long as corporations do not commit egregious human rights violations, they are free to unfairly influence elections, ignore fair labor standards, and perpetrate any number of other crimes on the people, their country, and their land.

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117. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984).

118. *See generally* Filartiga v. Peña-Irala, 630 F.2d 876, 877 (2d Cir. 1980); *see also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

119. Breed, *supra* note 24, at 1017.

120. *Kadic*, 70 F.3d at 244.

3. Numerous Courts Have Ruled Against Plaintiffs Invoking the ATCA in Order to Avoid Deciding Political Questions[121]

Procedural obstacles abound in ATCA litigation, and the constitutional political question doctrine has been used to quash several ATCA claims over the past few years.[122] The political question doctrine stands for the proposition that the subject matter of an issue may be inappropriate for judicial review.[123] In such cases, the claim is deemed non-justiciable, and as a result, the federal court refuses to rule on it, dismisses the claim, and leaves the constitutional question to be resolved in the political process.[124] In *Baker v. Carr*,[125] the Supreme Court stated that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."[126] Some justifications for a court finding that a matter is a political question include "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . ."[127] However, the Court also warned against overuse of the political question doctrine, stating that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[128]

By declaring ATCA claims nonjusticiable as political questions, federal courts so holding essentially ask Congress to clarify the purpose of the ATCA, define what America considers to be "the law of nations," or enumerate the circumstances under which courts are permitted to find a violation of international law. Defining or creating policies regarding "the law of nations" and treaties clearly do not fall within the powers of the judiciary; that role is reserved for the executive and legislative branches.[129] While these courts, seemingly, have used this doctrine to deny a remedy to several victims of egregious international violations, they are also refusing to usurp the power of the other branches and are instead respecting the constitutional boundaries of the power of the judiciary. The President and Congress should now respond, with sufficient clarity in a new law,

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121. Three other abstention doctrines have also typically barred plaintiffs' ATCA claims, including forum non conveniens, the act of state doctrine, and principles of international comity. Courts have tended to use all or a combination of these doctrines to bar a claim. *See* Breed, *supra* note 24, at 1020-21.

122. *See* Deutsch v. Turner Corp., 317 F.3d at 1016; Sarei v. Rio Tinto P.L.C., 221 F. Supp. 2d 1116, 1208-09 (C.D. Cal. 2002); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 284-85 (D. N.J. 1999).

123. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 76 (2001).

124. *Id*.

125. 369 U.S. 186 (1962).

126. *Id*. at 210.

127. *Id*. at 217.

128. *Id*. at 211.

129. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . . " U.S. CONST. art. II, § 2.

as to (1) what activities the United States deems to be in violation of the law of nations, (2) which entities can commit actionable violations (i.e., whether those liable can only be nations or private actors as well), (3) who can bring suit to hold those actors accountable, and (4) to what extent those actors will be liable.

4. The Statute and Its Case Law Allow Only for Civil Remedies, Not Criminal Punishments, Even Though the Violations are So Egregious that Civil Remedies Cannot Begin to Adequately Compensate Victims

While there is no dispute that the types of human rights violations described in cases like *Kadic* must be remedied and prevented, those violations are crimes and should be treated as such.[130] Calling genocide, rape, and slave-trading mere torts diminishes the severity of these acts and the consequences to the individuals and communities that have been violated. These are not acts that can be absolved through awards of monetary damages; rather, they are crimes that should be criminally prosecuted. If the United States is truly serious about litigating human rights claims in American courts and is genuinely interested in protecting fundamental human rights, then the United States must prosecute violators instead of simply offering their victims a possible financial cure through the U.S. court system.[131]

5. The Statute Tends to Undermine American Sovereignty by Shifting the Duty to Regulate American MNCs to Civil Actions by Alien Plaintiffs, and by Subjecting American Courts to International Law

Some legal scholars have observed that the most significant cost of ATCA human rights litigation is that it shifts the responsibility for official condemnation and sanction of foreign governments and private actors away from elected political officials and onto private plaintiffs and their attorneys.[132] Unfortunately, in determining which cases to bring and whom and when to sue, those people "have neither the expertise nor the constitutional authority to determine U.S. foreign policy."[133] Through the development of ATCA case law, the burden of reining in corporate America's activities in foreign countries is now clearly placed on foreign plaintiffs to bring suit against the entities in American

130. 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, 203 (2001).

131. *Id*.

132. While the U.S. government can do virtually nothing to punish its corporations for their actions in other countries, yet non-citizens and their attorneys can bring suit to correct the corporate misbehavior, the federal government appears impotent and its sovereignty is thereby undermined. Bradley, *supra* note 115, at 460.

133. *Id*.

courts. The U.S. government has no control over the majority of U.S. companies' activities abroad,[134] nor does the U.S. government have any means to punish or sanction companies should they commit an act particularly egregious or contrary to American foreign policy interests.

In addition, as claims under the statute have often been analyzed under principles of international law, American courts have been forced to define international law, to enumerate what exactly constitutes a violation of international law, and then to apply those standards to cases in the American judicial system.[135] A better choice for the American courts, and one that would not undermine the sovereignty of America and the American legal system, would be to analyze ATCA claims under principles of American tort law.[136]

E. The ATCA Should be Analyzed Under the Principles of American Tort Law

Courts can utilize American tort law either to avoid the pitfalls of attempting to resolve cases by defining the amorphous body of international law or to dismiss due to procedural hurdles. Over the past twenty-three years, courts have analyzed ATCA issues under section 1983 civil rights standards using state actor guidelines and plainly ignoring the word "tort" in the title of the statute and the cause of action.[137] Instead, courts allowed recovery for certain human rights violations, leaving a confusing void as to how to analyze indirect injury from persons acting in concert with governments and government officials.[138] The South Africa apartheid lawsuit is an excellent example of where this very issue may be analyzed under tort principles established by the Restatement of Torts and years of tort case law developed in the American court system.[139]

Indeed, courts that have tried to determine "joint action" in ATCA cases have openly admitted that the concept derives directly from common law tort principles, specifically described in the Restatement (Second) of Torts Section 876, "Persons Acting in Concert."[140] Section 876 addresses circumstances under which a party is liable when that party has assisted in the commission of a tortious act but not performed it himself.[141] There are two tests, and the applicable test is dependent upon whether the assistance takes the form of conspiracy or aiding-abetting.[142]

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134. The obvious exception here is the Foreign Corrupt Practices Act, discussed *infra*, Part VI.

135. *See supra* Part III.A.

136. Sebok Part I, *supra* note 9.

137. Sebok Part II, *supra* note 29.

138. *Id*.

139. *Id*.

140. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876.

141. RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876.

142. Sebok Part II, *supra* note 29; *see also* RESTATEMENT (SECOND) OF TORTS:

"Conspiracy" requires proof that the party accused of causing an indirect injury agreed in advance to a common scheme to participate in an unlawful act.[143] A prior agreement that rises to the level of conspiracy is difficult to prove, and charges against many MNCs involve lesser accusations better analyzed under the Section 876 guidelines for aiding-abetting, such as those alleged by the South African plaintiffs.

"Aiding-abetting" requires three distinct elements.[144] First, the party whom the defendant aids must perform a wrongful act that causes injury.[145] The notion that the apartheid regime caused injury to the plaintiffs is widely accepted due to the documented atrocities committed and ordered by South African officials. Second, the defendant must generally be aware of its role as part of an overall illegal or tortious activity during the time period when it is providing assistance.[146] The plaintiffs can argue here that the abuses of the apartheid regime were, at the time, known throughout the rest of the world, and that the defendants knew they were loaning money to support an abusive government. Finally, the defendant must knowingly and substantially assist the principal violation.[147] For example, if plaintiffs in the South African apartheid suit are to succeed, they must show that the money loaned by the defendant banks supported police forces that committed the tortious acts, and that the banks knew the loans were supporting the police's tortious activities. This third element creates a high evidentiary burden for plaintiffs.

While this analysis may be more legally sound and allow courts to refuse to define international law and U.S. foreign policy, the available remedies simply do not fit the crime. Again, monetary damages fail to compensate these victims for their suffering and do not adequately punish MNCs or deter future violations. Therefore, a new statute is needed to clarify causes of action and impose both civil and criminal liability.

IV. BUSINESS CODES OF CONDUCT AND INTERNATIONAL ORGANIZATION SUGGESTED GUIDELINES

Several attempts have been made to make corporations more socially and politically responsible for their actions in foreign countries. U.S. legislators have introduced bills and resolutions in Congress, the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD) have both drafted sets of suggested guidelines, and the companies themselves have even

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PERSONS ACTING IN CONCERT § 876.

143. RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876(a).

144. Sebok Part II, *supra* note 29.

145. RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876.

146. *Id*. § 876(b).

147. *Id*. § 876(c).

imposed internal codes of conduct. However, these efforts have proved to be, for the most part, ineffective and unsuccessful in curbing corporate misconduct abroad.

A. Internal Codes of Corporate Conduct

> "[T]oo many companies don't do anything with the [codes]; they simply paste them on the wall to impress employees, customers, suppliers and the public."
>
> - Thomas Donaldson[148]

Corporations have experienced increasing pressure to establish and abide by internal codes of conduct from external forces such as the media, shareholders, and the public as final consumers.[149] While in previous decades, corporations heard protests only from left-wing groups like Greenpeace and Amnesty International, new and non-traditional groups have emerged to demand corporations be more responsible.[150] Some of these groups include the companies' own stockholders who have formed coalitions to leverage their stock value and force MNEs to take notice of their demands to implement and enforce codes of conduct.[151] The media have also given increased coverage regarding corporate misbehavior in recent years, especially where inflammatory human rights abuses have occurred.[152]

However, rather than changing their practices, many MNCs have simply chosen to hide them.[153] They conceal their problems by adopting codes of conduct that sound promising, but in the end are completely voluntary. One scholar notes that "because of their voluntary nature, they are vastly unregulated as to their content, their enforcement, and consequently, their impact."[154] Even when companies include rules for internal monitoring within their codes, there exists considerable doubt as to issues of disclosure and criticism that the practice is simply the "fox watching the hen house."[155] As a result, codes of conduct imposed by corporations on themselves have tended to be more perfunctory than substantively effective.

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148. Thomas Donaldson, *Values in Tension: Ethics Away from Home*, HARV. BUS. REV., Sept.-Oct. 1996, at 48.

149. Baker, *supra* note 74, at 135.

150. *Id*. at 135-36.

151. *Id*. at 136.

152. Baker conducted a rough Westlaw search of the term "corporate abuse" between January 1, 2000 and the date of publication and discovered over 400 news articles. *Id*.

153. *Id*. at 135.

154. Baker, *supra* note 74, at 138.

155. *Id.* at 139.

B. U.S. Congressional Efforts

The U.S. Congress has made two efforts in recent years to regulate American MNCs. The first effort came in 1997 with the Good Corporate Citizenship and Federal Procurement Incentives Act.[156] The Act described a system of federal government preference for corporations that created and enforced a code of conduct, particularly in the arenas of foreign trade and investment assistance in trade and exports.[157] Required specific code of conduct provisions included safe and healthy workplace standards, the absence of child or forced labor and discrimination, payment of a living wage, environmental protection, and a nebulous provision that ethical conduct is recognized, valued, and exemplified by all employees.[158] The bill was referred to four House committees, yet has not experienced any activity since 1997.[159]

The second, and probably most significant effort to date, came in 2000, when Representative Cynthia McKinney, a Georgia Democrat, introduced the Corporate Code of Conduct Act.[160] The Act was designed to establish strict guidelines for corporations in terms of labor rights, human rights, and environmental protection based on U.S. and internationally-recognized standards.[161] It enumerated guidelines for MNCs to follow, with rewards for compliance through preference on government contracts, and punishment for noncompliance through the withdrawal of taxpayer-financed assistance and liability under the U.S. courts.[162] Section III of the Act established that an MNE, at a minimum, is required to: (1) provide a safe and healthy workplace; (2) ensure fair employment, including prohibition of the use of child and forced labor, prohibition of discrimination based upon race, gender, national origin, or religious beliefs, respect for freedom of association and the right to organize independently and bargain collectively, and the payment of a living wage to all workers; (3) prohibit mandatory overtime work by employees under age 18; (4) prohibit the practice of pregnancy testing of employees, forced usage of birth control, and the dismissal or discrimination of employees based on pregnancy; (5) prohibit

156. Good Corporate Citizenship and Federal Procurement Incentives Act, H.R. 2071, 105th Cong. (1997).

157. *Id*.

158. *See id*.

159. The bill was referred to the House Ways and Means Committee, the House Committee on Government Reform and Oversight, the House Committee on International Relations, and the House Banking and Financial Services Committee; *see also* Elisa Westfield, Note, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1104 (2002).

160. Corporate Code of Conduct Act, H.R. 4596, 106th Cong. (2000); the bill was again introduced in 2001 as the Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001).

161. Corporate Code of Conduct, H.R. 4596.

162. *Id*.

retaliation against any employee who conveys information relating to a violation or alleged violation of any fair employment requirement of this code; (6) promote specified good governance and good business practices; (7) maintain a corporate culture that respects free expression consistent with the workplace, encourages good corporate citizenship, makes a positive contribution to the communities in which the U.S. national operates, and promotes ethical conduct by all employees; (8) comply with internationally recognized worker rights and core labor standards; (9) uphold responsible environmental protection standards; (10) require partners, suppliers and subcontractors of the U.S. national government (including any security forces) to adopt and adhere to these principles; (11) require full public disclosure of specified information; and (12) implement and monitor compliance with these principles through a self-financing program internal to the business that meets specified requirements.[163]

Unlike previous attempts to regulate corporate conduct, this bill actually targeted several loopholes and problem areas that have allowed corporate abuses to continue unfettered.[164] First, by applying the Act to any U.S. national that "employs more than 20 persons in a foreign country, either directly or through subsidiaries, subcontractors, affiliates, joint ventures, partners or licensees,"[165] the Act prohibits MNCs from hiding behind those other named entities in order to violate human rights and ethics codes.[166] Second, the Act includes guidelines that address many of the issues made popular by activists arguing for environmental protection and fair and safe labor standards.[167] Third, the Act includes sections (6), (7), and (8) as catch-all provisions that a court could conceivably use to hold a corporation liable for a wide variety of non-specific unethical behavior.[168]

Realistically, however, the Act fails on many accounts; the potential efficacy and feasibility of the legislation are dubious, as well as the bill's chances of passage. If the bill were to be reintroduced and passed, it lacks specific guidelines to make it effective for its intended purpose. For example, the Act gives no timeline for implementing its Section III code of conduct. As a result, a corporation could theoretically receive the Act's preferential treatment by simply producing a code of conduct fulfilling the Section III requirements while reporting that it is currently "taking the necessary steps to implement the Code."[169] One scholar notes that while this may seem like a cynical approach to lawmaking, it is "exactly the approach needed in order to ensure that regulations are appropriately controlling MNEs."[170]

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163. *Id.* § 3(b).

164. Baker, *supra* note 74, at 113.

165. Corporate Code of Conduct Act, H.R. 4596 § 3(a).

166. Baker, *supra* note 74, at 113.

167. Corporate Code of Conduct Act, H.R. 4596; *see also* Baker, *supra* note 74, at 113.

168. Corporate Code of Conduct Act, H.R. 4596 §§ 6-8.

169. *Id.*; *see also* Baker, *supra* note 74, at 113-14.

170. Baker, *supra* note 74 n.118.

Another discouraging aspect of the Act lies in its dismal chances for reintroduction and subsequent passage. Of the thirty-two original co-sponsors, thirty-one were Democrats, one was an Independent, and none was Republican.[171] The Congresswoman who introduced the bill, Representative Cynthia McKinney, lost her place in the House in the primaries of the 2002 elections.[172] After the 2002 Congressional general elections, where the Republican Party boosted its majority in the House of Representatives and captured the majority in the Senate,[173] it now seems doubtful the Act will be reintroduced, let alone passed.

C. UN and The Organization for Economic Cooperation and Development (OECD) Voluntary Guidelines

Many transnational organizations have also attempted to create guidelines for taming MNC misconduct, specifically, the UN and the OECD.[174] However, the guidelines are voluntary or restricted to member states and do not emphasize the importance of corporate accountability or the need to punish the lack of accountability.

The OECD has thirty member states that operate to regulate corporate behavior.[175] One focuses on corporate governance: the Business Sector Advisory Group on Corporate Governance Issues (hereinafter "BSAG"). In its 1998 report to the OECD, the BSAG recommended that the OECD encourage its member countries to "formulate minimum international standards of corporate governance designed to promote fairness, transparency, accountability and responsibility" and "issue suggested guidelines for *voluntary 'best practices'* for boards to improve accountability."[176] The OECD did not act on these suggestions, and even if it did,

171. *Id.* at 114.

172. McKinney (D-Ga.) was highly critical of the Bush administration and its handling of post-September 11 measures. In her concession speech, she said, "In Congress, doing what is right is not always easy. Sometimes you have to stand up to seemingly unbeatable odds – speak truth to the most powerful interests – to do what is right." John Mercurio, *Barr, McKinney Lose in Georgia Primaries*, CNN, Aug. 21, 2002, *at* http://www.cnn.com/2002/ALLPOLITICS/08/21/elec02.ga.primary.results/index.html.

173. There are now 226 Republicans, 204 Democrats and 1 Independent in the U.S. House of Representatives. The Republicans increased their majority control from 15 to 22. In the U.S. Senate, Democrats lost their slight majority to the Republicans. CNN, *Election Results: Balance of Power* (November 14, 2002), *at* http://www.cnn.com/ELECTION/2002/pages/bop/index.html.

174. Other organizations include the European Union (EU) and the Organization of American States (OAS); these will not be discussed in this Note.

175. *See* OECD, *Overview of the OECD: What is it? History? Who does what? Structure of the organisation?*, *at* http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (last visited Oct. 6, 2003).

176. News Release, OECD, Advisory Group on Corporate Governance Reports to OECD (Apr. 2, 1998), http://www.oecd.org/media/release/nw98-35a.htm (emphasis added).

two shortfalls would occur. First, because the OECD's thirty member countries are wealthy, first-world nations, and because the OECD encourages equal treatment throughout OECD nations, the suggestions would have an extremely limited effect on the exploitation of non-Member nations.[177] Second, the term "voluntary 'best practices'" indicates that the OECD places little emphasis on targeting where the problem lies – corporate accountability.[178]

The UN has had similar shortcomings in similar regulation attempts. In 1996, after approximately twenty years of inaction on the issue, the UN adopted the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions (hereinafter "Declaration"),[179] which advocated the enforcement of current anti-bribery laws. However, members were not required to comply. The UN also tried to adopt a Code of Conduct for Transnational Corporations,[180] which was never adopted, and then a Code of Conduct for Public Officials which was adopted but faced the same problems as the Declaration faced as a non-binding document.[181] In addition, the latter Code contains a built-in disincentive for complying: member states that attempt to comply with the Code potentially put themselves at a disadvantage for attracting MNC investment as opposed to other member states that ignore the bribery of public officials.[182]

The most recent attempt to encourage corporate responsibility occurred in 1999 when the UN implemented Global Compact, a program meant to implore corporations to self-regulate the abolition of human rights abuses.[183] As an incentive for MNCs to adopt Global Compact, those that adopted it were allowed to mark their products with the UN seal and logo to exhibit compliance with UN guidelines.[184] Unfortunately, this created a problem similar to the potential problem of the U.S. Corporate Code of Conduct Act; an MNC can simply post on the UN website the steps that it is taking to comply with the guidelines, receive

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177. Baker, *supra* note 74, at 122.

178. *Id*.

179. *See* UN Declaration Against Corruption and Bribery in International Commercial Transactions, http://www.un.org/documents/ga/res/51/a51r191.htm (last visited Feb. 20, 2003).

180. *See* UN Code of Conduct for Transnational Corporations, *at* http://www.geocities.com/unolarchives/pages/c4ga3.html (last visited Feb. 20, 2003).

181. *See generally* UN Action Against Corruption, http://www.un.org/documents/ga/res/51/a51r059.htm (last visited Feb. 20, 2003).

182. Baker, *supra* note 74, at 124.

183. *See* UN Global Compact website, *at* http://www.unglobalcompact.org/hrnp$30001/www.unglobalcompact.org:80/Action/PageBuilder[myPage]?pageName=un.menuwhat_it_is.overview (last visisted Oct. 7, 2003).

184. *See* Baker, *supra* note 74, at 125; *see also* CorpWatch, *Bayer and the UN Global Compact: How and Why a Major Pharmaceutical and Chemical Company "Bluewashes" its Image*, http://www.corpwatch.org/campaigns/PCD.jsp?articleid=3129 (last visited Oct. 7, 2003) ("Bayer has signed on to nine voluntary, non-binding human rights and environmental principles. In exchange for the use of the UN name and logo, a range of UN programs hope to receive funding from giant corporations.").

the use of the UN seal and logo, and market itself as a UN-approved corporation, without actually taking any affirmative action.[185] Again, these non-binding declarations and codes have provided no tangible solution to the problem of corporate misconduct.

V. FOREIGN CORRUPT PRACTICES ACT (FCPA)

While the attempts to implement and enforce corporate codes of conduct and regulate corporate behavior have failed in several ways, one U.S. law, the Foreign Corrupt Practices Act (FCPA),[186] has been effective and serves as a possible model for future regulations. It is specific, and it has tangible, enforceable sanctions. The law is aimed at corruption, a vice that most agree distorts international competition and has a negative effect on international business transactions.[187] While it only addresses bribery of public officials by corporations, the supporting principles and implementation tools of this statute can surely be used to create more extensive and more effective regulations for creating corporate accountability in the future.

A. History and Development

The Foreign Corrupt Practices Act of 1977 (FCPA)[188] is one example of how the U.S. government has sought to regulate the conduct of American MNCs in foreign countries. In the wake of the Watergate investigations, which revealed extensive bribery of foreign officials by American corporations, there was a maelstrom of moral outrage.[189] Additionally, although bribery has obvious ethical

185. *See* UN Global Compact, *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles*, *at* http://www.unglobalcompact.org/irj/servelet/prt/portal/prtroot/com.sapportals.km.docs/documents/Public_Documents/gcguide.pdf (last visited Oct. 7, 2003) ("The Global Compact is a voluntary corporate citizenship initiative. As such, the Global Compact is not a regulatory instrument – it does not 'police' or enforce the behavior or actions of companies."); *see also* Baker, *supra* note 74, at n.183 ("Specifically, the website states that one of the requirements for participating in the Global Compact program is to 'provide, once a year, a concrete example of progress made or a lesson learned in implementing the principles, for posting on the Global Compact Website.'").

186. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977), as amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, § 5003(c), 102 Stat. 1107, 1419 (1998) (codified at 15 U.S.C. § 78dd-1 to 3).

187. *See* W. Paatii Ofosu-Amaah, Raj Soopramanien, & Kishor Uprety, *Combating Corruption*, *in* INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 811 (Raj Bhala ed., 2000).

188. Foreign Corrupt Practices Act,15 U.S.C. §§ 78dd-1 to 3 (1998).

189. H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 3-4 (1998).

and moral implications, Congress conceptualized the issue as a matter of U.S. foreign policy interests; American corporate bribery could have severe, detrimental effects on U.S. foreign policy interests.[190] Congress responded with the FCPA. The FCPA addresses the problem in two distinct ways: (1) by prohibiting foreign bribery, and (2) by creating record-keeping and accounting requirements for corporations.[191]

The anti-bribery provisions of the FCPA prohibit the payment, directly or indirectly, of money or "anything of value" to officials of a foreign government or political party, with corrupt intent, in order to obtain or retain business.[192] However, the FCPA does not forbid all payments to foreign officials or political parties; facilitating payments that are intended to "expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party officer" are not actionable under the statute.[193] In addition, payments that are allowed under the written laws of the foreign nation are allowed under the FCPA, as well as payments that are reasonable and bona fide expenditures related to the promotion of products and services, or payments related to the performance of contracts.[194]

The FCPA's record-keeping and accounting requirements are enforced against companies registered with the SEC pursuant to the Securities and Exchange Act of 1934.[195] Issuers are required first to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[196] Issuers are also required to create and utilize internal controls that provide "reasonable assurances" that transactions are appropriately authorized, transactions are recorded as necessary to maintain accountability for assets, and so forth.[197]

B. Sanctions and Efficacy

By many accounts, the FCPA has been quite effective in curbing corporate bribery abroad. A primary reason for the efficacy of the Act can be found in its sanctioning provisions, where the civil and criminal penalties for

190. Breed, *supra* note 24, at 1028-29; (citing WALLACE TIMMENY & ROBERT B. VON MEHREN, FOREIGN CORRUPT PRACTICES ACT: THREE YEARS AFTER PASSAGE 13 (1981)) ("The legislative history reflects that a primary concern of Congress was the damage that such payments has [sic] caused to American relations with foreign nations in critical areas of the world.").

191. 15 U.S.C. §§ 78dd-1 to 3.

192. *Id*. at § 78dd-2(a).

193. *Id*. at § 78dd-2(b).

194. *Id*. at § 78dd-2(c).

195. 15 U.S.C. § 78dd-2; Securities Exchange Act of 1934, Act June 6, 1934, ch. 404, 48 Stat. 881.

196. 15 U.S.C. § 78m-(b)(2)(A).

197. 15 U.S.C. § 78m-(b)(2)(B).

violators can be costly. Individuals who are found to be in violation of the FCPA may be imprisoned for up to five years and fined a maximum of $100,000.[198] Corporations may not, directly or indirectly, pay any amount of a fine imposed on an individual.[199] The Act also authorizes a civil penalty of up to $10,000 for individual violators.[200] Corporations may be fined a maximum of $2,000,000 for their violations.[201] While $2,000,000 may seem *de minimis* for a multinational corporation with yearly profit margins ranging from millions to billions, some corporations have been subject to large fines under the FCPA for multiple violations. In 1995, for example, the SEC fined Lockheed-Martin $28.4 million for multiple violations regarding a contract with Egypt involving its C-130 airplanes.[202]

However, only sixteen cases have been prosecuted under the Act from 1976 to 1996,[203] and the FCPA provides no private right of action.[204] Some argue that since enforcement of the FCPA has been problematic, it cannot be an effective deterrent to foreign bribery.[205] While there is merit to this criticism, some particularly significant data tends to contradict the assumption that where the frequency of prosecution is low, so is the effectiveness of the law. The Department of Commerce estimated in 1997 that U.S. MNCs lost $15 billion in lost contracts due to a competitor's bribery.[206] An additional survey indicates that 44.6% of those American businesspeople surveyed believed that the guidelines and sanctions embodied by the FPCA are either a "very important" or an "extremely important" factor affecting U.S. export trade today.[207] This data indicates that on some level, the statute has been an effective deterrent to foreign bribery.

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198. *Id*. at §78dd-2(g)(2)(A).

199. *Id*. at § 78dd-2(g)(3).

200. *Id*. at § 78dd-2(g)(2)(B).

201. 15 U.S.C § 78dd-2(g)(1)(A).

202. Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 13-14 (1999).

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

204. In *Lamb v. Phillip Morris*, Plaintiff accused a cigarette manufacturer of allegedly making contributions to a foreign charity in exchange for price controls by the foreign government on foreign tobacco. Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1025, 1027-30 (6th Cir. 1990) (holding that district court properly dismissed a plaintiff tobacco growers' claim under the FCPA against Phillip Morris).

205. *See* Ofosu-Amaah et al., *supra* note 187, at 811.

206. George et al., *supra* note 202, at 21-22; *see also* Breed, *supra* note 24, at 1031 ("U.S. companies are sacrificing significant opportunities to gain more business by bribing foreign officials.").

207. Breed *supra* note 24, at 1031 (citing JYOTI N. PRASAD, IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977 ON U.S. EXPORTS 121 (1993)).

Some international trade scholars believe that the FCPA is "clearly not in the best interest of the United States," namely because no other nation charges its own citizens with bribery of foreign officials.[208] However, the U.S. Congress has chosen elimination of corruption as a foreign policy goal, and overall, especially when contrasted with the ineffectiveness of voluntary codes of corporate conduct, the FCPA seems to be one of the best and most effective models the United States possesses for regulating its MNCs. However, it is important to remember that this significant step toward corporate accountability cannot be viewed in a vacuum. While bribery is a vice that can lead to additional abuses, it is not the sole gateway; abuses can and do occur without the bribery of public officials.[209]

VI. THE BENEFITS OF CREATING VIABLE AND EFFECTIVE SANCTIONS FOR AMERICAN CORPORATE MISCONDUCT AND A PROPOSAL FOR A NEW LAW

Creating a new law to penalize American MNCs for their activities abroad clearly has costs for private entities, consumers, and the U.S. government. However, the long-term benefits to those groups and to the international community far outweigh the initial burdens the law would impose. Those benefits include a stronger U.S. foreign policy, increasingly stable and economically profitable developing countries, and even the opportunity to fulfill U.S. obligations under the Generalized Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO).

A. Fulfilling GATT-WTO Obligations to Aid and Support Developing Countries

The United States, as part of its membership in the WTO, has agreed to implement policies and measures that will help least-developed and developing countries[210] become economically healthy and stable.[211] The contracting parties agreed that raising standards of living and contributing to the progressive development of the economies of all involved countries, particularly developing and least-developed countries, was a primary goal of the GATT and the WTO.[212]

208. Ofosu-Amaah et al., *supra* note 187, at 812.

209. Baker, *supra* note 74, at 121.

210. The term "less developed country" can be used generically to encompass both developing countries and least-developed countries, a distinction found in many Uruguay Round multilateral trade agreements. Generally, least-developed countries are those with an annual per capita GNP of less than $1000. *See* RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 60 (2000).

211. GENERAL AGREEMENT ON TARIFFS AND TRADE, art. XXXVI, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

212. *Id*. art XXXVI(1)(a).

As a result, developed countries, wherever appropriate, should "devise measures designed to stabilize and improve conditions of world markets . . . so as to provide them with expanding resources for their economic development."[213]

The GATT terms refer to trade-related measures, such as reducing and eliminating tariffs and non-tariff barriers, and the U.S. government has introduced several programs to achieve this objective, such as the Generalized System of Preferences,[214] the Caribbean Basin Trade Partnership Act[215] and the Andean Trade Preference Act.[216] However, some critics have deemed this mission to aid in development as merely a new colonialism operating under the auspices of international trade. The critics argue that the trade benefits really do nothing to aid in real economic growth and stability in developing countries.[217] As Cecil Rhodes once said, "[w]e must find new lands from which we can easily obtain raw materials and at the same time exploit the cheap slave labor that is available from the natives of the colonies."[218]

The vast majority of the human rights abuses perpetrated by American businesses occur in developing and least-developed countries. As illustrated above, many African countries have suffered and continue to suffer the effects of conflict diamonds and other abuses.[219] By passing new legislation to sanction American MNCs' activities abroad, the United States could both continue to fulfill its Article XXXVI obligations and truly attempt to aid in the development and journey toward economic stability of many third-world countries.

B. U.S. Foreign Policy Concerns

While the connection may not be obvious at first glance, the actions of American MNCs abroad, particularly of those operating in developing countries, directly affect U.S. foreign policy.[220] MNCs in developing countries often possess and exert more financial, political, and social power in relation to the host governments of those countries.[221] As a result, the MNCs' business practices and the products they produce are often the most noticeable and omnipresent representations of the United States and American culture to both the populations

213. *Id*. art XXXVI(4).

214. *See* 19 U.S.C. §§ 2461-2466 (2003).

215. *See id.* §§ 2701-2707.

216. *See id.* §§ 3201-3206.

217. Edward Goldsmith, *Development as Colonialism, in* THE CASE AGAINST THE GLOBAL ECONOMY. 253-66 (Jerry Mander & Edward Goldsmith eds., Sierra Club Books 1996).

218. *See id*. at 254.

219. *See* Amanda Banat, Note, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. L. 939 (2002).

220. Breed, *supra* note 24, at 1011.

221. *Id*. at 1011-12.

and the governments of these foreign countries.[222] They represent American economic, social and political values, and they are a "visible extension of market norms and cultural preferences . . . ."[223] Consequently, if American MNCs abuse that power through their activities in foreign countries, there can be adverse political reactions against the United States itself.

In addition, the United States could be forced to spend financial and human resources to correct a situation created by an American MNC.[224] As recent events in Liberia demonstrate, the United States sent peacekeepers to stabilize a country which an American MNC had, in its search for profit, helped to destroy.[225] Such a scenario is clearly adverse to American foreign policy interests.

C. Stability of Business Activity Abroad

Though it seems counterintuitive, American MNCs can also benefit from a new statute through the potential to foster more stable host countries for better investment opportunities. As illustrated in the Liberia example, human rights violations perpetuate instability and stagnate economic growth.[226] By supporting Charles Taylor and his terrorist tactics, Firestone Tire exacerbated the instability of the region in addition to helping Taylor attempt numerous coups.[227] Human rights violations by governments and MNCs lead to instability, and when the political, social, and economic climates of a country become unstable, the result can only be that foreign direct investment in those countries will slow significantly or freeze. In making investment decisions, businesses will always consider the cost of doing business in a given location. Those costs can be prohibitively high when the region is unstable.

When instability discourages international business investment, the results are largely negative for all. A company loses the opportunity to pick the most cost-efficient location for manufacturing or production of its product, the developing country loses the opportunity for economic growth through that company's investment within its borders, and the final consumers lose in paying a higher price domestically. A statute that punishes American MNCs for human rights violations should lead to greater stability in the countries in which they operate by curbing or eliminating the violations that cause the instability.

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222. *Id*. at 1012.

223. Debora Spar, *Foreign Investment and Human Rights; International Lessons*, CHALLENGE, Jan. 1, 1999, at 55, *available at* LEXIS, News Library, Allnews File.

224. *See supra* Part II.C.

225. *See id*.

226. *See supra* Part II.B.

227. *See id*.

D. Creating a Compromise in the Wake of Continuing U.S. Opposition to the International Criminal Court

> "Those who portray the ICC as a rogue court should wonder instead whether, in persisting in its efforts to sabotage the court, the U.S. is acting more and more like a rogue state."
>
> – Joanne Mariner[228]

In the past, the United States has tended to enter carefully into international agreements that subject the foreign policy of the United States to the will of other nations.[229] A very recent and still pressing example is the debate surrounding the International Criminal Court (ICC). The ICC has jurisdiction over the world's criminals that commit the most heinous of crimes, such as genocide, war crimes, and crimes against humanity.[230] In other words, the crimes the ICC has jurisdiction over are well-established violations of international law.[231] In addition, the court's jurisdiction only extends to crimes committed after the establishment of the court.[232] At the writing of this Note, ninety-one countries, including every European Union country, have ratified the treaty that establishes the ICC.[233]

Originally, the U.S. government supported participation in the ICC if the rest of world would agree to rules proposed by the United States.[234] The United States proposed that the members of the Security Council would have veto power over the ICC's docket, which in effect would mean that the court "could never prosecute an American citizen in the face of U.S. opposition."[235] The proposal was rejected at the 1998 Rome Convention, but the ICC treaty did include the "Singapore Compromise" which allows the Security Council to block prosecution for up to twelve months if it believes ICC prosecution would interfere with Security Council efforts to preserve international peace and security.[236] While 120 nations voted in favor of the ICC, the United States refused to sign the treaty in Rome, finding itself uncharacteristically in the company of six other nations:

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228. Joanne Mariner, *The Case for the International Criminal Court* (July 8, 2002), *at* http://www.cnn.com/2002/LAW/07/columns/fl.mariner.icc.0708/index.html/. Mariner is a human rights attorney practicing in New York.

229. *See id*.

230. *Id.*

231. *Id*.

232. The underlying treaty establishing the ICC came into force on July 1, 2002. *Id.*

233. *See* Coalition for the International Criminal Court, *State Signatures and Ratifications Chart*, *at* http://www.iccnow.org/countryinfo/worldsigsandratifications.html (last visited Aug. 24, 2003).

234. *See* Mariner, *supra* note 228.

235. *Id*.

236. *Id*.

China, Iraq, Yemen, Libya, Israel, and Qatar.[237] The Clinton administration grudgingly signed the Rome Statute[238] in December of 2001, primarily to be included in the shaping of the court.[239]

Recently, the United States has stepped up its quest to impede the ICC. Secretary of Defense Donald Rumsfeld has described the court as a "threat" to American interests, and the United States has threatened an array of drastic measures, including pledging a policy of total non-cooperation with the court's prosecutions.[240] Many commentators have criticized the U.S. government's aversion to the ICC as hypocritical in light of the U.S. demands on the rest of the global community.[241] In the wake of the September 11th attacks, U.S. officials have continually advocated global coalition-building and multilateral cooperation to fight terrorism and other violations of international law.[242] America's position on the establishment of the ICC and its threats to undermine its sovereignty could easily be viewed as "symptomatic of a broader unwillingness to be subject to the same international legal norms that bind other countries."[243]

Putting aside the controversial issue of whether or not the United States should accede to the jurisdiction of the ICC, the actions of the United States on this issue, and America's unwillingness to join in other international efforts, have frustrated and enraged even America's closest allies.[244] The world has given, America has taken, and few see any signs of reciprocity.[245] A new law that would allow the U.S. government to investigate the activities of American MNCs in foreign countries, and then prosecute those companies for any wrongdoings discovered, would be a good-faith effort to be involved in remedying the problems

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237. *Id*.

238. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9.

239. *See* Mariner, *supra* note 228.

240. *Id.*

241. Rupert Cornwell, *The War of the Worlds*, THE INDEPENDENT (London), Sept. 7, 2002, at 11, *available at* 2002 WL 26238016.

242. "We continue to pursue the terrorists in cities and camps and caves across the earth. We are joined by a great coalition of nations to rid the world of terror." President George W. Bush, Remarks to the Nation, *at* http://www.whitehouse.gov/news/releases/2002/09/2002911-3.html/ (Sept. 11, 2002).

243. Mariner, *supra* note 228.

244. "Long before 11 September, [America] had rejected the Kyoto global-warming treaty, and spurned international pacts banning landmines, curbing biological and chemical weapons, and setting up the International Criminal Court (ICC). This year, President Bush has pulled out of the Anti-Ballistic Missile treaty with the Russians, refused to attend the sustainable development summit in Johannesburg and resorted to diplomatic blackmail to sabotage the ICC . . . . The world's proclaimed champion of free trade also introduced blatantly protectionist measures on behalf of its own steel and farm industries. What happened, we wondered, to the new spirit of brotherly co-operation fostered by 9/11?" Cornwell, *supra* note 241.

245. *See id.*

of the world. The passage of such a law would also demonstrate that the United States does not condone human rights violations perpetrated by its commercial organizations. Taking an active role in bettering the conditions of other countries would illustrate that the United States does not believe its citizens may act above the law with impunity when in foreign countries.

E. Discouraging Corporate Abuse at Home

In the wake of the domestic Enron and MCI disasters, both Republican and Democrat legislators and the current Bush Administration have pledged to demand more accountability and responsibility from American corporations.[246] The longstanding desire for laissez faire governance has all but vanished as the accounting ledgers of large American corporations have proven false and misleading, leaving workers without pensions, and CEOs testifying before Congressional committees that they cannot recall the answers to questions, desperately invoking their Fifth Amendment privilege against self-incrimination.[247] President George W. Bush was also criticized for his close ties to and relationships with many corporations and their CEOs, particularly Enron's Kenneth Lay, whom he nicknamed "Kenny Boy."[248]

In July of 2002, President Bush attempted to distance himself from the scandals and signed into law the Accounting Industry Reform Act,[249] which is intended to rein in corporate wrongdoers and toughen oversight on the accounting industry.[250] While these reforms are clearly aimed at curbing and eliminating the negative effects of corporate financial abuse on the American people and domestic economy, the government would do well to show the populace that corporations do not have carte blanche authority to act with impunity throughout the rest of the world either. The introduction, passage, and signing into law of a statute sanctioning corporations for misdeeds abroad would re-assert U.S. sovereignty over its businesses and help the current Bush Administration distance itself from recent corporate scandals.

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246. CNN, *In Wake of Enron Debacle, Bush Pushes Rules for Corporations* (Mar. 7, 2002), *at* http://www.cnn.com/2002/ALLPOLITICS/03/07/bush.corporations/index.html.

247. "Lay, the former Enron chairman and CEO, will appear under subpoena before the Senate Commerce Committee, where his spokeswoman has said he will 'under the instruction of counsel,' invoke his Fifth Amendment right not to testify." CNN, *Lay to Join Other Enron Execs by Invoking the Fifth* (Feb. 12, 2002), *at* http://www.cnn.com/2002/LAW/02/11/enron.investigation/index.html.

248. CNN, *Bush-Lay Letters Suggest Close Relationship* (Feb. 17, 2002), *at* http://www.cnn.com/2002/US/02/177/bush.lay/index.html.

249. Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002, H.R. 3763, 107th Cong. (2002).

250. CNN, *In the Crossfire: Resisting the Political Blame Game* (July 31, 2002), *at* http://www.cnn.com/2002/ALLPOLITICS/07/31/cf.crossfire/index.html.

F. Limiting the Burden Placed on Courts by ATCA Expansion

There has been a surge of ATCA litigation since the *Kadic* court removed the state action barrier to expand the scope of liability,[251] and the lawsuits will continue to grow in number if plaintiffs like those in the South Africa apartheid case are allowed to recover for indirect injuries.[252] ATCA aside, U.S. courts tend to be magnets for international litigation due to high damage awards from juries, the permissibility of class action suits, broad discovery rules, and the ever-popular contingency fee arrangement.[253] In addition, with the variety and inconsistency of ATCA holdings among the various federal courts, plaintiffs are free to forum shop and try new claims with varying degrees of success.[254]

A new statute with clearly defined causes of action and guidelines as to how claims of international human rights violations are to be adjudicated would likely decrease the number of these claims, especially if a private right of action is expressly barred.[255] In addition, it would put an end to the possibility of abuse of judicial discretion, occasioned by judicial rulings mired in political questions when they are swayed by the victims of human rights violations at the hands of foreign governments and MNCs.

G. The New Law

> "Let's not mince words: we need to deal with the cancer of corruption. In country after country, it is the people that are demanding action on this issue . . . . [W]e all know that it is a major barrier to sound and equitable development."
>
> – James Wolfensohn, President of the World Bank[256]

Learning from the failures of previous attempts to regulate American MNCs through codes of conduct, seeing the proven efficacy of the FCPA, armed with the knowledge that the ATCA is inherently flawed and neither appropriate nor sufficient for the purpose of regulating the conduct of American MNCs, a new law must be created and passed to effectively curb corporate misconduct abroad.

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251. *See* Bradley, *supra* note 115, at 470-73.

252. *See* Ramasastry, *supra* note 2.

253. Bradley, *supra* note 115, at 473.

254. *Id*.

255. *See infra*, Part VI.G.

256. James P. Wesberry, *Perspective: International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth Is, the Corruption Eruption May Be Capped,* 18 NW. J. INT'L L. & BUS. 498, 498 (1998) (quoting L.A. TIMES syndicated column distributed Nov. 8, 1997 (on file with author)).

1. The Guidelines

Human rights abuses occur in several forms and are defined and categorized differently by various people and groups. Congress must choose which categories of violations it deems worthy of sanctioning in U.S. courts, carefully and specifically define those violations, and create a concrete cause of action for each. One category of human rights that Congress cannot, and should not, ignore is the protection of core civil and political rights. The United States has an international reputation of being a guarantor of civil and political liberties, and the current Bush Administration has stated that maintaining this international role is a current objective.[257] The maintenance of that reputation is "an indispensable prerequisite to U.S. efforts to foster these liberties in countries with authoritarian regimes."[258]

To start, Congress should look at situations where the civil and political rights of citizens of a foreign country have been compromised or directly violated by the interference of an American MNC. For example, when observing the Firestone-Liberia situation, Congress could establish language within the statute that would prohibit American MNCs from supporting, financially or otherwise, a known terrorist or terrorist group whose goal is to commit violent acts or overthrow the legitimate, internationally-recognized government. In addition, the statutory language should include prohibitions of unfairly influencing election processes through coercion or other efforts. These prohibitions would ensure that citizens have full rights to participate in a fair, democratic process and enjoy the realization of their efforts. These civil and political rights are so inherent and vital to the American political system that the United States should sanction any American MNC that attempts to deprive others thereof.

Other categories of human rights are more nebulous, namely social and economic rights. Fair labor practices, including wage and hour standards, fall into this category, and a consensus as to what actions are egregious has yet to be established. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which was signed by the United States on October 5, 1977,[259] describes these as "the enjoyment of just and favorable conditions of work."[260] These include a right to "fair wages and equal remuneration for work of equal

257. *See* White House Office of Global Communications, *at* http://www.whitehouse.gov/ogc/aboutogc.html (last visited Oct. 7, 2003). The OGC was created by Executive Order of the President to convey America's message to the world that "peace and freedom are . . . universal aspirations" and that "we value the dignity of all human life." "And America must always stand for liberty."

258. Breed, *supra* note 24, at 1032-33.

259. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). Although the United States is a signatory to the ICESCR, it has not yet ratified the treaty.

260. *Id*. art. 7, 993 U.N.T.S. at 6.

value" and "safe and healthy working conditions."[261] A review of the failed Corporate Code of Conduct Act and its listed prohibitions would be a good place to begin a discussion of how to safeguard economic, social, and cultural rights without severely limiting the ability of American MNCs to operate abroad. Congress must decide which of those rights it desires to protect and to what degree. While some argue that this category of rights is simply too amorphous and controversial to regulate, it has become an increasingly present issue, and Congress must address these violations to some extent because they tend to affect the populations of developing countries more intimately than any other category of violation.[262]

Whatever violations Congress chooses to sanction, they are less important than the specificity the drafters use in creating a cause of action, granting jurisdiction, designating liability, and avoiding the other pitfalls ATCA has suffered. The possible effectiveness of this new law lies in the strength and clarity of construction, which is precisely the cautionary tale of ATCA case law.

2. The Sanctions

The penalties for violation of this statute must be both civil and criminal in nature and allow for both corporate and individual prosecution and sanctioning. The FCPA provides a strong framework for this concept, with high monetary fines and the possibility of substantial imprisonment for individual violators.[263] However, imprisonment should also be authorized for corporate executives, such as the CEOs and board members, of corporations found to be in violation of this statute. While a provision such as this might cause a more lengthy and adversarial prosecution, it will also provide a substantial incentive for CEOs and others similarly situated to be familiar with the new law, implement changes to comply with the new rules, and perhaps even hire independent monitors to ensure the law is being observed in foreign countries. Additionally, the sanctions must apply to the corporations when violations occur through subsidiaries, limited partners, or joint ventures, as suggested under the failed Corporate Code of Conduct Act.[264] Indeed, there is a danger that some corporations may seek to avoid liability by simply not incorporating in the United States.

When monetary fines or sanctions are assessed pursuant to the law, the money paid should be allocated in two places. First, the federal budget must reflect an increase for the SEC and the Department of Justice in order to increase staff and other resources necessary to implement the law. Second, the money

261. *Id*.

262. Breed, *supra* note 24, at 1033.

263. *See* discussion *supra*, Part V.

264. The Act lists any U.S. national that "employs more than 20 persons in a foreign country, either directly or through subsidiaries, subcontractors, affiliates, joint ventures, partners or licensees . . . . " *See* Corporate Code of Conduct Act, H.R. 4596, 106th Cong. § 3(a); *see also* discussion *supra*, Part IV.B.

recovered from violators should, either directly or indirectly, go back to the countries in which the corporation or individuals representing the corporation did damage. For example, if Nike is fined for using child laborers in apparel manufacturing operations in Malaysia, a portion of that fine should somehow go to remedy the damage done through Nike's illegal practice. UN aid and relief organizations, such as the OECD, may be the most appropriate conduit for such efforts.

3. Who is Liable and Who Could Recover: Is a Private Cause of Action Necessary?

If a concern for judicial economy is a strong reason for creating and implementing such a law, the language of the statute must place some restrictions on the scope of lawsuits that alien plaintiffs can bring, and against whom they can bring them, in the U.S. federal court system. Some have argued that such a statute should expressly forbid a private cause of action in order to limit the cost of litigation in federal courts and to encourage passage of such a law without significant opposition from American MNCs.[265] However, the question must be asked, why should corporations be exempt from private plaintiffs? A person accused of murder can be both criminally prosecuted and sued civilly by the decedent's family for wrongful death. As such, why should corporations be the beneficiaries of an exception? Criminal prosecutions will deter future wrongdoing, yet do nothing to compensate the victims in foreign countries. Congress should be concerned with issues of judicial economy, and having a law that only enables the federal government to prosecute corporations and their executives is certainly more desirable than leaving corporations to do business without legal boundaries. However, private plaintiffs should not be denied recovery without careful consideration. Certainly, there is a correlation between the likelihood of passage of such a law and whether or not the law creates a private right of action.

VII. CONCLUSION

> "For America, the bombs came on September 11, 2001. After years of fitful attention to the rest of the world, we Americans suddenly found ourselves with no choice but to attend to international affairs."
>
> - Gary Bass[266]

265. *See* Breed, *supra* note 24, at 1033-34.

266. Gary J. Bass, *Atrocity & Legalism*, DAEDALUS, Jan. 1, 2003, at 73, *available at* 2003 WL 14638469. Bass is an assistant professor of politics and international affairs at Princeton University.

While the ATCA supports a noble goal, that of eliminating international human rights abuses, the statute's lack of clarity, conflicting court interpretations, and other flaws have almost swallowed the statute whole. It is clear that if American foreign policy still supports the goal of curbing human rights abuses throughout the world, a new statute must be created that enumerates specific causes of action for alien plaintiffs or allows for the criminal prosecution of American MNCs in federal courts for their actions abroad.

After the failure of the Corporate Code of Conduct Act, the question remains, how likely is it that a new statute will be created and passed, or that President George W. Bush would sign it into law? The answer is certainly unclear, but several factors, including the domestic political culture, lean favorably toward passage of such a law. After the September 11th terrorist attacks, Americans have become more aware of international affairs and America's role in those affairs. American people have realized that America's reputation in other countries, specifically a negative reputation, can and will have a direct effect on their lives, their families, and their country. When American MNCs perpetrate abuses abroad, their actions cast a dark shadow on the United States and its policies. The United States would never allow a foreign company to support terrorists in America with impunity, and the U.S. government should question the wisdom of allowing American companies to do the same in other countries. Creating a new statute will not only protect valuable human rights against MNC abuse, but also will be in the best interest of U.S. citizens, national security, and the progressive development of American foreign policy post-September 11th.