

A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions

Survey of Laws in the United States of America

Robert C. Thompson¹

The following is part of a larger project looking into the potential liabilities facing companies under public international law, specifically the laws governing genocide, crimes against humanity, and international humanitarian law. This survey is intended to assist in decisionmaking by companies, governments, and affected communities. It is not intended as a definitive description of liability or culpability under the law in the United States or internationally. It is not specific to any particular case or situation and is intended to be the basis for further research.

INTRODUCTION

Each section of this survey begins with a question posed by the survey sponsors about an important issue in international and national laws relating to the potential for addressing activities carried out by economic actors involved in conflict zones. Thus, the survey is not intended to be a general analysis of all international humanitarian law and U.S. analogs, but a focused review of laws bearing on the particular question being addressed. Further, owing to time and space limitations, it focuses almost exclusively on U.S. federal law, while noting in some instances where state laws may be parallel.

There are three aspects of U.S. law that are important to bear in mind when exploring the relationships between U.S. law and international humanitarian law. The first aspect is the presence in U.S. federal statutes of substantive norms explicitly found in international law. This aspect may be referred to as the “nationalization of international law.” This aspect is not unique to the United States; international treaties customarily call upon signatories to adopt national domestic legislation in order to implement the terms of the treaty. The Statute of Rome provides the basis for a broad expansion of international criminal law among the member states. A crime is not admissible in the International Criminal Court so long as a member state has commenced and is diligently prosecuting that crime in its national courts.

Thus, if a member state wishes to ensure that it, and not the ICC, prosecutes crimes committed on its own territory or by one of its own nationals, then it must ensure that its domestic legislation is broad enough to cover all of the crimes set for the in the Statute. Accordingly, as the accompanying studies of the laws of Canada, the U.K., France and Norway demonstrate, member states are undertaking the necessary revisions to their domestic legislation to achieve “complementarity” with

¹ Robert C. Thompson is a 1967 graduate of Harvard Law School. From 1973 to 1984 he served as a senior attorney with the U.S. Environmental Protection Agency. From 1984 to 1992 he was a partner with the law firm of Graham & James. From 1993 to 2000 he was a partner with the law firm of LeBoeuf, Lamb, Greene & MacRae, LLP, with whom he is currently associated as Counsel.

the Statute. This process is resulting in a significant expansion of international humanitarian law (IHL) and international criminal law (ICL).

Although the United States is not a party to the Rome Statute, and its coverage of the substantive crimes set forth in therein is limited, it has historically become a party to various treaties which declare certain activities to be unacceptable under generally-accepted international norms and Congress has adopted criminal legislation carrying out the purposes of those treaties. The United States criminal statutes cover, for example, genocide, war crimes, torture, trafficking in women and children, and, potentially, the use of land mines.

A U.S. statute, the Alien Tort Claims Act (ATCA), allows victims of some breaches of international law to file private civil lawsuits in federal courts against the perpetrators of those breaches. Federal courts applying ATCA have imported international law directly into U.S. law. There has been extensive debate over nearly a quarter of a century as to whether Congress actually authorized the extensive grant of substantive authority that the courts have exercised. The passage of the Torture Victim Protection Act of 1991 (TVPA) was accompanied by strong legislative history supporting Congressional approval of an expansive reading of ATCA.² The U.S. Supreme Court has recently decided a case that may lead to a resolution of some of this controversy, as more fully discussed below.

The second aspect of U.S. law that bears on these unacceptable business practices involves various domestic statutes that apply extraterritorially, that is, they apply to conduct that occurs outside of the territorial jurisdiction of the United States. Congress has enacted criminal statutes covering those areas where it has determined that the United States has an interest in applying its criminal jurisdiction to conduct that takes place entirely outside of the United States, such as in the case of the war on terrorism, the war on drugs, the need to protect U.S. agents acting abroad, and the effort to prohibit U.S. nationals from engaging in bribery of foreign officials. These statutes have generally withstood legal challenges under the U.S. constitution. One goal of this analysis is to show how some of these existing U.S. laws could be brought to bear in curbing the business practices that are deemed unacceptable to the international community.

The third aspect of U.S. law covered by this analysis involves those statutes that apply only within the territory of the U.S. or at its borders, but which may directly or indirectly implicate business activities carried out abroad. Examples of these statutes are the National Stolen Property Act (NSPA), the Racketeering Influenced Corrupt Organizations Act (RICO), and laws relating to customs, immigration and naturalization, money laundering and trafficking in women and children.

Where neither “nationalized international law,” or the extraterritorial or domestic application of existing law, are sufficient to address unacceptable business practices, one may conclude that there is a need for future U.S. legislation or efforts on the part of the international community to expand IHL or ICL.

² *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) [hereinafter *Karadzic*]. (“Karadzic also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens.”)

RESPONSES TO SURVEY QUESTIONS

I. Status of business entities under criminal law:

1. **Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**

Yes. Corporate responsibility for criminal conduct is well established under both federal and State laws. “A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.”³ Corporations and other forms of business entities are treated the same as individuals for purposes of most criminal statutes in the U.S., both federal and State. Under federal law, many criminal statutes state explicitly define “person” to include corporations, and other forms of liability on corporations were affirmed by the Supreme Court in 1909.⁴

The general approach of State penal codes is reflected in the position taken by the American Law Institute in its Model Penal Code. In 1976 the American Law Institute’s Model Penal Code adopted Sections 2.07 and 2.97. Section 2.07 states that “a corporation may be held criminally liable for penal offenses committed by its agents on its behalf if the legislative purpose plainly appears to impose such liability.” Section 2.97 provides that an omission to discharge a specific duty imposed on a corporation may be criminally punished.

A corporation may be held accountable for a violation of international law under ATCA and the TVPA.⁵

³ V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve*, 109 Harv. L. Rev. 1477, 1488 (1996) [hereinafter Khanna]. See, Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 Geo. L.J. 1559, 1563, 1570, 1573-74 (1990) (noting the growth in criminal prosecutions of and sanctions against corporations as well as the growth in corporate criminal liability). See, Beth Stephens, *STEFAN A. RIESENFELD SYMPOSIUM 2001: The Amoral of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int’l L. 45 (2002). See, Gilbert Geis and Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 Am. J. Crim. L. 341 (2002) [hereinafter Geis and DiMento].

⁴ *New York Central and Hudson River Railroad Company v. U.S.*, 212 U.S. 481 (1909) (“It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.”)

⁵ *Wiwa v. Texaco*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002)[hereinafter *Wiwa III*]; *Presbyterian Church of Sudan v. Talisman Energy*, 244 F.Supp.2d 289 (S.D.N.Y. 2003)[hereinafter *Talisman*]; *SINALTRAINAL v. The Coca Cola Co.*, 256 F. Supp. 2d 1345, 2003 U.S. Dist. LEXIS 7145, No. 01-3208 (S.D. Fla. March 31, 2003); *Estate of Rodriguez v. Drummond Co.*, 256 F.Supp.2d 1250, 1267 (N.D.Ala. 2003) [hereinafter *Drummond*]; but see *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997) where the district court held that the TVPA, in referring to an “individual,” did not express a Congressional intent to include corporations. See further discussion of the Alien Tort Claims Act under Section 7, *infra*.

2. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?

The standards for imputing criminal activity of an employee or agent to a corporation are succinctly summarized in the following excerpt from a recent law review article:

A corporation can be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment. Because corporations are incorporeal legal entities, courts look to employees of the corporation as a means of imputing intent, or mens rea, as well as the guilty act, or actus reus, to the corporation. Courts use a three-prong inquiry to determine whether a corporation will be held vicariously liable for the acts of its employees. First, the individual must be acting within the scope and nature of his employment. Second, the individual must be acting, at least in part, to benefit the corporation. Finally, the employee's act and intent must be imputed to the corporation.⁶

b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present?

Although U.S. courts initially resisted holding corporations liable for crimes on the theory that a corporate entity is not capable of forming the requisite criminal intent, such a theory has not been a bar to the application of criminal statutes to corporations since the Supreme Court ruled on the matter in 1909.⁷ To the extent that any requirement for proving a mens rea was present, the mental state of the corporation's servants, acting in their corporate capacity, will suffice.

⁶ Annie Geraghty, *Corporate Criminal Liability*, 39 Am. Crim. L. Rev. 327, 328 (2002).

⁷ *New York Central*, 12 U.S. 481. See Geis and DiMento, *supra*. See Khanna, *supra*.

3. Under your criminal code (penal law), what is the legal standard for convicting someone of aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

A. Aiding and Abetting

The U.S. criminal code makes aiding and abetting an integral part of a federal crime:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.⁸

Section 2 applies to the entire criminal code.⁹ Thus, unless there is an express statutory provision to the contrary, a person may be convicted of aiding and abetting any act made criminal under the code.

The elements of aiding and abetting are, generally: (1) guilty knowledge on the part of the accused (*mens rea*); (2) the commission of an offense by someone; and (3) the defendant assisted or participated in the commission of the offense (*actus reus*).¹⁰

Aiding and abetting liability under 18 *U.S.C.* § 2 requires proof that defendants in some way associated themselves with venture, that they participated in venture as something that they wished to bring about, and that they sought by their actions to make venture succeed.¹¹

State law is generally consistent with federal law on this matter. The American Law Institute's Model Penal Code provides that:

a person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he, (i) solicits the other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or committing it, or (iii) having a legal duty to prevent the commission of the offense fails to make proper effort to prevent [it].¹²

⁸ 18 U.S.C. § 2 (2000).

⁹ See, Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *Fordham L.Rev.* 1341, 1345 (2002).

¹⁰ *U.S. v. Staten*, 581 F2d 878, 886 (D.C. Cir. 1978); *U.S. v. Raper*, 676 F2d 841, 849 (D.C. Cir. 1982).

¹¹ *Central Bank, N. A. v First Interstate Bank, N. A.*, 128 L Ed 2d 119, 114 S Ct 1439 (1994).

¹² American Law Institute, *Model Penal Code* § 2.06(3).

U.S. court decisions applying international law in the context of suits under ATCA and TVPA, have acknowledged that aiding and abetting is a well-established element of the “laws of nations” as well, beginning with the Nuremberg tribunal and continuing through the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹³ The principal U.S. court decisions in which aiding and abetting is held to apply to ATCA include *Karadzic*,¹⁴ *Wiwa*,¹⁵ *Talisman*,¹⁶ and the *Unocal* series of decisions.¹⁷ The *Unocal* litigation, discussed more at length below, will soon result in a decision by the Court of Appeals for the Ninth Circuit that addresses the complicity issue, which will in turn likely result in Supreme Court review and a definitive decision addressing the issue.

B. Conspiracy

The U.S. criminal code makes conspiracy a separate federal offense:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

¹³ *United States v. Alstotter*, 6 L. Rep. Tr. War Crim. 1, 62 (1948) (“This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.”); *Prosecutor v. Tadic (Case No. IT-94-1-T)*, *Opinion and Judgment*, May 7, 1997, at PP 678, 691.; *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000), <http://www.ictor.org/>.

¹⁴ *Karadzic*, 70 F.3d 232.

¹⁵ *Wiwa v. Royal Dutch Shell Petroleum Company*, 2002 U.S. LEXIS 3293, at court opinion 49 (S.D.N.Y. 2002) [hereinafter *Wiwa III*]. (“The TVPA provides for liability for an individual who ‘subjects’ another to torture or extrajudicial killing. See 28 U.S.C. § 1350, note, § § 2(a) & (b). While the language of the TVPA could be more precise, the definition of the verb ‘subject’ suggests, as plaintiffs argue, that the use of that word expands rather than narrows the reach of the statute. ‘Subject’ means to cause someone ‘to undergo the action of something specified; to expose ... to make liable or vulnerable.’ Random House Webster’s College Dictionary (1999). Using this definition, individuals who ‘cause someone to undergo’ torture or extrajudicial killing, as well as those who actually carry out the deed, could be held liable under the TVPA.”).

¹⁶ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 90. (“The Amended Complaint properly alleges that Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations. As noted *supra*, the Amended Complaint includes allegations that Talisman worked with Sudan to carry out acts of ‘ethnic cleansing’; that Talisman encouraged Sudan to do so; and that Talisman provided material support to Sudan, knowing that such support would be used in carrying out such unlawful acts. Moreover, the allegations set forth that Talisman’s acts were substantial as that term is understood in international law.”)

¹⁷ The principal court decisions to date in the *Unocal* litigation are: *National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 334 (C.D. Cal. 1997) [hereinafter *National Coalition*]; *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997) [hereinafter *Paez*]; *Doe v. Unocal Corp.*, 27 F.Supp. 2d 1174 (C.D. Cal. 1998) [hereinafter *Total Dismissal*]; *Doe v. Unocal Corp.*, 67 F.Supp. 2d 1140 (C.D. Cal. 1999) [hereinafter *Class Certification*]; *Doe v. Unocal*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000) [hereinafter *Lew Opinion*]; *Doe v. Unocal*, 2002 U.S. App. LEXIS 129263 (9th Cir. 2002) [hereinafter *Ninth Circuit Panel Opinion*].

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.¹⁸

There are four elements of criminal conspiracy, each of which the prosecution must prove beyond a reasonable doubt. Circumstantial evidence alone is a sufficient basis for a conspiracy conviction. A conspiracy exists where there is: (1) an agreement between at least two parties, (2) to achieve an illegal goal, (3) where the parties possess knowledge of the conspiracy and with actual participation in the conspiracy, and (4) where at least one conspirator committed an overt act in furtherance of the conspiracy.¹⁹

“A conspiracy is distinct from the substantive crime contemplated by the conspiracy and is charged as a separate offense.”²⁰ Acquittal on a conspiracy charge does not bar prosecution based on the substantive offense. Likewise, acquittal of the substantive offense does not necessarily bar conviction on the conspiracy count; however, if the government's theory of illegal conspiracy depends upon the defendant's knowledge of and assistance with the substantive count, acquittal on the substantive count mandates acquittal on the conspiracy count.²¹

The concept of conspiracy is found in international law and as such is carried into federal common law. In *Talisman*, the court stated:

The concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law, especially in the specific context of genocide, war crimes, and the like. The Statute of the International Military Tribunal, the body that tried Nazi war criminals, stated that ‘leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.’ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279. Allied Control Council Law No. 10, used to prosecute German war criminals domestically, created criminal liability not only for principals who committed acts of genocide or war crimes but also for those who were connected with any plans or enterprises involving the commission of such crimes. See William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT’L REV. RED CROSS 439, 442 (June 2001). Such complicity could include corporate liability.²²

¹⁸ 18 U.S.C. § 371 (1994).

¹⁹ Raphael Prober and Jill Randall (2002) *Federal Criminal Conspiracy*, 39 Am. Crim. L. Rev. 571.

²⁰ *Id.*

²¹ *Id.*

²² *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 322.

4. Are there any other special elements not required in the conviction of a natural person that must be present when the defendant in a criminal proceeding is a business entity?

As stated earlier in answer to Question No. 1, corporations may be prosecuted for any crime it is capable of committing, even aiding and abetting rape or murder. There are no insurmountable hurdles or extra burdens (such as additional filing fees, bonds, consent requirements or the like) that make prosecution of a corporation inherently more difficult than prosecution of an individual.

The principal issues that a corporate prosecution involves that are not found in the prosecution of natural persons are the following:

- **Naming the proper corporate entity.** Because business enterprises often have multiple corporate entities, the pleading should be carefully drawn to identify the correct corporate entity.
- **Piercing the corporate veil.** Where the actions of a subsidiary corporation are involved, and the prosecution wishes to implicate the parent U.S. corporation, the pleading should fully and carefully set forth the basis for piercing the corporate veil.²³ Where numerous corporations have similar-sounding names, or have identical names, but are incorporated in different jurisdictions, the pleadings should avoid mistakenly naming the wrong entity.
- **Imputing actions of servants to the corporation.** The corporation can be expected to raise the defense that the real criminals were acting ultra vires, i.e. without corporate authority. Accordingly, the pleadings should fully and carefully state the basis for imputing the actions of the individuals to the corporation. If the criminal behavior occurred at a very senior level, and numerous individuals were involved, this requirement should be easily met. The ordinary principles of agency law apply with respect to non-employee contractors, agents, and the like.
- **Immunity of State-Owned Entities.** As discussed below, corporations and other business entities which are majority owned by foreign states or subdivisions thereof are immune from suit in the U.S. federal and state courts.

²³ *Wiwa III*, 2002 U.S. LEXIS 3293, at court opinion 41. The court found that Royal Dutch/Shell controlled Shell's Nigerian subsidiary, and thus the activities of the subsidiary can be imputed to the parent company. Similarly, in *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 105, the court had little difficulty piercing the corporate veil and attributing the presence of a subsidiary to the parent where it appeared that the parent and subsidiary had the same officers and directors, the subsidiary did all of its business by or for the parent, and the subsidiary had no financial standing other than that of the parent.

II. Status of International Law/International Humanitarian Law in your country's legal framework:

5. May an individual be [criminally] prosecuted for violations of international law in the courts of your country?

No, unless the international law in question has been incorporated directly into U.S. criminal law through Congressional legislation. U.S. courts have not subscribed to the doctrine of universal jurisdiction, and thus legislation is needed in order for a violation of international law to be prosecuted in a U.S. court.^{24 25} Congress has enacted numerous criminal statutes that could lead to prosecution of many of the activities we have described as unacceptable. These statutes can be broken into the following three categories: (1) laws which directly import international law into U.S. law (“nationalized international law”); (2) laws which apply U.S. law “extraterritorially”, i.e. to acts taking place outside of the territorial United States (“internationalized national law”); and (3) domestic laws that apply to activities within the territorial United States, but which may impact international activities.

The U.S. Congress has “nationalized international law” by adopting statutes covering genocide,²⁶ war crimes,²⁷ torture,²⁸ piracy,²⁹ slavery,³⁰ trafficking in women³¹ and children³²—all activities proscribed under international agreements.

Numerous other federal laws apply “extraterritorially,” i.e. they make conduct outside of the U.S. a criminal offense punishable in the United States. Leading examples of this are: counterfeiting,³³ conspiracy to export drugs to the United States, and support of or

²⁴ Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 Va. J. Int'l L. 425, 450-461 (1999).

²⁵ Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 Fordham Int'l L.J. 378, 383 (1999) (“The fact that international law authorizes states to exercise certain adjudicatory jurisdiction over international crimes does not mean that U.S. courts may, without more, exercise such jurisdiction. Under U.S. law our courts may exercise only such adjudicatory authority as is conferred upon them by U.S. law to prosecute crimes codified in U.S. law.”)

²⁶ 18 U.S.C. § 1091. The genocide statute applies only to acts committed by nationals of the United States or to acts committed with the territory of the United States. § 1091(d).

²⁷ 18 U.S.C. § 2441. The war crimes statute applies only to acts where the either the perpetrator or the victim is a member of the U.S. armed forces or a national of the U.S. §2441(b). It defines war crimes as acts prohibited under: (1) the 1949 Geneva Conventions and any additional protocol to which the U.S. is a party; (2) the 1907 Hague Conventions; and (3) common article III of the 1949 Geneva Convention.

²⁸ 18 U.S.C. § 2340A. The torture statute applies only to acts committed outside of the United States. It states that the U.S. courts have extraterritorial jurisdiction to try the offender if the offender is either a U.S. national or is found in the U.S. § 2340A(b). The statute also makes conspiracy to commit torture a crime. § 2340A(c).

²⁹ 18 U.S.C. § 1651.

³⁰ 18 U.S.C. §§ 1583, 1589 (the latter section covering “forced labor”), U.S. Const. 18th Amend.

³¹ 18 U.S.C. § 1441. See also the Victims of Trafficking and Violence Protection Act of 2000, PL 105-386, which contains 22 U.S.C. § 7101, et seq., relating to the international trafficking of women and girls.

³² 18 U.S.C. § 1591.

³³ 18 U.S.C. § 470.

conspiracy to commit terrorism.³⁴ When these offenses are connected to certain other activities, such as when counterfeit currency is used to purchase stolen (i.e. plundered) property or arms in violation of sanctions, the U.S. statute may be invoked to hold the perpetrator accountable in a U.S. court. Similarly, criminal actions can be brought against those who export drugs to the United States and use the proceeds to finance conflict activities, or against terrorists who become finance their activities through illicit exploitation of natural resources, such as diamonds.

Enforcement of criminal statutes on an extraterritorial basis requires that the United States obtain jurisdiction over the perpetrator; thus the perpetrator must be present in the United States.³⁵ If the perpetrator is a corporation, the usual rules involving jurisdiction over corporations would pertain. If the perpetrator is an individual, physical presence in the U.S. is required for a court to assert jurisdiction. The U.S. courts do not try defendants “in absentia.” Where an extradition treaty is in force between the U.S. and a foreign country in which an individual defendant is located, the government of that country may be persuaded to provide mutual assistance to U.S. authorities, leading to the arrest of the individual and his extradition to the U.S. to stand trial.³⁶

In a few exceptional and notable cases, the individuals have been essentially kidnapped by U.S. law enforcement authorities or captured on the battlefield or in occupied territory by military authorities. The courts have not closely examined the circumstances leading to an individual’s being “present” in the U.S.³⁷ The Supreme Court has refused to allow the dismissal of indictments where a defendant has been the subject of a transborder abduction.³⁸ Because the abduction of a foreign citizen without the consent of the government involved is a breach of international law, and is likely to lead to a diplomatic *contretemps*, the practice is used sparingly, and only by authorization at the highest levels of the Department of Justice.³⁹ In the few cases involved, the federal authorities have

³⁴ 18 U.S.C. § 2333(a): “Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.”

³⁵ The well-known cases of John Walker and Yaser Esam Hamdi are examples of the use of battlefield seizure to bring a defendant to justice in the United States.

³⁶ *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992).

³⁷ See *Kasi v. Ageelone*, 300 F3d 487 (4th Cir. 2002). In that case, the murderer of two CIA agents carried out in Virginia fled to Pakistan and was later abducted by FBI agents in Pakistan. See *Ker v. Illinois*, 119 U.S. 436 (1886). In 1960, the U.N. Security Council determined that Israel’s abduction of Adolph Eichmann from Argentina violated the sovereignty of that nation. *Alvarez*, at p. 159.

³⁸ *U.S. v. Alvarez-Machain*, 504 U.S. 655, at 670 (1992).

³⁹ Department of Justice, United States Attorneys’ Manual, § 9-15.610. (“Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an *Alvarez-Machain* type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with the OIA before such return.”)

generally exhausted diplomatic channels and have been prompted by motivations strong enough to overcome concerns about diplomatic niceties.

A decision to prosecute an individual or a corporation for a breach of federal law is subject to the doctrine of “enforcement discretion.” Federal prosecutors are not required to prosecute every violation of U.S. criminal law, nor could they, given the finite resources at their disposal. A federal prosecution which involves a complex fact situation, international actors and events, the need to develop evidence that will withstand challenge in court, and the potential for significant foreign policy implications will not be undertaken lightly.

In allocating investigative and legal resources, federal prosecutors have considerable latitude in making decisions as to which laws to enforce, the extent of the enforcement effort, the selection of defendants, the resources devoted to particular cases, appellate strategy, and a myriad of other aspects of law enforcement. These decisions may be influenced purely by resource considerations, or they may be influenced by policy direction from the U.S. Department of Justice. In turn, the Justice Department must take into account the varying policy and political considerations, often from inconsistent perspectives, that abound in a law enforcement agency.

Thus, the presence in the criminal laws of a statute that proscribes a given activity does not necessarily mean that any particular violation of that statute will lead to a federal prosecution. Given the vicissitudes of policy, a decision not to prosecute a given violation at one point in time could be followed at another point in time by a full-fledged prosecution of that same violation. This analysis focuses primarily on whether there is a *potential* for U.S. law to be applied in prosecuting a certain activity or crime, not on whether the political and policy will is present on the kind of scale that would be necessary for a successful prosecution to be conducted.

Federal statutes that are potentially applicable to activities conducted in the U.S. or at its borders cover a wide range of activities that, in turn, may implicate those allegedly conducting certain illegal activities abroad. U.S. customs and immigration regulations, for example, can be used to intercept goods and people involved in these crimes. If plundered goods are moved into the United States accompanied by fraudulent customs documents, those responsible for the false documents are punishable in U.S. courts. Money derived from crime or criminal enterprises may be subject to interdiction under U.S. money laundering statutes. Persons traveling into or out of the U.S. for the purposes of conducting crime or criminal enterprises may use forged or altered passports. Traffickers may move their victims into the U.S. with forged travel documents.

The two U.S. statutes that may have the most significant potential for interdicting the illicit exploitation of resources abroad are: (1) the National Stolen Properties Act (NSPA);⁴⁰ and (2) the Racketeering Influenced Corrupt Organizations Act (RICO).⁴¹

⁴⁰ 18 U.S.C. § 2315. The NSPA reads in part: “Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$ 5,000 or more <ellipsis> of the value of \$ 500 or more, which have crossed a State or United States boundary after being

The NSPA makes it a federal felony offense to import property into the United States that has been “stolen, unlawfully converted or taken.” The term “stolen” has been consistently interpreted by the courts to include not only property acquired by outright theft, but property wrongfully taken from its rightful owner, with intent to deprive him of possession.⁴² In several reported cases, the NSPA has been applied to art antiquities taken from foreign countries and imported in to the United States.⁴³ These cases involved foreign patrimony laws (i.e. art antiquities made public property by law); accordingly, public property taken by force during a conflict may be considered “stolen” within the meaning of the NSPA. Thus, the NSPA interpretation could be applied to natural resources, acquired through outright theft, fraudulent acquisition, or plunder/pillage abroad, and imported into the United States.

A significant volume of the natural resources flowing from conflict areas (e.g. diamonds) are likely to end up in U.S. markets. Clearly, if a means could be found to identify given resource streams as “stolen,” and it could be shown that the buyers were aware that they were “stolen,” then the domestic NSPA could become a formidable weapon for interdicting the illicit resource streams, resulting in both accountability for past crimes, but also presenting a dampening effect on future violations. Hopefully, the combined effect would result in a lessening of conflict.

It could be difficult in some cases to prove that a particular shipment of natural resources was “stolen” and that the purchasers were aware of that fact. However, with modern investigative techniques, including the aid of undercover agents and informers, it should be well within the capabilities of the Federal Bureau of Investigation, aided by police officials in foreign countries through Interpol, to establish that a particular stream of natural resources stemmed from illicit sources and that the U.S. purchasers knew it.

The second U.S. statute with significant applicability to the actors involved in unacceptable business practices is the Racketeering Influenced Corrupt Organizations Act. RICO has been summarized as follows:⁴⁴

stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken <ellipsis> [s]hall be fined under this title or imprisoned not more than ten years, or both.” (Emphasis added.)

⁴¹ 18 U.S.C. § 1961 *et seq.*

⁴² The federal Court of Appeals for the Ninth Circuit approved the following jury instructions: “‘Stolen’ means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership.” *U.S. v. Hollingshead*, 495 F. 2d 1154, 1156 (9th Cir. 1974).

⁴³ The decision cited in the preceding footnote involved art antiquities, as do the following two federal court decisions: *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977) and *U.S. v. Schultz*, 2003 U.S. App. LEXIS 12834 (2d Cir. 2003). The NSPA decisions are discussed generally in the following law journal articles: Robert Morris Collin, *The Law and Stolen Art, Artifacts and Antiquities*, 36 How. L.J. 17 (1993) and Robert C. Schwartz, *NOTE: In Schultz We Trust: The Future of Criminal Prosecution for Importers of Illicit Cultural Property Under the National Stolen Property Act*, 11 Cardozo J. Int'l & Comp. L. 211 (2003).

⁴⁴ Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1246 (1992).

RICO prohibits the following activities: (1) acquiring an interest in an enterprise by using or investing income either directly or indirectly derived from a pattern of racketeering activity, (2) acquiring or maintaining either directly or indirectly an interest in an enterprise through a pattern of racketeering activity, (3) conducting or participating directly or indirectly in the affairs of an enterprise through a pattern of racketeering activity, and (4) conspiring to violate any of the above-listed provisions. The "pattern" of acts referred to in RICO consists of acts somehow "related" to one another by a common plan or scheme. The statute provides criminal and civil remedies for violations. Civil actions promise a plaintiff treble damages, costs of the suit, and attorneys' fees. On the criminal side, an individual convicted under RICO may be fined, imprisoned for up to twenty years, or both, and will be required to forfeit any proceeds derived from the prohibited activity.

RICO provides a civil cause of action for "any person injured in his business or property by reason of a violation of section 1962." *18 U.S.C. § 1964(c)*. Thus, a person injured abroad by such a violation may find relief under RICO. RICO Section 1962(c) provides that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)" of Section 1962.

The term "pattern of racketeering activity" is defined as follows: "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."⁴⁵ "Racketeering activity" includes (a) "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [*21 U.S.C. § 802*]), which is chargeable under State law and punishable by imprisonment for more than one year, and (b) any violation of a lengthy list of specific federal criminal statutes, including, *inter alia*, the NSPA, and statutes pertaining to counterfeiting, fraud relating to identification documents, mail fraud, financial institution fraud, unlawful procurement of citizenship and naturalization, witness tampering, misstatements in an application for a passport, visa or permit, peonage

⁴⁵ 18 U.S.C. § 1961(1).

and slavery, laundering of monetary instruments, sexual exploitation of children, trafficking in counterfeit goods, and white slavery.”⁴⁶

The U.S. prosecutors have a powerful tool when using RICO to prosecute a conspiracy charge. A RICO prosecution (or civil lawsuit) need not allege that the conspiracy took place on U.S. territory, only that it could have an effect within the United States.⁴⁷

The importance of RICO in connection with an effort to combat certain activities lies principally in its potential application to those perpetrators who engage in domestic or foreign commerce of the U.S. “through a pattern of racketeering activity,” or invest in a U.S. business or acquire U.S. real estate using the proceeds of their illicit activities. If they do so, or conspire to do so, they may face not only the potential for criminal prosecution, but lawsuits by the victims of their activities. A person who, on the requisite number of occasions and the requisite number of times, commits any of the acts listed under (a) or (b) in the preceding paragraph and thereafter uses the proceeds of such conduct in the U.S. may face a RICO charge. If the “racketeering activity” is itself a crime under U.S. law, e.g., importing “stolen” property, the person may face not only an NSPA charge, but a RICO charge as well. And even if the “racketeering activity” is not itself punishable in the United States, for example, it is an act “chargeable under State law and punishable by imprisonment of more than one year,” a RICO charge may be brought in the U.S. federal courts. The term “chargeable under State law” has been interpreted to mean that the act taking place abroad need only be one which, if committed in the United States, would be an offense punishable under State law.⁴⁸

Courts have sustained RICO counts in a number of ATCA cases: *Marcos*⁴⁹ and *Wiwa III* are leading examples. In the *Marcos* case, the Ninth Circuit held that the conduct of former President Marcos in the Philippines constituted “racketeering,” inasmuch as it involved fraudulent or otherwise illegal misappropriation of property. When the Marcoses brought millions of dollars of jewelry into the United States when they fled the Philippines, this constituted transportation of stolen property, a RICO predicate offense. The Marcoses also purchased real property in the United States, which constituted a violation of RICO. The Ninth Circuit affirmed the granting of an injunction prohibiting the Marcoses from disposing of any of their assets worldwide.⁵⁰ In *Wiwa III*, the court

⁴⁶ 18 U.S.C. § 1961((5)).

⁴⁷ See *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989) [hereinafter *Republic of the Philippines*]. See also Brilmayer and Norchi, 105 Harv. L. Rev. 1217, at 1257 (“In finding jurisdiction [in the Noreiga case], the court noted that, even if extraterritorial conduct produces no effect in the United States, a defendant can still be reached if he intended to produce an effect in the United States or is part of a conspiracy in which some co-conspirator's activities occurred in American territory.”)

⁴⁸ *Wiwa III*, 2002 U.S. LEXIS 3293, at court opinion 80.

⁴⁹ *Republic of the Philippines*, 862 F.2d. 1355.

⁵⁰ *Id.*, at 1358. (“Here there is alleged to be a group of individuals associated in fact for the purpose of illegally investing the fruits of fraud and illegally using the mails and wire and illegally transporting in interstate commerce the fruits of the fraud. The effect on the commerce of the United States of engaging in mail or wire fraud or bringing stolen property into the country is palpable. The Marcoses are mistaken in arguing that such criminal acts have no consequences for commerce to or in this country. The criminal enterprise which they are charged with conducting consisted in operations taking place within the United

held that alleged bribery, extortion, murder and arson, even though they occurred in Nigeria, nonetheless constitute “racketeering” within the meaning of RICO.⁵¹

Congress has also enacted numerous criminal statutes that apply to activities carried out entirely in the United States that may play an important role in an overall scheme to either violate international law or, if not prohibited under international law, nonetheless are considered to be unacceptable.

Extraterritorial acts that affect U.S. interests may be made criminal, and statutes that have reached beyond U.S. borders have survived constitutional challenges on a regular basis. Leading examples of this are: (1) the Foreign Corrupt Practices Act,⁵² which makes it a crime for a person subject to U.S. jurisdiction to bribe a foreign official; (2) 18 U.S.C. §§ 1114(1) and 1201(a)(5), making it a federal crime to kidnap and murder a U.S. federal agent; 18 U.S.C.S § 1959, applied to the murder in Mexico of an American national mistakenly identified as a U.S. federal drug agent; 31 U.S.C. § 5318, requiring domestic banks to conduct due diligence with regard to transactions in bank accounts held by foreigners so as to detect and report on transfers of funds involved in terrorist activities and funds derived from illegal activities, including corruption. Similarly, the extraterritorial enforcement of U.S. drug laws, as exemplified by the famous Noriega case,⁵³ rests on a theory of prevention of harm in the United States.⁵⁴

States. These operations had multiple effects on the domestic and foreign commerce of this country. If the operations were criminal, the operators incurred criminal liability under our law. RICO provides a civil cause of action for ‘any person injured in his business or property by reason of a violation of section 1962.’ 18 U.S.C. § 1964(c). Plaintiffs allege violations of two subsections found in section 1962: section 1962(c) and section 1962(d). Title 18 U.S.C. § 1962(c) provides that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Section 1962(d) makes it ‘unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)’ of Section 1962.”

⁵¹ *Wiwa III*, 2002 U.S. LEXIS 3293, at court opinion 83.

⁵² 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff.

⁵³ See *U.S. v. Noriega*, 117 F.3d 1205 (11th Cir. 1997).

⁵⁴ See Brillmeyer and Norchi, 105 Harv. L. Rev. 1217, at 1257: (“A jurisdictional issue also arose in the celebrated case of *United States v. Noriega*. The facts underlying the case are well known. In February, 1988, a federal grand jury in Miami indicted General Manuel Noriega for conspiracy to transport cocaine into and out of the United States. General Noriega (along with Lieutenant Colonel Luis Del Cid) was charged with a pattern of racketeering activity in violation of the RICO statutes as well as various violations of the drug law. General Noriega was charged as a ‘principal’ for violating the Travel Act, participating in a racketeering enterprise, and conspiring to import, distribute, and/or manufacture cocaine for sale in the United States.

On December 20, 1989, President Bush ordered United States combat troops into Panama City on a mission with the goal, inter alia, of seizing General Noriega to face the indictment in the United States. Not long after the invasion, Lieutenant Colonel Del Cid, the commander of two thousand Panamanian troops, surrendered to American forces. The apprehension of General Noriega took longer, but after eleven days in the Papal Nunciature in Panama City, General Noriega surrendered as well.

Supporting its conclusion, the Court cited Justice Holmes's opinion in *Strassheim v. Daily* for the proposition that ‘[a]cts done outside a jurisdiction, but intended to produce or producing effects within it, justify a State in punishing the cause of the harm as if [the accused] had been present at the effect, if the

6. May a business entity be prosecuted for violations international law in the courts of your country?

See the answer to Question 5.

III. Alternative Mechanisms: Civil Law/Tort

7. Can you think of any bases in your country's tort law (civil law) for suing individuals and/or business entities for violations of international law?

Although U.S. federal courts do not automatically apply the doctrine of universal jurisdiction, the 1980 decision by the Second Circuit in *Filartiga*⁵⁵ launched the federal courts into an expansive interpretation of the Alien Tort Claims Act⁵⁶ so as to allow numerous tort claims brought in federal court for a breach of the “law of nations.”

State courts have on rare occasions allowed tort claims brought by victims of certain crimes or unacceptable activities. For example, a state court in Hawaii allowed claims brought by the estate of a Philippine man against former Philippine president Ferdinand Marcos for false imprisonment, torture and conversion of property.⁵⁷ California courts allowed claims for forced labor and personal injuries brought by a Korean national against a cement company that had employed him as a slave laborer.⁵⁸ A Louisiana court allowed claims by citizens of Indonesia that they were injured by security forces employed by a subsidiary of a U.S. corporation⁵⁹ (although the court, in a later proceeding, dismissed the claims for insufficient pleadings).⁶⁰ The California Superior Court for Los Angeles County is currently trying a case brought by Burmese villages

State should succeed in getting him within its power.’ The impact territoriality theory of jurisdiction expounded by Justice Holmes indeed supports the Noriega court’s result. Importation of drugs has a direct and deliberate effect in the United States, which is enough under Strassheim to support application of American law. As Justice Holmes suggested, however, the impact theory limits itself to situations in which the consequences for the forum were intended or purposeful.

A quite different question would arise if the sole basis for obtaining jurisdiction over Noriega consisted of his alleged role in a conspiracy. Under a conspiracy theory of extraterritoriality, Noriega could be held to American law by virtue of his co-conspirators’ acts in the United States. This theory has been used in establishing personal jurisdiction over absent defendants, and, in the context of venue, the conspiracy theory has been justified by recourse to the defendant’s ‘constructive presence.’”)

⁵⁵ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) [hereinafter *Filartiga*].

⁵⁶ 28 U.S.C. § 1350. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The text of the statute is: “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.”

⁵⁷ *Roxas v. Marcos*, 89 Haw. 91 (1998).

⁵⁸ *Taheiyo Cement Corp. v. Superior Court*, 105 Cal.App.4th 399 (2003). This decision was subsequently overturned on constitutional grounds by the federal Circuit Court of Appeals for the 9th Circuit because the California statute allowing the case to be brought had impermissibly interfered with the foreign policy of the U.S. *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003).

⁵⁹ *Alomang v. Freeport-McMoRan, Inc.*, 718 So.2d 971 (La. 1998).

⁶⁰ *Alomang v. Freeport-McMoRan, Inc.*, 811 So.2d 98 (La. 2002).

involving claims for forced labor, rape and murder, essentially the same claims involved in the federal *Unocal* case currently pending before the federal Court of Appeals for the Ninth Circuit, discussed below. In addition, state law claims may be included in a federal complaint and decided by a federal court exercising supplemental jurisdiction under 28 U.S.C. § 1367(c).⁶¹

Although state courts are open to victims of human rights abuses occurring abroad, the federal courts are the preferred forum. This is due in large part to the favorable procedures contained in the Federal Rules of Civil Procedure, including liberal discovery rules. A defendant facing federal claims in state courts has the right to remove the case to federal court under 28 U.S.C. § 1441. Accordingly, most plaintiffs see little to gain by initiating litigation in a state court.

Defendants in many ATCA cases over the years have argued that the ATCA statute was only intended to allow the federal courts to take jurisdiction over tort claims arising under international law as it existed in 1789, eg. slave trading, piracy, violation of safe conduct and infringement of the rights of ambassadors. ATCA decisions over the past two decades have given the statute more than a mere jurisdictional interpretation; they have recognized a substantive private right of action that is coextensive with international law as it has developed since the statute was originally enacted in 1789. As discussed below, the U.S. Supreme Court has recently ruled that ATCA is a jurisdictional statute which allows the federal courts to enforce, as part of federal law, those provisions of international law that are clearly recognized and accepted among civilized nations.”⁶²

A separate private right of action in federal courts for torture committed “under color of law” and “extrajudicial killing” was created by Congress in 1991, when it adopted the Torture Victims Protection Act (TVPA).⁶³ The TVPA is codified as a note to the ATCA

⁶¹ See, for example, *Estate of Rodriguez v. Drummond*, 256 F.Supp.2d 1250 (N.D.Ala. 2003). State law claims for wrongful death and aiding and abetting were included in the federal complaint.

⁶² *Sosa v. Alvarez-Machain*, 159 L. Ed. 2d. 718, 753, 124 S. Ct. 2739, 2765, 543 U.S. ____ (2004).

⁶³ Torture Victim Protection Act of 1991. Act March 12, 1992, P.L. 102-256, 106 Stat. 73. Codified as a note to 28 U.S.C. § 1350. The text of the statute is: “Section 1. Short title

This Act may be cited as the 'Torture Victim Protection Act of 1991.

Sec. 2. Establishment of civil action

(a) Liability. 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.

(b) Exhaustion of remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions

(a) Extrajudicial killing. For the purposes of this Act, the term 'extrajudicial killing' means a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

in 28 U.S.C. § 1350.⁶⁴ Attached as Appendix A is a selection of ATCA and TVPA cases intended to provide the reader with an understanding of how the federal courts have interpreted and applied these two statutes.

An ATCA analysis must examine whether the underlying claim is based on the “law of nations.” Most judicial decisions acknowledge that “international law” is an amorphous body of authority, including treaties, decisions of international courts, widely observed customs and the writings of international legal experts.⁶⁵ Generally, “[A]ctionable violations of international law must be of a norm that is specific, universal and obligatory.”⁶⁶ As mentioned above, the U.S. Supreme Court has recently stated that: “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”⁶⁷ A breach of international law for which a private party may bring an action must be one that is intended to protect private individuals, which distinguishes it from those laws intended to protect the sovereignty of a state.

Although claims for piracy, slavery and genocide may be actionable without state authorization of the participation of a state actor, international law generally applies only to states, and thus there must be “state action” involved in order to constitute a breach of such law. In those cases, an individual may not violate an international legal norm unless he is acting under color of a state’s law.⁶⁸ The “under color of law” test may be met by a

(b) Torture. For the purposes of this Act--

(1) the term ‘torture’ means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

⁶⁴ See note 1, above, containing an excerpt from *Karadzic*, in which Judge Newman of the Second Circuit pointed to the legislative history of the TVPA as authority for Congressional approval of ATCA’s broad reach.

⁶⁵ *Filartiga*, 630 F.2d 876, at 880. (“The Supreme Court has enumerated the appropriate sources of international law. The law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’ *United States v. Smith*, 18 U.S. (5 *Wheat.*) 153, 160-61, 5 L. Ed. 57 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D.Pa.1963).”)

⁶⁶ *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F3d 1467, 1475 (9th Cir. 1994).

⁶⁷ *Sosa*, 159 L. Ed. 2d. 718, 753, 124 S. Ct. 2739, 2765, 542 U.S. ____.

⁶⁸ *Estate of Rodriguez v. Drummond Co.*, 256 F.Supp.2d 1250 (N.D.Ala. 2003).

showing that a private person was acting together (i.e. aiding and abetting or in complicity) with governmental authorities.⁶⁹ Often, courts confronting this issue draw parallels from cases involving the federal civil rights statutes, where “state action” must be found.⁷⁰

ATCA and TVPA are not a panacea for victims of human rights abuses committed abroad. The plaintiffs must first obtain personal service upon the perpetrators, and most potential defendants are foreigners not found in the United States. An individual may be served with process if he visits the United States, even briefly, using so-called “tag” service. Federal courts also have personal jurisdiction over corporations that are “doing business” in the United States. Absent such personal jurisdiction, ACTA and TVPA provide no means for judicial relief for a human rights victim.

Even where personal jurisdiction is established, ACTA/TVPA claims are also limited by the various doctrines applicable to all federal court cases that are discussed elsewhere in this section, such as sovereign immunity, forum non conveniens, head of state, political question, and others. Finally, even where a final judgment is rendered, enforcement of that judgment against an absent defendant with no discoverable asset in the U.S. is usually impossible. Because of this, many ATCA/TVPA defendants choose not even to appear in court to defend themselves. Many huge default judgments, often including millions of dollars in punitive damages, have been rendered.⁷¹ Few, if any, plaintiffs have obtained any substantial monetary relief.

⁶⁹ *Id.*

⁷⁰ See, *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362, at 374-376 (E.D.La. 1997).

⁷¹ *Teresa Xuncax, et al. v. Hector Gramajo*, 886 F. Supp. 162, 200 (D.Mass. 1995). {“n45 See, e.g., Ortiz Ex. E, documenting the following cases: *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (for torture to death: \$175,000 to sister, \$200,000 to father in compensation, \$5,000,000 to each as punitive damages); *Martinez-Baca v. Suarez-Mason*, No. 87-2057 SC (N.D. Cal., Apr. 22, 1988) (for systematic arbitrary detention and torture: \$11,170,699 in compensation (including lost earnings), \$10,000,000 in punitive to victim; *Forti v. Suarez*, No. 87-2058-DLJ (N.D. Cal. Apr. 25, 1990) (for first plaintiff, for arbitrary detention, torture, and witnessed abuse and execution of brother: \$3,000,000 compensatory, \$3,000,000 in punitive; for second plaintiff, for arbitrary detention, abuse and ‘disappeared’ mother: \$2,000,000 in compensation, \$1,000,000 punitive); *Trajano v. Marcos*, No. 86-0207, (D. Hawaii, May 19, 1991) (for torture and summary execution: \$236,000 in lost earnings, \$175,000 moral damages, \$1,250,000 exemplary damages to victim's estate; \$1,250,000 in compensation, \$1,250,000 exemplary to victim's mother; *Siderman v. Argentina*, No. CV-82-1772-RMT (MCx) (C.D. Cal. Sep. 28, 1984) (for torture: compensatory damages totalling \$ 2,607,575.63 to victim), vacated on other grounds, No. CV-82-1772-RMT (MCx) (C.D. Cal. Mar. 7 1985), rev'd and remanded, 965 F.2d 699 (9th Cir. 1992); *Quiros de Rapaport, et al. v. Suarez-Mason*, No. C87-2266 JPV (N.D. Cal. Apr. 11, 1989) (for torture and murder of one victim, disappearance of another: \$10,000,000 in compensation, \$10,000,000 punitive to victims' widows, \$5,000,000 in compensation, \$5,000,000 punitive to victims' mother and sister, respectively). See also *Todd v. Panjaitan*, No. CV-92-12255-PBS (D. Mass. Oct. 26, 1994) (awarding \$2,000,000 in compensation to mother as administratrix of son's estate, \$ 2,000,000 in compensation to mother, and \$10,000,000 in punitive damages); *Paul v. Avril*, No. 91-399-CIV (S.D. Fla. July 1, 1994) (awarding six victims of torture and arbitrary detention between \$2,500,000 and \$3,500,000 in compensatory damages each together with \$4,000,000 each in punitive damages.)”

A major motivating factor in many ATCA/TVPA cases is a desire on the part of the injured victim to tell his or her story and obtain a judicial acknowledgment of the mental and physical injuries he or she has suffered at the hands of the defendant.

Tort claims in federal court have arisen under the Foreign Sovereign Immunities Act (FISA) discussed below under Question No. 11.

8. What types of causes of action might be asserted against a business entity with respect to actions committed outside of your country but which involve a business entity that is domiciled in your jurisdiction?

The answer to this question is covered in the answers to Questions Number 5 and 7.

IV. Jurisdiction:

9. On what bases do the courts of your country assert jurisdiction over criminal and civil defendants?

U.S. courts⁷² have personal (*in personam*) jurisdiction over a natural person if: (1) the defendant is resident in or domiciled in a jurisdiction; (2) the defendant is physically present in the jurisdiction; (3) the defendant has consented to be sued; or (4) the defendant appears in court to defend the action, without stating that the appearance is for the purposes of contesting jurisdiction (“special appearance”).

U.S. courts have personal jurisdiction over a corporation if: (1) the corporation is organized in a jurisdiction; (2) the corporation is doing business in the jurisdiction;⁷³ (3) the corporation has consented to be sued; or (4) the corporation appears in court to defend the action without specifying that the purpose of the appearance is a special appearance.

⁷² Under the Federal Rules of Civil Procedure, federal district courts apply the procedural rules on jurisdiction that are applicable to the state jurisdiction in which they are sitting. F.R.C.P. 4(k)(1)(A).

⁷³ See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 329. (“[A] corporation is ‘doing business’ and is therefore ‘present’ in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York ‘not occasionally or casually, but with a fair measure of permanence and continuity.’ (quoting *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985)). In order to meet this standard, a plaintiff must show that a defendant engaged in ‘continuous, permanent, and substantial activity in New York.’ *Wiwa*, 226 F.3d at 95. The continuous presence and substantial activities need not be conducted by the foreign corporation itself. Indeed, personal jurisdiction may be based upon activities performed on behalf of a foreign corporation by an agent: Under well-established New York law, a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available. *Wiwa*, 226 F.3d at 95.”)

In personam jurisdiction over an individual or a corporation may be “general,” i.e. a suit may be brought for any cause of action over which the forum court has subject matter jurisdiction and there is proper venue; or, “specific,” i.e. the suit may be brought only with regard to those activities which gave rise to the cause of action.⁷⁴

In a criminal matter, if a criminal act is commenced in one state, but the defendant is in another state, the first state may ask the authorities to arrest the defendant and extradite him to the requesting state to stand trial. If the defendant has fled to a foreign country, a treaty of extradition is in effect between the foreign country and the U.S., the U.S. may formally request that the foreign country arrest and extradite the defendant to stand trial in the original court in which the criminal complaint was filed.

There are certain circumstances in which a court may obtain jurisdiction over property located within the jurisdiction, so-called *in rem* jurisdiction. There are other circumstances, such as in proceedings for the dissolution of marriage, in which the court may determine the marital status of a petitioner even though the spouse is not within the jurisdiction. This is done through publication or by mailing a copy of the petition to the last and usual place of abode of the absent spouse.

The term “physically present” is generally interpreted not to require presence for any period of time longer than necessary to serve the defendant with court papers.⁷⁵ This so-called “transient” or “tag” jurisdiction has allowed courts in the United States to obtain jurisdiction over persons who are merely visiting the U.S. temporarily.⁷⁶ Among the defendants who have been “tagged” in recent years are: Pena-Irala (served while in the United States on an expired visitor’s visa), Hector Gramajo, former Defense Minister of Guatemala, who was served while attending the Harvard Kennedy School, Karadzic (served when entering his hotel in New York City during a trip to New York during which he addressed the United Nations), Assasie-Gyimah (Ghanian military officials temporarily in the United States)⁷⁷; and Li Peng (former Chinese Premier, served while visiting the U.S. in connection with the Tiananmen Square massacre).

⁷⁴ See *International Shoe Co v Washington*, 326 US 310, 318 (1945). The decision notes that in some prior cases, the defendant’s “continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities”). See also Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv L Rev 1121, 1148-53 (1966). (The article introduces the “general” and “specific” terminology.)

⁷⁵ See *Burnham v Superior Court of California*, 495 U.S. 604 (1990)(Defendant served with divorce papers while on a visit to California.) “Tag” jurisdiction and “doing business” jurisdiction are referred to as “exorbitant” forms of jurisdiction. See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int’l L. J. 141 (2001) (Quoting John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT’L L. 695, 703 n.34 (1993). “Exorbitant jurisdiction can be defined as those assertions of jurisdiction that are not generally recognized by accepted principles of international law.”)

⁷⁶ A person may be prosecuted for a crime committed outside of the territory of the U.S. and found guilty even if he is kidnapped and forcibly brought to the U.S. See *U.S. v Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991).

⁷⁷ *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1193 (S.D.N.Y. 1996).

A corporation is “doing business” in a jurisdiction if it is conducting its affairs in some fashion that appears to be “continuous and systematic.”⁷⁸ The court must review the facts in each case to ensure that certain “minimal contacts” have occurred in order to meet constitutional standards for due process. In such a case, the corporation may be served with process on any claim that a plaintiff may have against it. This is referred to as “general” jurisdiction. In many jurisdictions, a corporation that has been formed outside of a state (a “foreign corporation”) must register with the state authorities in order to be allowed to do business within the state. Nonregistration carries with it certain penalties, among them the denial of the right to sue on contracts entered into in the state. Most, if not all, jurisdictions requiring the registration of foreign corporations also require the foreign corporation to designate an agent within the state for service of process (usually the state secretary). If a corporation is doing business, but has failed to register with the authorities, a plaintiff may nonetheless commence an action against the corporation and may make use of statutory authority to serve the corporation in its home jurisdiction. The statute is referred to as a “long-arm” statute.

A corporation that commits a crime in a jurisdiction may be made to answer through extradition proceedings, just as a natural person would be.

Additionally, if a corporation is not regularly doing business in a jurisdiction, yet commits a tort in that jurisdiction, an injured plaintiff may also make use of the “long-arm” statute to make service upon the corporation in its home jurisdiction, but only for the purposes associated with the particular tort involved.⁷⁹ The legal fiction involved here is that the corporation, by sending a product into, or taking some other action in, a state, has impliedly consented to be sued in connection therewith.

Because personal jurisdiction based on “doing business” requires very little more than certain “minimum contacts” with a jurisdiction, it enables plaintiffs to sue multinational corporations, even through their corporate headquarters and all other corporate offices may be outside of the jurisdiction or even the U.S. In *Wiwa II*, the court determined that merely maintaining a shareholder relations office in New York was sufficient to subject Shell to the jurisdiction of the federal court. Conversely, the district court in the *Unocal* case dismissed an action against Total S.A. on the grounds that the defendant did not have even minimal contacts with California.⁸⁰

Finally, it should be noted that a foreign government that maintains a diplomatic legation in the United States is always “present” in the United States, and it, or any of its sub-entities, may be sued in federal courts, subject to the Foreign Sovereign Immunities Act. Service of process through diplomatic channels is provided for under that Act.⁸¹

⁷⁸ See *International Shoe Machinery Co. v. Washington*, 326 U.S. 310, at 318, 320.

⁷⁹ A general discussion of the American systems of jurisdiction as compared with European systems can be found in Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. Colo. L. Rev. 1 (1993).

⁸⁰ *Total Dismissal*, 27 F. Supp. 2d 1174.

⁸¹ 28 USC § 1608. See Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, at 503 (2002).

10. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

Cost. The costs involved in federal court litigation can be prohibitive even when legal services are furnished pro bono. A human rights suit against a multinational corporation will inevitably be defended by one or more top law firms, each thoroughly familiar with the myriad ways in which a plaintiff can be worn down by costly and time-consuming legal maneuvers. A plaintiff can expect to see one or more motions to dismiss, which, if any is denied, will result in one or more appeals. In the meantime, there will be extensive discovery--depositions, interrogatories, requests for admission, and document requests. There will likely be numerous status conferences and incidental court appearances. If the motion to dismiss is unsuccessful, the defendants will file motions for summary judgment, resulting in further court appearances, briefs, and court conferences. If the plaintiff is seeking to certify a class under F.R.C.P. Rule 23, the defendant will likely oppose the certification, resulting in additional briefing, court appearances and appeals. Even a dedicated pro bono legal office can have its resources stretched thin by all of these proceedings. If the plaintiffs lose, they face the potential for an assessment of court costs, which could be significant.

U.S. Government and “Act of State” Issues. Even if jurisdiction and venue are proper, a federal court has discretionary authority to dismiss the suit under the act of state doctrine⁸² or one of its related doctrines, such as “comity” or “political question” (see discussion under Question No. 12 below). The U.S. Department of Justice may file an amicus brief to represent the interests of the U.S. government. Or, the State Department and/or the Department of Justice may inform the court, via a “Statement of Interest,” that the suit should be dismissed. It is also common for a foreign government to file a statement asking the court to employ the doctrines of comity⁸³ or forum non conveniens.

⁸² See further discussion of “act of state doctrine” below.

⁸³ See *Gabriel Ashtanga Jota v. Texaco Corporation*, 157 F.3d 153, at 160 (2d Cir. 1998) {hereinafter *Jota*}. (“When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum. That is the approach usually taken with a dismissal on the ground of forum non conveniens, as we noted in Part 1, and it is equally pertinent to dismissal on the ground of comity.”) See *Sarei v. Rio Tinto, op cit. at 1200*: {“ In deciding whether to invoke international comity, courts frequently look to the standard set forth in section 403 of the Restatement, which provides that ‘a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.’ RESTATEMENT, § 403(1). See also *Marsoner v. United States*, 40 F.3d 959, 965 (9th Cir. 1994) (‘Under the revised Restatement, reasonableness is ‘an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe’); *Sequihua, supra*, 847 F. Supp. at 63. The Restatement identifies a number of factors that courts should consider in assessing whether the exercise of jurisdiction would be unreasonable: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be

Legal Objections. A multinational corporation can be expected to raise every defense or objection to the lawsuit that can be advanced without embarrassing the presenting attorney. Among the myriad legal objections raised in previous ATCA cases are: the statute of limitations;⁸⁴ lack of standing, insufficient basis for certification of a class (including lack of common injuries or other factual or legal issues and failure of the plaintiffs to represent the class);⁸⁵ various formal deficiencies in pleadings;⁸⁶ lack of personal jurisdiction (including lack of jurisdiction over a parent corporation when the entity having contacts with the jurisdiction is a subsidiary); lack of subject matter jurisdiction (both statutory and constitutional objections having been presented); improper service of process; sovereign immunity; head of state immunity, forum non conveniens, the act of state doctrine,⁸⁷ justiciability (political question),⁸⁸ comity,⁸⁹ local

regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.’ RESTATEMENT, § 403(2).”) See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 147: (“Normally, comity entails a domestic court honoring a foreign court’s judgment or dismissing a case in favor of a pending proceeding. See, e.g., *Cunard S. S. Co. v. Salen Reefer Servs.* AB, 773 F.2d 452 (2d Cir.1985) (affirming the grant of comity to a Swedish court decision staying creditor actions); *Allstate Life Ins. Co. v. Linter Group, Ltd.* 994 F.2d 996 (2d. Cir. 1993) (affirming dismissal in favor of a pending proceeding in Australia).”)

⁸⁴ ATCA has no statute of limitations. In the absence of a specified time period, one court decision has applied the ten-year statute limitations found in the TVPA. See *Ivanova v. Ford Motor Company*, 67 F.Supp. 424, at 462 (D.N.J. 1999). Other cases have employed analogous state statutes of limitations. See *Alfredo Forti et al. v. Guillermo Suarez-Mason*, 672 F.Supp. 1531, at 1549 (N.D.Ca. 1988) (Applying the one-year statute of limitations for personal injuries under California law.)

⁸⁵ *Class Certification*, 167 Fed. Supp. 2d 1140, 1141. (“First, the plaintiff must have suffered an injury in fact -- an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”)

⁸⁶ See *Beanal v. Freeport-McMoran*, 1998 U.S. Dist LEXIS 2522 (E.D.LA 1998). The court dismissed the complaint for failure to state a claim (insufficient facts to support standing) after giving plaintiff leave to amend in a prior ruling.

⁸⁷ The act of state doctrine stems from the judicial recognition that “Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” *Underhill v. Hernandez*, 169 U.S. 250, 252 (1897). Related to the act of state doctrine is the justiciability or political question doctrine. The Second Circuit, writing in *Karadzic*, described the elements of this doctrine: “[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. at 217; see also *Can v. United States*, 14

action,⁹⁰ absence of state involvement (in an attempt to defeat an ATCA claim invoking the “law of nations”); absence of state involvement in torture (to meet the TVPA requirement that torture be carried out “under color of law); failure to join an indispensable party (usually a governmental entity which is immune from suit and cannot be joined or a foreign party over which the court has no personal jurisdiction); and failure to exhaust local remedies (under the TVPA).⁹¹

11. Do the courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

U.S. federal courts and the overwhelming majority of State courts recognize the doctrine of *forum non conveniens* (FNC).⁹² The Supreme Court described the doctrine in *Gulf Oil v. Gilbert*⁹³ and *Piper Aircraft Co. v. Reyno*.⁹⁴ The doctrine applies. The decision as to whether to apply the doctrine lies within the discretion of the trial court, and such discretion may be exercised even though jurisdiction and venue are proper in the selected forum.⁹⁵ Ordinarily, the appellate court will not disturb a trial court’s decision unless it is clear that the trial court failed to apply the correct rule of law, e.g. to consider all relevant factors when making its determination.⁹⁶ The defendant has the burden of proof with respect to all elements of the doctrine.⁹⁷ The plaintiff’s choice in selecting the forum must be given great weight.⁹⁸

F.3d 160, 163 (2d Cir. 1994).” *Karadzic*, 70 F.3d 232, 249. The Second Circuit commented that: “it would be a rare case in which the act of state doctrine precluded suit under [the ATCA].” *Id.*, at 250.

⁸⁸ See *Baker v. Carr*, 369 U.S. 186 (1962).

⁸⁹ The doctrine of comity is related to both the act of state doctrine and the doctrine of *forum non conveniens*, inasmuch as each doctrine requires the forum court to examine whether the courts of the state in which the acts occurred has an interest in the matter.

⁹⁰ See *Bigio v. Coca-Cola*, op cit. at 451: (“Under the local action doctrine, courts may not exercise jurisdiction over any ‘local’ action involving real property unless the property at issue is found within the territorial boundaries of the state where the court is sitting. [citations omitted].”)

⁹¹ In *Wiwa II*, 226 F.3d, at 56, the court found that exhaustion for TVPA purposes had occurred when the defendant did not show that it would be amenable to suit in Nigeria. (“Nigerian courts remain an uncertain forum for justice.”) The court also referred to the U.S. State Department Country Report for Nigeria, which stated: “The judiciary is subject to political influence, and is hampered by corruption and inefficiency. The judicial system was incapable of providing citizens with the right to a speedy trial.” Available at: <http://www.state.gov/g/drl/rls/hrrpt/2000/at/700.htm>.

⁹² See Phillip J. Blumberg, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 Am. J. Comp. L. 493, 524 (2002).

⁹³ *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947).

⁹⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) [hereinafter *Piper*].

⁹⁵ *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, at 100 (2d Cir. 2000) [hereinafter *Wiwa II*].

⁹⁶ *Id.*, at 107.

⁹⁷ See Blumberg, 50 Am. J. Comp. L. 493, at 506.

⁹⁸ *Wiwa II*, 226 F.3d, at 107.

The classic FNC analysis begins with the determination as to whether an alternative forum exists.⁹⁹ Although a court may require that there be more than the mere existence of a judicial system and the legal right to file suit, there is a split of authority as to whether certain systemic problems, such as the absence of a right to a jury trial, endemic judicial corruption, or the unavailability of legal aid area sufficient to preclude granting a motion to dismiss on *forum non conveniens* grounds.¹⁰⁰ If the defendant is not subject to service in the alternate forum, the court may condition its dismissal on FNC grounds upon the defendant's agreement to consent to jurisdiction.¹⁰¹

In *Piper*, the Supreme Court ruled that the likelihood that the law of the alternate forum may be less favorable to the plaintiff is irrelevant in determining whether an adequate forum exists.¹⁰² However, the Court also noted: "In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."¹⁰³ Despite this pronouncement, courts have in the past rarely refused to dismiss on the grounds that there were deficiencies in the alternative court that would affect the realistic availability of a judicial remedy.¹⁰⁴ However, the tide appears to be turning in favor of finding that an alternate forum is inadequate if the court system is corrupt or incompetent and the likelihood of a just result is remote.¹⁰⁵

⁹⁹ See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 124. ("In assessing whether or not to grant a dismissal based on the doctrine of *forum non conveniens*, a two step analysis is required. First, the court must determine whether an adequate alternative forum exists. Second, if such a forum exists, the court must undertake a balancing test and weigh several factors involving the private interests of the parties and the public interests at stake.")

¹⁰⁰ See Blumberg, 50 Am. J. Comp. L. 493, at 507. The article lists twelve factors commonly considered by courts in assessing the convenience of a foreign forum, and notes that courts have sometimes used one or more of these systemic deficiencies as grounds for the exercise of discretion to deny a motion to dismiss.

¹⁰¹ *Id.*, at 523. See *Republic of the Philippines*, 862 F.2d. ("We hold that dismissal on the ground of *forum non conveniens* was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador . . .")

¹⁰² *Piper*, 454 U.S. 235 at 247.

¹⁰³ *Id.*, at 255.

¹⁰⁴ Blumberg, 50 Am. J. Comp. L. 493, at 507. See also *Karadzic*, 70 F.3d 232, at 249. ("Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.")

¹⁰⁵ The "clearly unsatisfactory" exception in *Piper* has been aptly applied in human rights cases. Recent cases have declined to dismiss on FNC grounds, relying in part on reports that the proposed alternate forum was unlikely to provide a favorable result even if the case could be brought from an institutional or procedural standpoint. See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 127-128. Court decisions on the exhaustion of remedies provision in the TVPA could lead to further expansion of the "clearly unsatisfactory" doctrine. See *Wiwa II*, 226 F.3d, at 57, where the courts of Nigeria were viewed as potentially corrupt, making it unlikely that the plaintiff could obtain a suitable remedy.

Having found that an adequate alternate forum is available, the court must next consider both the private and public interests affected and weigh them together to determine where the balance of interests lies. In human rights cases seeking a U.S. trial of events occurring in a foreign jurisdiction, the balancing process can become complex. Private factors to be considered involve the question of whether a serious hardship or inconvenience would be avoided by dismissal. The private interest factors to be weighed include: the availability of witnesses and the cost of bringing them or their testimony to the forum,¹⁰⁶ the location of the parties, the location of documents and the costs of production, and the availability of suitable counsel.¹⁰⁷ The costs inconvenience involved on the defendant's side must be weighed against the costs and inconvenience involved on the plaintiff's side.¹⁰⁸

The public interest equation seems to give the courts the greatest difficulty. One principal factor considered by the courts is the interest of the forum state in providing a judicial forum for its citizens and residents.¹⁰⁹ The converse consideration applies when the

¹⁰⁶ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 141. ("Second, large corporations like *Talisman* routinely litigate cases outside of their home jurisdiction. Third, as plaintiffs point out, 'the need to photocopy and ship documents is hardly unprecedented in American litigation.' *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49, 66 (2d Cir. 2000).")

¹⁰⁷ See *Wiwa II*, 226 F.3d, at 107. ("The record, however, contains substantial evidence that trial in New York will be less expensive and burdensome for the plaintiffs. The plaintiffs have already obtained excellent pro bono counsel to litigate this matter in the courts of the United States; there is no guarantee that they will be able to obtain equivalent representation in England without incurring substantial expenses. Two of the plaintiffs lived in the United States when the action was brought. The cost and difficulties of relocating themselves to England for the duration of the litigation is likely to be onerous. Finally, the plaintiffs and their attorneys have already made substantial investments of time, money, and energy in pursuing this litigation in the U.S. courts. Requiring the plaintiffs to replicate them in the British courts would substantially increase their burden.")

¹⁰⁸ See *Wiwa II*, 226 F.3d, at 103. ("In arguing that England is a more appropriate forum, defendants rely upon arguments such as the inconvenience of shipping documents from England to the United States and the additional cost for a Nigerian witness of flying to New York rather than London. These considerations are indeed a legitimate part of the *forum non conveniens* analysis, but (a) the defendants have not demonstrated that these costs are excessively burdensome, especially in view of the defendants' vast resources, cf. *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) ('It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit.'). and (b) the additional cost and inconvenience to the defendants of litigating in New York is fully counterbalanced by the cost and inconvenience to the plaintiffs of requiring them to reinstitute the litigation in England--especially given the plaintiffs' minimal resources in comparison to the vast resources of the defendants. These considerations cannot justify overriding the plaintiffs' choice of forum.") See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 143. ("In this case, defendants clearly have the upper hand when it comes to resources. The relative poverty of plaintiffs is a factor the Court may consider.")

¹⁰⁹ See *Wiwa II*, 226 F.3d, at 106. ("The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses 'provides scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong. House Report at 3, 1992 U.S.C.C.A.N. at 85. This passage supports plaintiffs' contention that in passing the Torture Victim Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts. If in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations.")

parties are all or partly from the alternate forum state. Another principal factor is the potential burden on the selected court (i.e. court congestion), which raises the issue of whether the burden should best be borne by the foreign forum, which may have the greatest interest in the outcome. The extra burden of trying a “foreign” case includes: the need to consider conflict of laws issues and, where necessary to apply foreign substantive law; the need to make special provisions for translation and interpretation in a variety of foreign languages; and the need to consider matters of sovereign immunity and matters of state. Complex multi-party litigation can thus add an overwhelming burden to an already crowded court docket, and an overworked federal judge’s temptation to find that another forum is more convenient is surely great.

Lawsuits against business entities on account of their involvement in regional conflicts will generally involve events that occur far from the U.S. and almost entirely foreign parties. The defendants are likely to raise the FNC issue at the outset and to press it aggressively. As in any litigation situation, the decision to dismiss on FNC grounds a claim involving foreign parties and foreign events arising from a conflict situation is a complex process which only requires the judge to “consider” all relevant factors and to “balance” them before reaching a result. Thus, it may be difficult to predict the outcome of a motion to dismiss on FNC grounds, and it is also difficult to obtain a reversal of a decision which is left to the discretion of the trial judge.

The courts appear to be recognizing the diminishing disparity in costs and inconvenience between litigating in one location as opposed to another. Fax machines, e-mail, video conferencing, jet travel and video depositions all contribute towards reducing that disparity.

Some recent cases where the doctrine of forum non conveniens was litigated:

Aguinda v. Texaco Co., 303 F.3d 470 (2d Cir. 2002), affg. *Aguinda v. Texaco. Co.*, 945 F.Supp. 625 (S.D.N.Y. 1996).¹¹⁰

Cabiri v. Assasie-Gyimah, 921 F.Supp. 1189 (S.D.N.Y. 1996).¹¹¹

¹¹⁰ Suit dismissed: all plaintiffs and all members of the putative class were living in Ecuador or Peru.

¹¹¹ Dismissal denied. The court stated (at 1199: “In the instant action, the access to sources of proof and the availability of witnesses are, as plaintiff points out, in defendant's control. Since this action is brought pursuant to United States case law and statutes, namely the Alien Tort Claims Act and the Torture Act, this Court has an interest in having the issues of law presented decided by a United States court. Moreover, the Court is unconvinced that the courts of Ghana provide an adequate alternative forum for this action. Presuming Cabiri's allegations to be true, he would be putting himself in grave danger were he to return to Ghana to prosecute this action. As the court in *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854 (S.D.N.Y. 1983), aff'd, 767 F.2d 908 (2d Cir. 1985), stated: “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the district court may conclude that dismissal would not be in the interests of justice. A motion to relegate a plaintiff to a foreign forum will be denied if the plaintiff shows that foreign law is inadequate, or that conditions in the foreign forum plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.” *Id.* at 861 (internal quotations and citations omitted). In that case, Judge Haight determined that the plaintiffs, citizens of Iran who had applied for political asylum in the United States, would be unable to obtain justice in the courts of Iran, and that if the plaintiffs were to return to Iran to prosecute their claims, as the defendant

Eastman Kodak Co. v. Kavlin, 978 F.Supp. 1078 (S.D.Fla. 1997)

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)¹¹²

The Presbyterian Church of Sudan v. Talisman Energy, 2003 U.S. Dist. LEXIS 4085 (SDNY 2003)¹¹³

Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 99 (2d Cir. 2000) (*Wiwa II*)¹¹⁴

12. Would the doctrine of sovereign immunity be applicable to protect a state-owned enterprise?

Under the Foreign Sovereign Immunities Act (FSIA),¹¹⁵ a business enterprise which is majority-owned by a foreign state or a political subdivision thereof is an “agency or

suggested, they would likely be killed. Under those circumstances, the court held that the defendant's motion to dismiss based upon *forum non conveniens* had ‘no substance.’ *Id.* Likewise in the instant action, the Court finds that plaintiff is highly unlikely to obtain justice in the Ghanaian courts, and that to force plaintiff to bring this action in Ghana would unnecessarily put him in harm's way, or, also unacceptable, would mean an end to the action altogether.” [Citation omitted.]

¹¹² The Second Circuit (at 250) dismissed the FNC claim as follows: “Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.”

¹¹³ The court observed (at court opinion 126): “It would be rather surprising if the government of Sudan conducted a war of ‘ethnic cleansing’ against plaintiffs and at the same time granted them a fair judicial process to remedy those injuries. In addition, it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them.”

¹¹⁴ The Second Circuit (at 109) summarized its analysis of FNC as applied in this case as follows: “In order to be granted dismissal based on *forum non conveniens*, the defendants bear the burden of establishing that the Gilbert factors ‘tilt[] strongly in favor of trial in the foreign forum.’ *R. Maganlal & Co.*, 942 F.2d at 167. We believe they have failed as a matter of law to meet this burden. The factors weighing against dismissal include (1) the substantial deference courts are required to give to the plaintiff's choice of forum, (2) the enormous burden, expense, and difficulty the plaintiffs would suffer if required to begin the litigation anew in England, (3) the policy favoring our court's retention of such suits brought by plaintiffs who are residents of the United States, and (4) the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture. These factors are more than sufficient to overcome the defendants' weak claim for dismissal based on *forum non conveniens*.”

¹¹⁵ 28 U.S.C. § 1330, 1332(a)(4), 1391(F), 1441(D), 1602 TO 1611 (2001) See the discussion of the history of sovereign immunity in the U.S. and the genesis of the FSIA in Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 Va.J.Int'l L. 765 (1996). Prior to 1952, the U.S. followed the “absolute” theory of sovereign immunity, whereby all foreign states, including their state-owned enterprises, were immune from suit. In theory, nonstate activities of foreign sovereigns were not immune, but in practice, the State Department would routinely send a “letter of suggestion of immunity” whenever requested by a foreign government, the courts routinely dismissed actions on the strength of such letters. The “restrictive theory” of immunity was adopted in the U.S. in 1952 when the Acting Legal Advisor to the

instrumentality” of that foreign government.¹¹⁶ Thus, unless one of the specific exceptions in the FSIA applies, the business enterprise has the same presumptive immunity from suit in both federal and State courts as the foreign government itself.¹¹⁷ In human rights cases, the FSIA is frequently invoked by defendants, and often allowed by courts.

The defendant has the initial burden of demonstrating that the immunity provision applies, whereupon the burden shifts to the plaintiff to establish an exception.¹¹⁸ The specific exceptions are found in §1605.¹¹⁹

State Department advised the Attorney General that the State Department believed that the issue of whether a particular activity was “commercial” was a matter best left to the courts. See letter from Jack B. Tate, State Department Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952) in 26 Dep’t St. Bull. 984 (1952). The so-called “Tate Letter” is published as an appendix to the Court’s decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976). After the Tate Letter, the practice of providing “suggestions of immunity” was discontinued, leaving the courts with the task of determining whether a given activity was either governmental or private/commercial. The “restrictive” theory of sovereign immunity has been statutory since the FSIA was enacted in 1976.

¹¹⁶ (b) An “agency or instrumentality of a foreign state” means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . 28 U.S.C. § 1603(b).

Conflicts among courts have arisen over the question of whether the term “instrumentality” pertains to either a business entity which is owned by two different foreign states or a business entity which is owned by another entity which is in turn majority-owned by a foreign state or political subdivision thereof (“tiered ownership”). See Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat’l L. 489 (2002).

¹¹⁷ See *Ge Bao v. Li Peng*, 2002 U.S. App. LEXIS 7311 (C.A.D.C. 2002). (Government of the People’s Republic of China and its Chairman held to be “foreign states” and therefore immune from lawsuit involving a class action for forced labor in China.)

¹¹⁸ *The Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1470 (9th Cir. 1995).

¹¹⁹ 28 U.S.C. § 1605: “(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

The exceptions which are pertinent to this analysis are: (1) the waiver exception in § 1605(a)(1); (2) the “commercial activities” exception in § 1605(a)(2); (3) the exception for actions to determine the rights in property taken in violation of international law in § 1605(a)(4); the tort exception in § 1605(a)(5); and the anti-terrorist exception in § 1605(a)(7).¹²⁰

The waiver exception in § 1605(a)(1) provides that the holder of the immunity may waive it “either explicitly or by implication.” The term “by implication” has given rise to unsuccessful arguments that foreign entities have implicitly waived immunity by joining international conventions recognizing human rights,¹²¹ or even by violating *jus cogens*

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(22)]) when the act upon which the claim is based occurred.”

¹²⁰ The remaining two exceptions are unlikely to be of any practical or legal significance in future human rights litigation. The first, the exception for determining rights in property obtained by inheritance or gift or immobile property located in the U.S. (§ 1605(a)(3)) is likely to apply, if at all, to actions for recovery of plunder which may be exchanged for property in the U.S. Second, dealing with enforcement of arbitration clauses in commercial agreement (§ 1605(a)(6)), is unlikely to apply to situations where formal agreements with human rights victims general do not exist.

¹²¹ *Argentine Republic v. Amerasia Hess*, 488 U.S. 428, at 442-443 (“Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.”)

international human rights norms.¹²² Generally, courts have not found a waiver to be present unless it is contained in a document that unmistakably uses waiver language when referring to a particular event or set of events, such as a waiver of suit provision in a commercial contract.¹²³ This interpretation has made the waiver exception of little interest in recent human rights cases.

The “commercial activity” exception in § 1605(a)(2) has figured prominently in the dismissal of a number of human rights suits. In dealing with the commercial activity exception, U.S. courts have principally focused on two issues: Was the activity “commercial” in nature,¹²⁴ and did the commercial activity have a sufficient nexus with the United States, either by being conducted in or in part in the U.S. or by having a “direct effect” within the United States?¹²⁵ In *Saudi Arabia v. Nelson*,¹²⁶ the Supreme Court determined that unjustified imprisonment and torture of an American citizen by the Saudi Arabian police as part of an effort by a state-owned hospital to silence his criticism of hospital safety policies was not “commercial activity” because the activities that the suit was “based upon (i.e. the actual imprisonment and torture) were the exercise of police powers (i.e. governmental in nature).¹²⁷

In *Letelier v. Republic of Chile*,¹²⁸ the Second Circuit found that the use of LAN, the state-owned Chilean airline, to transport the assassins of the former Chilean ambassador to the U.S., was not sufficiently connected to the crime itself to make the actual

¹²² *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *Smith v Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996).

¹²³ Implicit waiver provision of 28 U.S.C. § 1605(a)(1) must be construed narrowly. *Saudi Arabian Airlines Corp. v Tamimi (In re Tamimi)*, 176 F3d 274 (CA 4 1999).

¹²⁴ “Commercial activity” is defined in 28 U.S.C. § 1603(d): (d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” “Commercial activity” occurs when a foreign state or a state-owned enterprise “engages in the marketplace in the manner or a private citizen or corporation, exercises only those powers than [sic] a private citizen can exercise, and does not exercise powers peculiar to sovereigns.” See Working Group, p. 23. See *The Export Group v. Reef Industries, Inc.*, *op.cit.*, at p. 1475. (“[A]cts which are either commercial in nature or those which private persons normally perform.”)

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

¹²⁵ Foreign instrumentalities have been found amenable to suit in federal courts for such matters as: employment discrimination [in connection with U.S. office of foreign airline. *Alonso v. Saudi Arabian Airlines Corp.* 98 Civ. 7781 (SAS), 199 U.S. Dist. LEXIS (S.D.N.Y. 1999); presence of a ship within the 12-mile territorial limits of U.S. jurisdiction. *Compania Anonima Venezolana De Navegacion*, 1995 U.S. Dist. LEXIS 22176 (Dist. Guam 1995)

¹²⁶ *Saudi Arabia v. Nelson*,¹²⁶ 507 U.S. 349 (1993).

¹²⁷ *Id.*, at 361. (“The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state’s exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature [citations omitted].”)

¹²⁸ *Letelier v. Republic of Chile*, 748 F.2d 790 (1983).

assassination by use of a car bomb “commercial” activity within the meaning of the FSIA.¹²⁹

Even where the courts have found that the claim is “based upon” commercial activity, the activity may not have a “direct effect” in the U.S. In *Republic of Argentina v. Weltover*,¹³⁰ the Supreme Court allowed an action to proceed against the Argentine government brought by a non-U.S. plaintiff to enforce payment of certain government bonds. The only connection with the United States was that the bonds were payable in New York. This tangential connection with the United States would imply that an equally tangential nexus between a human rights abuse and the United States would suffice. However, subsequent lower court cases have shown otherwise.

In *Barry J. Martin v. The Republic of South Africa*,¹³¹ the Second Circuit found that a claim for injuries arising out of the refusal of a South African state-owned hospital to treat a black American was barred by the FSIA because the only direct effect alleged in the United States was that the plaintiff returned to the United States.

In *Prinz v. Republic of Germany*,¹³² the D.C. Circuit held “The lingering effects of a personal injury suffered overseas [slave labor and associated abuses occurring in wartime Poland] can not be sufficient to satisfy the direct effect requirement of the FSIA.”

In the *Unocal* litigation, the Ninth Circuit found that the military government of Myanmar (State Law and Order Restoration Council, or SLORC) and its state-owned oil company (MOGE) were engaging in “commercial activity” while participating in the forced labor, rape and murder associated with the Yadana pipeline project, but that the effects of such abuses were felt only in Myanmar, thus defeating the “commercial activity” exception.¹³³

The exception for “property taken in violation of international law” in § 1605(a)(3) may be applicable to the recovery of plunder, because it appears to allow a claimant to seek the return of plundered property which may have been converted into commercial assets in the U.S. It may have limited applicability, since most plunderers are likely to avoid investing in U.S. This portion of the FSIA may have potential linkages with RICO actions.

The exception for torts committed by foreign entities (§ 1605(a)(5)) is likely to be of little practical use to human rights plaintiffs, since it requires a showing that the activities giving rise to the tort occurred entirely in the U.S. or else that there are effects of the tort in the U.S. In *Argentine Republic v. Amerada Hess Shipping Co.*,¹³⁴ the Court held that

¹²⁹ The plaintiffs had earlier prevailed under the tort exception in the FSIA (discussed below), and were seeking to level against LAN under a provision which allows a successful plaintiff to reach “commercial” assets involved in the commission of a tort.

¹³⁰ *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

¹³¹ *Barry J. Martin v. The Republic of South Africa*, 836 F.2D 91 (1st Cir. 1987)

¹³² *Prinz v. Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994).

¹³³ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 19263, at court opinion 66.

¹³⁴ *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989).

the effects must occur within U.S. territory, not merely within the admiralty jurisdiction of the U.S. (the high seas, where Argentine military aircraft attacked and damaged a tanker).

The exception for terrorist activities in § 1605(a)(7) is likely to provide little practical comfort to most victims of human rights violations. The exception allows only U.S. nationals to sue and the perpetrator must be someone acting in his official capacity on behalf of a foreign state that is listed as a sponsor of terror in a federal regulation.¹³⁵ The current list includes: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.¹³⁶

The FSIA did not supersede certain other judicial doctrines that could lead the court to dismiss an action against a foreign actor. These doctrines, discussed above under Question No. 10 include: the act of state doctrine, the head of state immunity doctrine, the doctrine of comity, the political question doctrine (also referred to as the justiciability doctrine), and the local action doctrine.

¹³⁵ See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141, at n62 (2001). See, e.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, at 12-19 (D.D.C. 1998) (finding the FSIA § 1605(a)(7) exception to foreign sovereign immunity applicable as against Iran); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, at 68-70 (D.D.C. 1998) (finding the exception applicable as against Iran); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, at 1247-48 (S.D. Fla. 1997) (finding the exception applicable as against Cuba), vacated sub nom. *Alejandre v. Telefonica Langa Distancia de P.R., Inc.*, 185 F.3d 1277 (11th Cir. 1999).

¹³⁶ 22 C.F.R. 126.1(d)(2002)

APPENDIX A: Summary Descriptions of Selected Decisions Under the Alien Tort Claims Act

The Filartiga v. Pena-Irala (1980).

The Court of Appeals for the Second Circuit issued the first decision recognizing that the Alien Tort Claims Act (ATCA) created a federal cause of action. The defendant in *Filartiga v. Pena-Irala*¹³⁷ was a Paraguayan police official who allegedly tortured and killed Joelito Filartiga because he suspected that Filartiga's father was hostile to the Stroesser regime. The father and daughter of the victim later moved to the United States. When they learned that Pena had come to the U.S. as a visitor, they served him with a complaint filed in the Southern District of New York. The trial judge dismissed the suit on jurisdictional grounds, ruling that the "law of nations" did not extend to the treatment by a foreign country of its own citizens.¹³⁸

The Second Circuit reversed, ruling that the phrase "law of nations" in ATCA refers to the law of nations as it exists today, not as it existed at the time ATCA was enacted.¹³⁹ In searching for the sources of the "law of nations", the Court stated:

The Supreme Court has enumerated the appropriate sources of international law. The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law' [citations omitted].¹⁴⁰

The court noted that there is universal acceptance that torture is proscribed under international humanitarian law; it has been proscribed under numerous international declarations, conventions and treaties, among them being the International Declaration of Human Rights¹⁴¹ and the U.N. Declaration on Torture.¹⁴² The court stated: "The treaties

¹³⁷ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) [hereinafter *Filartiga*].

¹³⁸ *Filartiga*, 630 F. 2d, at 880.

¹³⁹ *Filartiga*, 630 F. 2d, at 881. ("Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.")

¹⁴⁰ *Filartiga*, 630 F.2d, at 880.

¹⁴¹ *Filartiga*, 630 F.2d, at 883. ("The international consensus surrounding torture has found expression in numerous international treaties and accords. E. g., American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ('No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment'); International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 (semble). The substance of these international agreements is reflected in modern municipal i.e. national law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay. Our State Department reports a general recognition of this principle: 'There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens There is no doubt that these rights are often violated; but

and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments.”¹⁴³ By ruling that the law of nations regulates not just the conduct of nations vis-à-vis each other, but the conduct of nations and individuals towards individual persons, the Second Circuit set the stage for a new era in federal human rights litigation.¹⁴⁴ Following the trial on remand before the district court, the Filartigas obtained a judgment against Pena in the amount of \$10,385,364, of which \$10,000,000 was for punitive damages.¹⁴⁵

Tel-Oren v. Libyan Arab Republic (1984).

In *Hannoch Tel-Oren v. Libyan Arab Republic*,¹⁴⁶ Israeli survivors of an attack in Israel¹⁴⁷ sued Libya, the Palestine Liberation Organization and others for various criminal violations and torts, including ATCA claims for violation of the “law of nations.” The matter was dismissed by the District court for lack of subject matter jurisdiction and also on statute of limitations grounds, and the D.C. Circuit affirmed the dismissal, although on widely different grounds. Each of the three judges on the panel concluded that the suit should be dismissed, but each gave his own reasons. The decision is notable because of the spirited debate between Judges Edwards and Bork over two fundamental issues raised in an ATCA analysis: (1) whether ATCA is merely a procedural statute which allows plaintiffs to sue for torts where a private right of action exists under international law, or whether ATCA itself provides individuals with a right to sue where no such express right exists in international law; and (2) whether ATCA addresses only the “laws of nations” as they stood in 1789, when the Judiciary Act was enacted, or whether it addresses international laws as they have ripened to the present day.

Judge Edwards wrote that there is no requirement in ATCA for the existence of a private right of action in international law itself—once a “violation” has occurred, the basis for

virtually all governments acknowledge their validity.’ Department of State, Country Reports on Human Rights for 1979, published as Joint Comm. Print, House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. 2d Sess. (Feb. 4, 1980), Introduction at 1. We have been directed to no assertion by any contemporary state of a right to torture its own or another nation’s citizens.”)

¹⁴² Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975).

¹⁴³ *Filartiga*, 630 F.2d, at 884.

¹⁴⁴ As of this writing [October 2004], there have been more than sixty federal court decisions relying on *Filartiga*.

¹⁴⁵ *Filartiga v. Pena-Irala*, 577 F. Supp. 869 (S.D.N.Y. 1984).

¹⁴⁶ *Hannoch Tel-Oren, et al. v. Libyan Arab Republic, et al.*, 726 F.2d 774 (D.C. Cir. 1984), [hereinafter *Tel-Oren*] affg. *Hannoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 549 (D.D.C. 1981).

¹⁴⁷ *Tel-Oren*, 726 F.2d, at 771: (“On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization (hereinafter ‘the PLO’) turned a day trip into a nightmare for 121 civilian men, women and children. The PLO terrorists landed by boat in Israel and set out on a barbaric rampage along the main highway between Haifa and Tel Aviv. They seized a civilian bus, a taxi, a passing car, and later a second civilian bus. They took the passengers hostage. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded. Most of the victims were Israeli citizens; a few were American and Dutch citizens.”)

redress is under U.S. law.¹⁴⁸ Judge Bork wrote that the courts must look to international law itself for the source of a right to sue; ATCA is merely a grant of procedural jurisdiction for U.S. courts to entertain causes of action existing under the “law of nations.”¹⁴⁹ Judge Edwards, in response, pointed out that such an interpretation would render ATCA meaningless, since there is no express right in international law for individuals to sue for redress.¹⁵⁰

Judge Bork also argued that ATCA could only refer to the “laws of nations” existing in 1789, and without a further expression of Congressional intent, it was inappropriate for federal courts to impose their own somewhat speculative views as to what Congress could originally have intended.¹⁵¹ To do so would be to interfere with the conduct of foreign policy, which, under the separation of powers within the U.S. Constitution, is assigned to the legislature and the executive.¹⁵²

Judge Edwards responded by citing the Supreme Court in *The Paquete Habana*,¹⁵³ where the Court held that the “law of nations” consisted in “the general consent of civilized nations,” as it exists at the present time, and thus one must look to the *current* state of international law.¹⁵⁴

Judge Edwards upheld the lower court’s dismissal of the action because he believed that international law applied only to “state” actors, and the PLO was not a “state” actor, and hence beyond the reach of ATCA.¹⁵⁵ He also believed there is also no “harmony or consensus” in international law regarding acts of terrorism.¹⁵⁶ He suggested that the courts should look to U.S. common law for the substantive authority for victims to sue.¹⁵⁷ Judge Bork upheld the dismissal because ATCA did not confer a substantive right to sue upon the plaintiff and thus the court lacked subject matter jurisdiction. Judge Robb upheld the dismissal on the grounds that the case involved a “political question,” where a

¹⁴⁸ *Tel-Oren*, 726 F.2d, at 779.

¹⁴⁹ *Tel-Oren*, 726 F.2d, at 819.

¹⁵⁰ *Tel-Oren*, 726 F.2d, at 779.

¹⁵¹ *Tel-Oren*, 726 F.2d, at 822. (“Since international law does not, nor is it likely to, recognize the capacity of private plaintiffs to litigate its rules in municipal courts, as a practical matter only an act of Congress or a treaty negotiated by the President and ratified by the Senate could create a cause of action that would direct courts to entertain cases like this one.”)

¹⁵² *Tel-Oren*, 726 F.2d, at 812. (“A statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection. It will not do simply to assert that the statutory phrase, the ‘law of nations,’ whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers’ general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.”)

¹⁵³ *The Paquete Habana*, 175 U.S. 677, (1900).

¹⁵⁴ *Tel-Oren*, 726 F.2d, at 789.

¹⁵⁵ *Tel-Oren*, 726 F.2d, at 795.

¹⁵⁶ *Id.*

¹⁵⁷ *Tel-Oren*, 726 F.2d, at 782.

decision by the court would amount to an impermissible intrusion into U.S. foreign policy.¹⁵⁸

Judge Bork's concurring opinion has been cited by the U.S. Department of Justice in its amicus brief to the Ninth Circuit in the *Unocal* appeal, discussed below.

Forti v. Suarez-Mason (1988).

*Forti v. Suarez-Mason*¹⁵⁹ consists of two district court decisions involving ATCA and state law claims against a former Argentine general for his actions during the Argentine "dirty war."

The court originally followed *Filartiga* and Judge Edward's rationale in *Tel-Oren*, stating: "Plaintiffs must plead a violation of the law of nations as it has evolved and exists in its contemporary form."¹⁶⁰ The court rejected numerous defenses, among them being the claimed failure to join the defendant's military superiors in Argentina as "indispensable parties."¹⁶¹

The court initially denied a motion to dismiss claims for cruel, false imprisonment, assault and battery, intentional infliction of emotional distress, conversion, murder and summary execution, wrongful death, and a survival action, but dismissed claims for "cruel, inhuman and degrading treatment" and "disappearances" on the grounds that these actions did not constitute violations of the "law of nations."¹⁶²

On rehearing, the court considered affidavits presented by eight international law scholars and other materials to the effect that "forced disappearances" is internationally recognized as a part of the law of nations for ATCA purposes, and reinstated the claim for disappearances.¹⁶³ The court found that the plaintiffs had failed to show that there was an "international consensus" that "cruel, inhuman or degrading treatment" was contrary to the "law of nations," and accordingly denied the motion for reconsideration on this issue.¹⁶⁴

The Marcos Litigation (1986-1996).

Ferdinand Marcos, the deposed former dictator of the Philippines, fled to Hawaii in 1986. There, he was served with a number of complaints filed by victims of human rights

¹⁵⁸ *Tel-Oren*, 726 F.2d, at 825.

¹⁵⁹ *Alfredo Forti et al. v. Guillermo Suarez-Mason*, 672 F.Supp. 1531 (N.D.Ca. 1988) [hereinafter *Forti I*]; *reh'g. granted*, 694 F.Supp 7097 (N.D.Ca. 1988) [hereinafter *Forti II*].

¹⁶⁰ *Forti I*, 672 F.Supp., at 1539.

¹⁶¹ *Forti I*, 672 F.Supp., at 1552. ("Absent an interest in the litigation, a government superior who allegedly issued an order to perform the challenged action is merely a potential joint tortfeasor. A joint tortfeasor is not a 'necessary' party within the meaning of Rule 19.")

¹⁶² *Forti I*, 672 F.Supp., at 1152.

¹⁶³ *Forti II*, 694 F.Supp., at 711.

¹⁶⁴ *Forti II*, 694 F.Supp., at 712.

abuses. These complaints were initially dismissed by the district court, citing the “act of state doctrine.”¹⁶⁵ The Ninth Circuit reversed.¹⁶⁶ All complaints were consolidated into a single class action with approximately 10,000 members of the class.¹⁶⁷

The Republic of the Philippines also filed an action seeking the repatriation of funds illegally obtained and invested in the U.S.¹⁶⁸

During the course of these protracted proceeding, the defendants raised a host of arguments against the imposition of liability under ATCA and TVPA. All were ultimately dismissed by the courts, including: that the claims were barred by the statute of limitations;¹⁶⁹ that the class certification was improper because the class defined was overly board (all citizens of the Philippines who had been injured by Marcos’ actions) and the plaintiffs were not representative of the entire class;¹⁷⁰ that, under constitutional principles, the court lacked jurisdiction over Marcos because all acts occurred in the Philippines and therefore there was no “nexus” with the U.S.;¹⁷¹ that the claims were barred by the Foreign Sovereign Immunities Act;¹⁷² that ATCA does not create a private right of action by an individual plaintiff;¹⁷³ that ATCA is only a jurisdictional statute and implies no substantive cause of action;¹⁷⁴ that Marcos was not responsible for the actions of his subordinates;¹⁷⁵ that the plaintiffs had not exhausted their local remedies, as required under TVPA;¹⁷⁶ that the trial court improperly allowed exemplary (punitive) damages;¹⁷⁷ and that the trial court employed an improper method of calculating damages, using a statistical method.¹⁷⁸

The trial judge awarded the class exemplary damages in the amount of \$766 million and punitive damages in the amount of \$1.2 billion.¹⁷⁹ The Ninth Circuit let the award stand.¹⁸⁰

¹⁶⁵ *Trajano v. Marcos*, 1986 U.S. Dist. LEXIS 22541 (D.Ha. 1986) [hereinafter *Marcos I*].

¹⁶⁶ *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)(nonpublished opinion).

¹⁶⁷ *Hilao v. Marcos*, 103 F.3d 767, 774 (9th Cir. 1996) [hereinafter *Marcos IV*].

¹⁶⁸ *The Republic of the Philippines v. Ferdinand E. Marcos*, 862 F.2d 1355 (9th Cir. 1988).

¹⁶⁹ *Marcos IV*, 103 F.3d, at 773.

¹⁷⁰ *Marcos IV*, 103 F.3d., at 774.

¹⁷¹ *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992) [hereinafter *Marcos II*]. The court declared that the extraterritorial reach of ATCA rested upon the general recognition that the prohibition on torture contained in international law is a *jus cogens* norm.

¹⁷² *Marcos II*, 978 F.2d, at 498. The Marcos’ actions could not be “state action” because they violated Philippine law and were thus not authorized by the state; hence they were not protected under the FSIA.

¹⁷³ *Marcos II*, 978 F.2d, at 503.

¹⁷⁴ *Hilao v. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) [hereinafter *Marcos III*], (“We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards which ‘confer [] fundamental rights upon all people vis-a-vis their own governments.’ [citation omitted].”)

¹⁷⁵ *Marcos IV*, 103 F.3d, at 777.

¹⁷⁶ *Marcos IV*, 103 F.3d, at 778.

¹⁷⁷ *Marcos IV*, 103 F.3d, at 780.

¹⁷⁸ *Marcos IV*, 103 F.3d, at 786.

¹⁷⁹ *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Ha. 1995).

¹⁸⁰ *Marcos IV*, 103 F.3d, at 787.

Prinz v. Germany (1994).

In *Prinz v. Germany*,¹⁸¹ the D.C. Circuit ruled that the federal district court had no jurisdiction over a claim in tort and quasi-contract brought by Hugo Prinz, a Holocaust survivor, who had been held as a slave laborer in Poland during WWII. The court held that the Foreign Sovereign Immunities Act,¹⁸² which would otherwise have created a federal question, was not retroactive, and, in any case, even if the court applied the “commercial activities” exception in the Act, such exception did not apply since the only “direct effect” in the U.S. was that the plaintiff resided there, which was insufficient to invoke the exception.

Xuncax v. Gramajo (1995).

*Teresa Xuncax, et al. v. Hector Gramajo*¹⁸³ was an ATCA suit brought by a group of expatriate Guatemalan citizens and a nun who was a U.S. citizen against the former Defense Minister of Guatemala. The claims were for torture, deaths and injuries of a particularly gruesome nature inflicted between approximately 1982 and 1989 by the Guatemalan military. The court found that Gramajo had responsibility for the actions of those under his command.¹⁸⁴ It found that Gramajo was not entitled to immunity under the FSIA, since his actions were totally outside the scope of his official authority.¹⁸⁵ It found that the TVPA allowed suits for torture taking place prior to its enactment.¹⁸⁶ It found that the TVPA’s exhaustion requirement was met, since the courts in Guatemala had not yet reached a decision in a criminal action against Gramajo, and Guatemalan law did not allow civil actions to be brought until after judgment was rendered in a criminal case.¹⁸⁷

The court followed *Filartiga* in finding that the “law of nations” referred to in ATCA could be determined by reference to “international consensus,” and further determined that torture, summary execution, disappearance, and arbitrary detention were “fully recognized violations of international law.”¹⁸⁸ It ruled, however, that a claim for “cruel, inhuman and degrading treatment must be divided into two categories: (1) a category consisting of actions aimed directly at the plaintiff (witnessing torture, having one’s home ransacked, being bombed); and (2) acts directed at others which place one in fear and cause one to flee the country. Only the first category is fully recognized as a violation of international law.¹⁸⁹ It held that only the victim could sue for torture or arbitrary detention inflicted on a relative.¹⁹⁰ The court awarded compensatory damages in the range of \$500,000 to \$3,000,000 to the individual plaintiffs and punitive damages

¹⁸¹ *Prinz v. Germany*, 26 F.3d 1166 (C.A.D.C. 1994).

¹⁸² See discussion of the Act under Question No. 12 in the preceding section.

¹⁸³ *Teresa Xuncax, et al. v. Hector Gramajo*, 886 F. Supp. 162 (D.Mass. 1995) [hereinafter *Xuncax*].

¹⁸⁴ 886 F.Supp., at 172.

¹⁸⁵ 886 F.Supp., at 175.

¹⁸⁶ 886 F.Supp., at 177.

¹⁸⁷ 886 F.Supp., at 178.

¹⁸⁸ *Xuncax*, 886 F.Supp., at 184.

¹⁸⁹ 886 F.Supp., at 187.

¹⁹⁰ 996 F.Supp., at 192.

ranging from \$500,000 to \$6,000,000.¹⁹¹ As part of its analysis, the court considered damage awards in other ATCA/TVPA cases. The other plaintiffs were awarded compensatory damages in the \$500,000 to \$2,000,000 range, but no punitive damages, since the court applied Guatemalan law, which has no provision for such damages.¹⁹²

Kadic v. Karadzic (1995).

*Kadic v. Karadzic*¹⁹³ involved two related actions filed against Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of “Srpska.” Plaintiffs were numerous victims of human rights abuses committed by Bosnian-Serb forces under Karadzic’s command. The district court (Judge Leisure) dismissed both suits on the grounds that the ATCA and TVPA claims for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death were not cognizable under the “law of nations” unless committed by a state actor. Since the U.S. government had not formally recognized Srpska, Karadzic was a private individual, and, as such, not subject to an ATCA or TVPA suit.¹⁹⁴

On appeal, the Second Circuit reversed. The court held that claims for violation of the “law of nations” could be made only against individuals, whether or not acting under state authority. This ruling followed a scholarly review of international legal authority, including early cases involving piracy and the slave trade, a 1795 opinion of the U.S. Attorney General relating to claims against American citizens who aided the French in plundering British property, the Restatement (Third) of Foreign Relations,¹⁹⁵ Judge Edwards’ opinion in *Tel-Oren*,¹⁹⁶ various UN General Assembly declarations,¹⁹⁷ and the Genocide Conventions.¹⁹⁸

The court concluded that the alleged violations constituted genocide and war crimes, which fall within a category of offenses of “universal concern,” and thus are those for

¹⁹¹ 886 F.Supp., at 202.

¹⁹² *Id.*, at 202.

¹⁹³ *Kadic v. Karadzic*, 70 F.3d 232 (2d. Cir. 1995), *rehearing denied, sub nominee Kadic v. Karadi* [sic], 74 F.3d 377 (2d. Cir. 1995), *reversing Doe v. Karadzic*, 866 F.Supp. 734 (S.D.N.Y. 1994).

¹⁹⁴ *Doe v. Karadzic*, 866 F.Supp., at 742. The TVPA requirement that torture be conducted “under color of law” was interpreted by the court to require that the actions be attributable to a state entity.

¹⁹⁵ Restatement (Third) of the Foreign Relations Law of the United States (1986), pt.2, introductory note; § 702, n3. (“Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”)

¹⁹⁶ *Tel-Oren*, 726 F.2d, at 795. (“[a] handful of crimes to which the law of nations attributes individual responsibility. . .”)

¹⁹⁷ G.A. Res. 96(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946), G.A. Res. 95(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188 (1946).

¹⁹⁸ The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *Doe v. Karadzic*, 866 F.Supp., at 241. (“Especially pertinent to the pending appeal, the Convention makes clear that ‘persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. [citation omitted] These authorities unambiguously reflect that, from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.’”)

which individual actors are liable under international law.¹⁹⁹ Further, the court held that the plaintiffs were entitled to show at trial that Karadzic, as the president of Sprska, was a “state actor” for purposes of international law, or that he had acted in concert with a state (the former Yugoslavia) and could thus be held liable for both ATCA and TVPA violations, including torture inflicted “under color of law.”²⁰⁰

The court went on to reject the applicability of the “political question”²⁰¹ and “act of state” doctrines.²⁰²

Abebe-Jira v. Negewo (1996).

In *Abebe-Jira*,²⁰³ the Eleventh Circuit upheld a judgment against an Ethiopian prison guard for compensatory and punitive damages on ATCA claims for torture and cruel and inhuman treatment. Plaintiffs were Ethiopian citizens. The court examined the line of ATCA and TVPA cases, beginning with *Filartiga*, and rejected claims that ATCA did not create a private right of action,²⁰⁴ and that the subject matter raised nonjusticiable political questions.²⁰⁵

Beanal v. Freeport-McMoran (E.D.La 1998).

The plaintiff in *Beanal v. Freeport-McMoran*,²⁰⁶ was a tribal leader in Irian Jaya, Indonesia, who filed an ATCA claim on his own behalf and as a representative of victims of abuses allegedly committed by an American company in operating private security

¹⁹⁹ *Kadic v. Karadzic*, 70 F.3d, at p. 243. (“The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, see Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 *Int'l Conciliation* 304 (April 1949) (collecting cases), and remains today an important aspect of international law, see Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4 *The Vietnam War and International Law* 447 (R. Falk ed., 1976).”)

²⁰⁰ *Id.*, at 244.

²⁰¹ *Kadic v. Karadzic*, 70 F.3d, at 249.

²⁰² *Id.*, at 250. (“However, as in *Filartiga*, 630 *F.2d* at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.”)

²⁰³ *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

²⁰⁴ *Id.*, at 848. (“Lastly, we find support for our holding in the recently enacted Torture Victim Protection Act of 1991 (TVPA), Pub.L. No. 102-256, 106 Stat. 73. In enacting the TVPA, Congress endorsed the *Filartiga* line of cases: The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed ‘in violation of the law of nations.’” H.R.Rep. No. 367, 102d Cong., 2d Sess. 3, reprinted in 1992 U.S.C.C.A.N. 84, 86 (emphasis added). Congress, therefore, has recognized that the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law.

²⁰⁵ *Id.*

²⁰⁶ *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362 (E.D.La. 1997) [hereinafter *Beanal I*] and *Beanal v. Freeport-McMoran Co.*, 1998 U.S. Dist. LEXIS 2522 (E.D.La. 1998) [hereinafter *Beanal II*]

forces to protect its mining operation. The defendant corporation was alleged to have used its security guards to detain, torture, and otherwise abuse the indigenous people. The complaint asserted claims for environmental torts, human rights abuses, and “cultural genocide.” The defendant moved to dismiss on a variety of grounds.

The Eastern District of Louisiana decision. The decision is notable for its searching inquiry into previous ATCA/TVPA cases and its favorable treatment of the *Filartiga*, *Kadic* and other cases in what appears to be a considerable effort to find a way to allow one or more claims to go forward. However, in the end, the court held that environmental torts and “cultural genocide” were not actionable under ATCA. As to the human rights abuses, the court also concluded that the plaintiff had not stated sufficient facts to establish claims under either ATCA or the TVPA. Regarding the TVPA, the court concluded: (a) that a corporation was not an “individual” within the meaning of the TVPA, and therefore not subject to the statute;²⁰⁷ and (b) that the defendant was not a “state,” and had not acted in a relationship with a state, and therefore had not acted “under color of law.” Although no TVPA claim could be upheld, the court noted that the TVPA did not supersede ATCA; accordingly, it might be possible to state a claim for torture under ATCA, although the court is somewhat vague in discussing just how this was to be done. It granted leave to the plaintiff to amend his complaint to allege facts sufficient to state an ATCA cause of action of some sort. The court also found that Beanal had not pled sufficient personal injuries to have standing to bring the action, but, again, allowed the plaintiff 60 days to amend his pleadings. When the plaintiff failed in his amended pleadings to include sufficient allegations of fact to support claims for genocide or other human rights abuse, and claims for personal injury, the matter was dismissed, with prejudice.²⁰⁸

Jota v. Texaco (1998).

In *Jota v. Texaco*,²⁰⁹ the Second Circuit affirmed the dismissal of an ATCA suit brought by members of indigenous tribes of Ecuador against Texaco alleging environmental damage to their native lands due to oil operations. The Second Circuit affirmed the lower court’s dismissal on grounds of *forum non conveniens*, comity, and failure to join an indispensable party, although it conditioned its affirmance of the dismissal on *forum non conveniens* grounds on Texaco’s agreement to subject itself to the jurisdiction of the courts of Ecuador.²¹⁰ The matter has been brought in Ecuadoran courts.

Ivanova v. Ford (1999).

In *Ivanova v. Ford*,²¹¹ the federal district court in New Jersey dismissed a class action for unjust enrichment and *quantum meruit* under Michigan and Delaware law,²¹² for unjust

²⁰⁷ *Beanal I*, 969 F.Supp., at 382.

²⁰⁸ *Beanal II*, 1998 U.S. Dist. LEXIS, at court opinion 11.

²⁰⁹ Gabriel Ashtanga Jota v. Texaco Corporation, 157 F.3d 153 (2d Cir. 1998).

²¹⁰ *Id.*, at 159.

²¹¹ *Ivanova v. Ford Motor Company*, 67 F.Supp. 424 (D.N.J. 1999).

²¹² *Id.*, at 432. Ford Motor Company is incorporated in Delaware and has its principal place of business in Michigan.

enrichment under German law, and for violation of the law of nations under ATCA. Ivanova, a Belgian citizen, claimed that she had literally been purchased, along with 38 other adolescents, and had been forced to work for Ford Werke, A.G. in Germany during WWII.²¹³ The court concluded that the plaintiff had stated a valid claim for forced labor under ATCA, following the *Filartiga* rationale and citing as authority international law the Nuremberg trials, the Rome Statute of the International Criminal Court, and numerous court decisions in the U.S., including *Tel-Oren*, and *Kadic*.²¹⁴

However, the court dismissed all claims, generally on two grounds: (1) that the statute of limitations had expired (in the case of the ATCA claim, the court used the ten-year period under the TVPA, since ATCA has no statute of limitations and the court may apply the period contained in the “most closely analogous” statute;²¹⁵ and (2) that a claim for forced labor during WWII raised “nonjusticiable political questions” which were more properly to be addressed by the executive and legislative branches of government.²¹⁶

Bigio v. Coca-Cola Company (2000).

In *Bigio v. Coca-Cola*,²¹⁷ the Second Circuit applied the act of state doctrine to dismiss an ATCA claim brought by several Egyptians whose property was seized by the Egyptian government in the early 1960’s. The plaintiffs alleged that the original seizure was motivated by the fact that they were Jewish, and that the seizure was a breach of the “law of nations” because it was motivated by religious persecution. The plaintiffs complained that Coca-Cola had subsequently acquired the property, knowing that the Bigio plaintiffs had a claim to it. The court found that no ATCA claim had been pleaded, since the complaint did not allege that Coca-Cola had participated in the initial expropriation. The court dismissed the argument that Coca-Cola had failed to stop the Egyptian government from disposing of the property.

Tachiona v. Mugabe (2001).

In *Tachiona v. Mugabe*,²¹⁸ the plaintiffs were Zimbabwean citizens who were arrested, tortured and beaten by the forces of the Zimbabwe government in connection with the June 2000 parliamentary elections. Their ATCA/TVPA suit in the Southern District was dismissed on grounds of “head of state immunity” as well as diplomatic immunity. Mugabe and his associated were in the United States at the invitation of the United Nations when they were served. The court, however, allowed a default judgment against the Zimbabwe African National Union-Patriotic Front, the Zimbabwe government's ruling political party of which Mugabe was First Secretary and President, and two other named individual defendants were senior officers.

²¹³ *Id.*, at 440. (“Such assertions suffice to support an allegation that Defendants participated in slave trading.”)

²¹⁴ *Id.*, at 439-441.

²¹⁵ *Ivanova v. Ford Motor Company*, 67 F.Supp., Id., at 462.

²¹⁶ *Id.* At 484.

²¹⁷ *Raphael Bigio et al. v. Coca-Cola Company*, 239 F.3d 440 (2d. Cir. 2000).

²¹⁸ *Adella Chiminya Tachiona v. Robert Gabriel Mugabe*, 169 F.Supp. 2d 259 (S.D.N.Y. 1999).

Sarei v. Rio Tinto (2002).

In *Sarei v. Rio Tinto*,²¹⁹ the Central District of California dismissed all ATCA/TVPA claims filed as a putative class action by a group of natives of Bougainville, New Guinea, against an international mining company headquartered in London. The plaintiffs alleged war crimes, crimes against humanity, torture, extrajudicial killing, racial discrimination and environmental harm. They alleged that the defendants incited a bloody ten-year civil war in which thousands were killed or injured. During the proceedings, the court received a Statement of Interest from the State Department that stated that continuance of the lawsuit would adversely affect the foreign policy of the United States, largely based on the fact that a peace agreement had recently been reached and was in the process of being implemented.²²⁰ The court, placing great emphasis on the government's position, dismissed on the basis of the "act of state" doctrine,²²¹ the "political question" doctrine,²²² and the doctrine of comity.²²³

Aguinda v. Texaco (2002).

In *Aguinda v. Texaco*,²²⁴ the Second Circuit affirmed the District court's dismissal on *forum non conveniens* grounds of claims brought on essentially the same facts as alleged in the *Jota v. Texaco* litigation.

Wiwa v. Royal Dutch Petroleum Company (2002).

*Wiwa v. Royal Dutch Petroleum Company*²²⁵ involved an ATCA/TVPA action brought by the next of kin of Ken Wiwa and John Kpuien, two Nigerian environmental activists who were arrested, tortured and eventually hanged after a trial by a special tribunal by the Nigerian government, allegedly for their activities opposing the defendants' development of oil properties in the Ogoni region of Nigeria. A Jane Doe plaintiff alleged personal suffering. The plaintiffs stated ATCA/TVPA claims for summary execution, crimes against humanity, torture, forced relocation, rape and other violations of international

²¹⁹ *Alexis Holyweek Sarei, et al. v. Rio Tinto PLC*, 221 F.Supp. 2d 1111 (C.D.Ca. 2002).

²²⁰ *Id.* At 1181. ("On November 5, 2001, the Attorney General, acting on behalf of the Department of State, filed a Statement of Interest of the United States pursuant to 28 U.S.C. § § 516 and 517. The Statement of Interest attached an October 31, 2001 letter from the Legal Advisor of the State Department to the Attorney General's Office that 'explained the Department of State's views on the effects that continued adjudication of the action may have on the conduct of U.S. foreign relations.' Specifically, the Legal Advisor stated that continued adjudication of this lawsuit 'would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations.'")

²²¹ *Id.* at 1193.

²²² *Id.* at 1198.

²²³ *Id.* at 1200, 1204.

²²⁴ *Maria Aguinda, et al. v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002), *aff'g. Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

²²⁵ *Wiwa v. Royal Dutch Petroleum Company*, 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. 1998), *modified by Wiwa v. Royal Dutch Petroleum Company*, 1998 U.S. Dist. LEXIS 22352 (S.D.N.Y. 1998) [hereinafter, collectively, *Wiwa I*]; *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir. 2000) (hereinafter *Wiwa II*); and *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. LEXIS 3293 (S.D.N.Y. 2002) [hereinafter *Wiwa III*].

law, together with a variety of common law claims under the laws of Nigeria, New York, and the U.S.

At the District Court level, Judge Kimba Woods dismissed the original complaint on *forum non conveniens* grounds, finding that an alternate forum existed in England, and also that the court lacked personal jurisdiction over the corporate defendants because they lacked “minimum contacts” with New York. Her dismissal was conditioned on the defendants consent to service of process in England, compliance with all applicable discovery rules, their consent to pay any judgment rendered, their waiver of any security bond that might be required and their waiver of any statute of limitations defense if the action were to be committed within one year of final disposition of the U.S. matter.²²⁶

On appeal, the Second Circuit reversed, stating: (1) that the defendant corporation had sufficient contacts with New York on account of its maintenance of an investor relations office in New York; and (2) that the District Court, in making its *forum non conveniens* analysis, had failed to take into account critical factors: (a) that the choice of the forum by the plaintiffs should be given greater weight on account of the fact that some of the plaintiffs were U.S. nationals; (b) that the U.S. has an interest in seeing that claims for violation of international law are litigated in a U.S. forum; and (c) the balancing test to be applied had given undue weight to considerations favoring a British forum.²²⁷

On remand, the Judge Woods court applied the legal tests enunciated by the Second Circuit and, in a very thorough and instructive decision, denied the defendants’ motion to dismiss. In the course of that decision, the District court analyzed the TVPA in such a way as to support a claim against one of the individual defendants for aiding and abetting in the torture violations,²²⁸ and also analyzed the RICO statute so as to allow claims for economic injuries suffered by the plaintiffs.²²⁹

The Unocal Litigation (1997-Present).

The ongoing Unocal ATCA litigation²³⁰ involves a pipeline project (the “Yadana Project”) to transport natural gas from the eastern coast of Myanmar, through the Tenasserim region in southern Myanmar, to Myanmar’s border with Thailand. The Yadana Project is a joint venture of Unocal Corporation and its wholly-owned subsidiary, Union Oil Company of California (both U.S. corporations)(28.2625%); Total, S.A. (a French company)(31.2375%); the Myanmar Oil and Gas Enterprise (a state-owned

²²⁶ *Wiwa I*, 1998 U.S. Dist. LEXIS, at court opinion 8.

²²⁷ *Wiwa II*, 226 F.3d, at 101.

²²⁸ *Wiwa III*, 2002 U.S. LEXIS, at court opinion 50.

²²⁹ *Id.*, at court opinion 66.

²³⁰ The principal court decisions to date in the *Unocal* litigation are: *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 334 (C.D. Cal. 1997) [hereinafter *National Coalition*]; *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997) [hereinafter *Paez*]; *Doe v. Unocal Corp.*, 27 F.Supp. 2d 1174 (C.D. Cal. 1998) [hereinafter *Total Dismissal*]; *Doe v. Unocal Corp.*, 67 F.Supp. 2d 1140 (C.D. Cal. 1999) [hereinafter *Class Certification*]; *Doe v. Unocal*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000) [hereinafter *Lew Opinion*]; *Doe v. Unocal*, 2002 U.S. App. LEXIS 129263 (9th Cir. 2002) [hereinafter *Ninth Circuit Panel Opinion*].

enterprise of the Myanmar government)(15%); and a Thai governmental entity (25.5%). Unocal held its interest in the Yadana Project through a subsidiary, Unocal Myanmar Offshore Company. The complaints allege that the Myanmar military provided security and other services to the Project, including the building of roads, helipads and an airstrip along the pipeline route. It is alleged that the Myanmar military engaged in serious human rights abuses while providing these services, including forcing villagers to work on roads, camps, helipads, etc., torturing and executing those who refused, torturing and assaulting persons, raping women, taking land and other property without compensation, and forcing villagers to relocate away from the pipeline route.

The plaintiffs in the two related (but not consolidated) actions were originally eighteen local villagers from the Tenasserim region (four in one action are referred to as the “Roe” plaintiffs, and the remaining fourteen are referred to as the “Doe” plaintiffs), the Federation of Trade Unions of Burma, and the National Coalition Government of the Union of Burma. The Doe plaintiffs had sought to represent an entire class of residents of the Tenasserim region who were injured by the Project.

The complaints state claims under ATCA, TVPA, RICO and California state common law claims for wrongful death, false imprisonment, assault, intentional infliction of emotional distress, and negligence. Class certification was denied by the district court on the grounds that the relief sought against Unocal could not redress their claimed injuries.²³¹

Three of the original villager plaintiffs and the National Coalition Government of the Union of Burma were dismissed. In the Roe action, the district court dismissed the claims of Government in Exile on the grounds that it lacked standing to sue in a federal court, since it was not the recognized government of Myanmar. In the same decision, the court dismissed the claims of the Trade Unions to sue in a representative capacity, leaving only potential claims based on harm to the Trade Unions themselves.²³²

The original list of defendants included the Myanmar military, the Myanmar state-owned oil company, the Yadana Project, Total, S.A., Unocal and several high-ranking Unocal executives. The Myanmar military and the Myanmar-owned oil company were each granted dismissal by the district court on the grounds that they were entitled to sovereign immunity under the Foreign Sovereign Immunity Act²³³ and that the claimed “commercial activity” exception to the FSIA was inapplicable because the activity involved, albeit of a commercial nature (construction of a pipeline) neither occurred on U.S. territory nor had a direct effect in the U.S.²³⁴ Total S.A. was dismissed on the grounds that it did not have the “minimal contacts” with California required in order to employ the California long-arm statute to obtain personal jurisdiction over it.²³⁵ The foregoing series of dismissals left only Unocal Corporation, Union Oil of California and

²³¹ *Class Certification*, 67 F.Supp. 1140, at 1147.

²³² *National Coalition*, 176 F.R.D. 329, at 360.

²³³ See discussion of the FSIA under Question No. 11 below.

²³⁴ *Paez*, 963 F.Supp. 880, at 888.

²³⁵ *Total Dismissal*, 27 F.Supp.2d 1174, at 1184.

two Unocal executives as the remaining defendants in the action (collectively referred to as *Unocal*).

The complaints against Unocal are not based on assertions that these defendants personally committed the alleged abuses. The plaintiffs assert various theories under which Unocal is responsible for the actions of the Myanmar military or individual soldiers in the commission of the abuses: Unocal allegedly entered into an arrangement with the Myanmar military to provide security for the Yadana Project, although it had in its hands reports that the Myanmar government regularly engaged in abuses under humanitarian law.²³⁶ Further, Human Rights Watch informed Unocal at a meeting held in early 1995 that forced labor was so pervasive in Myanmar that Human Rights Watch could not condone any investment that aided the Myanmar regime.

Unocal and its executives allegedly worked closely with the Myanmar military during the course of the pipeline construction, meeting regularly to give directions as to the pipeline route to be followed, and supplying food, wages and other forms of support. Unocal allegedly was well aware of the commission of abuses throughout the life of the Yadana Project, but it did nothing to stop such abuses, nor did Unocal end its relationship with the Myanmar military.

The district court granted Unocal's motion for summary judgment on all claims. First, the court addressed claims relating to all abuses except for forced labor (which it analogized to slavery). It reasoned that international law required that the perpetrator of these abuses be a "state actor," i.e. acting "under color of law." The court stated that the "color of law" element would be satisfied if there had been "joint action" involving both Unocal and the Myanmar military, or if Unocal has "participated or influenced" the military in its commission of the crimes, or if Unocal had "conspired" with the military in the commission of the abuses. It found that a shared goal of making a profit did not amount to "joint action." It further found that the plaintiffs did not present evidence that Unocal "participated in or influenced" the military through its control of the military, or that Unocal had "conspired" with the military to commit the abuses. Accordingly, the plaintiffs' ATCA and TVPA claims failed.

Regarding whether Unocal was vicariously liable for the military's use of forced labor, the court engaged in analysis of three decisions issued by U.S. Military Tribunals following the trials of German industrialists under Control Council Law No. 10 for forced labor practices occurring under the Nazi regime. In *United States of America v. Friedrich Flick*, "The Flick Case," 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952), the conviction of two of the defendants rested upon a finding that they had "actively participated" in the Third Reich's forced labor program. In *United States of America v. Carl Krauch*, "The Farben Case," 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1952), the convictions of five defendants rested on a finding that they had "embraced the opportunity to take full advantage of the slave-labor

²³⁶ *Lew Opinion*, 110 F.Supp. 1294, at 1298.

program.” In *United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach*, “The Krupp Case,” 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1950), the conviction of Krupp von Bohlen and his associates was based on findings that the defendants’ will “coincided with the will of those from whom the alleged compulsion emanated.” *Id.* at 1439. Moreover, the “Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor.” *Id.* at 1440.

The Court summarized its analysis of the German industrialists’ cases as follows:

The Court disagrees with Plaintiffs that these cases hold that an industrialist is liable where he or she has knowledge that someone else would commit abuses. Rather, liability requires participation or cooperation in the forced labor practices. In the Flick Case, Weiss took ‘active steps’ with the ‘knowledge and approval’ of his superior to procure forced laborers so that the company could increase its production quota. The Tribunal’s guilty verdict rested not on the defendants’ knowledge and acceptance of benefits of the forced labor, but on their *active participation in the unlawful conduct*. (Emphasis added.)²³⁷

The Court distinguished *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999),²³⁸ by concluding that, whereas Ford Motor Company was alleged to have actively sought to acquire the forced labor of the plaintiff, there was no such evidence that Unocal, despite its knowledge of, and acquiescence in, the forced labor in Myanmar, did not seek the use of forced labor on the Yadana Project.²³⁹

Finally, the court determined that it did not have subject matter jurisdiction over the RICO claim (conspiracy with the military to obtain forced labor)²⁴⁰ because the statute applies extraterritorially only when the actions involved are linked to the United States. Since the forced labor neither occurred in the United States, nor had significant “effects” in the United States, RICO did not apply.²⁴¹

²³⁷ *Lew Opinion*, 110 F. Supp. 1294, at 1310.

²³⁸ Discussed above under its own heading.

²³⁹ *Lew Opinion*, 110 F.Supp. 2d 1294, at 1310.

²⁴⁰ The district court decision referred to the RICO claim as one based on conspiracy to obtain forced labor. On appeal, the RICO claim was characterized as being based on extraterritorial violations of the Hobbs Act, 18 U.S.C. § 1951, which proscribes conspiracy to use or the use of robbery or extortion to affect interstate commerce. *Lew Opinion*, 110 F. Supp. 1294, at *Ninth Circuit Panel Opinion*, 2002 U.S. App. Lexis 129263, at court opinion 77.

²⁴¹ *Lew Opinion*, 110 F.Supp. 1294, at 1311. Having found no violation of international law, and hence no violation of federal law, the court found no basis for assuming jurisdiction under the “federal question” statute (28 U.S.C. § 1331) or for using its discretion to exercise jurisdiction over the state law claims. *Id.*, at 1311, 1312.

On appeal to the Ninth Circuit, a three-judge panel reversed in part and affirmed in part.²⁴² Applying the standard applicable to review of motions for summary judgment, the panel concluded that there was sufficient evidence to support a variety of factual conclusions regarding the extent to which Unocal had supported the Myanmar military while being aware that the military was committing gross violations of humanitarian law. Although it rejected the District Court’s use of the “active participation” test drawn from the decisions of the military tribunals under Control Council Act No. 10, it found that, even applying that test, Unocal could be found liable for aiding and abetting.²⁴³

Judge Pregerson agreed with the lower court that international law—and neither the law of Myanmar, nor federal common law, nor California state law—should be applied, stating:

Finally, ‘the basic policy underlying the particular field of law’ is to provide tort remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law, as discussed in the next paragraph. We conclude that given the record in the present case, application of international law is appropriate.²⁴⁴

The international law applicable to the present case is to be determined by examining “various contemporary sources.”²⁴⁵ Rejecting the use of the IMT decisions, Judge Pregerson stated:

The Military Tribunals applied the ‘active participation’ standard in these cases only to overcome the defendants’ ‘necessity defense.’ In the present case, Unocal did not invoke -- and could not have invoked -- the necessity defense. The District Court therefore erred when it applied the ‘active participation’ standard here.²⁴⁶

Judge Pregerson then examined other “contemporary sources,” including *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998), reprinted in 38 *I.L.M.* 317 (1999), where the International Tribunal for the former Yugoslavia (“ICTY”) stated that “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime” constituted the *actus reas* of aiding and abetting.²⁴⁷ He noted

²⁴² Judge Pregerson wrote the majority opinion, in which Judge Tashima joined; Judge Reinhardt filed a concurring opinion.

²⁴³ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 38.

²⁴⁴ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 41.

²⁴⁵ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 45.

²⁴⁶ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 37.

²⁴⁷ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 45, citing *Furundzija*, IT-95-17/1-T, at 235 (Dec. 10, 1998), reprinted in 38 *I.L.M.* 317 (1999).

that *Furundzija*'s use of a "substantial effect" test was consistent with other ICTY decision: *Prosecutor v. Kunarac*, IT-96 -23-T & IT-96-23/1-T, P 391 (Feb. 22, 2001),²⁴⁸ and *Prosecutor v. Tadic*, ICTY-94-1, P 688 (May 7, 1997).²⁴⁹ He noted that the *Furundzija* court had reached its conclusion following an exhaustive review of existing international legal sources, including the Rome Statute of the International Criminal Court. He observed that in *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000)²⁵⁰, the International Criminal Tribunal for Rwanda described the *actus reus* of aiding and abetting as "all acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime."²⁵¹

Judge Pregerson summarized his analysis of the *Furundzija* standard as follows:

The *Furundzija* standard for aiding and abetting liability under international criminal law can be summarized as knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. At least with respect to assistance and encouragement, this standard is similar to the standard for aiding and abetting under domestic tort law.²⁵²

Applying that standard to the facts of the case, Judge Pregerson concluded that the record contained substantial evidence creating a material issue of fact as to whether Unocal's conduct fell within the *Furundzija* test. Accordingly, he reversed the District Court's granting of the summary judgment on the issue of forced labor.

Regarding the questions of whether Unocal could be found liable for murder, torture and rape, Judge Pregerson stated:

[W]e adopted the Second Circuit's conclusion that 'acts of rape, torture, and summary execution,' like most crimes, 'are proscribed by international law only when committed by state officials or under color of law' to the extent that they were committed *in isolation*. *Kadic*, 70 F.3d at 243-44. We, however, also adopted the Second Circuit's conclusion that these crimes 'are actionable under the Alien Tort [Claims] Act, without regard to state action, to the extent that they were committed *in pursuit of genocide or war crimes*,' *id.* at 244 (emphasis added), i.e., in pursuit of crimes, such as slavery, which never require state action for ATCA liability to attach. According to Plaintiffs' deposition testimony, all of the acts of murder, rape, and torture alleged by Plaintiffs occurred in furtherance of the forced labor program. [note omitted] As discussed above in section II. A. 2.

²⁴⁸ <http://www.un.org/icty/foca/trialc2/judgement/index.htm>

²⁴⁹ <http://www.un.org/icty/tadic/trials2/judgement/index.htm>

²⁵⁰ <http://www.icttr.org/>

²⁵¹ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 47, citing *Prosecutor v. Musema*, ICTR-96-13-T, at p. 126 (Jan. 27, 2000).

²⁵² *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 48.

a, forced labor is a modern variant of slavery and does therefore never require state action to give rise to liability under the ATCA. Thus, under *Kadic*, state action is also not required for the acts of murder, rape, and torture which allegedly occurred in furtherance of the forced labor program.²⁵³

Judge Pregerson concluded that there was sufficient evidence on the record to create material issues of fact as to whether: (a) the Myanmar military had committed acts of murder and rape in furtherance of the pipeline project; and (b) Unocal had aided and abetted those acts. However, Judge Pregerson found that there was a lack of sufficient evidence for the torture claim to stand.²⁵⁴

The Pregerson opinion sustained the lower courts' rulings regarding the dismissal of the Myanmar Military and the Myanmar Oil and Gas Enterprise under the Foreign Sovereign Immunities Act, agreeing that the "commercial activity" exceptions found in 28 U.S.C. § 1605(a)(2).²⁵⁵ It found that the "act of state" doctrine did not preclude Unocal's liability.²⁵⁶ It upheld the District Court's ruling as to its lack of jurisdiction under RICO.²⁵⁷

Judge Reinhardt's concurring opinion took strong objection to the use of decisions of the recent "ad hoc" tribunals and, in particular, the articulation of a standard for aiding abetting which would extend so far as to include giving "moral support."²⁵⁸ He urged, instead, the use of federal common law as the source for the standard to apply in assessing joint liability for a breach of international law.²⁵⁹ Under this line of reasoning, he would look to common law standards leading to the imposition of vicarious liability for joint venture, agency and reckless disregard.²⁶⁰

The Ninth Circuit Panel Decision has been vacated pending rehearing by the Ninth Circuit en banc.²⁶¹ Oral argument took place in mid-2003 and, as of this writing (October, 2004) no decision has been rendered.

Japanese Slave Labor Cases (2003).

A series of cases arose in California brought by victims of slave labor by private companies operating in territory held by Japan during World War II. A California statute had extended the statute of limitations for suits brought to recover damages for slave labor during the second world war.²⁶² Two California intermediate appellate courts

²⁵³ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 56.

²⁵⁴ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 58-60.

²⁵⁵ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 70.

²⁵⁶ *Id.*, at 76.

²⁵⁷ *Id.*, at 82-83.

²⁵⁸ *Ninth Circuit Panel Opinion*, 2002 U.S. App. LEXIS 129263, at court opinion 98-99.

²⁵⁹ *Id.*, at 90. ("In my view, the answer is that we look to traditional civil tort principles embodied in federal common law, rather than to evolving standards of international law, such as a nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal.")

²⁶⁰ *Id.*, at 103.

²⁶¹ *Doe v. Unocal*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003).

divided over the issue of whether the political question doctrine prevented the courts from adjudicating the issue of wartime reparations.²⁶³ The Ninth Circuit held that the California state infringed on the foreign policy powers of the U.S. government. It also held that the ATCA 10-year statute of limitations had expired.²⁶⁴

The Presbyterian Church of Sudan v. Talisman Energy, Inc. (2003).

*The Presbyterian Church of Sudan v. Talisman Energy, Inc.*²⁶⁵ was a class action under F.R.C.P. Rule 23 filed by the minister of a Christian church and several congregants who alleged that Talisman Energy, Inc., a large Canadian oil company, had actively collaborated with the military in southern Sudan in a program of ethnic cleansing aimed at the non-Muslim peoples in the area who constituted a purported threat to Talisman's plans for oil development in the area.²⁶⁶ The complaint alleged that Talisman had constructed airfields in southern Sudan that were used as bases of operation for bombing and other attacks by the predominantly Muslim government of Sudan. The ethnic cleansing program entailed extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape, and the enslavement of civilians.²⁶⁷

Talisman moved to dismiss the action on the basis of lack of subject matter jurisdiction, lack of personal jurisdiction, lack of standing (of plaintiffs), *forum non conveniens*, international comity, act of state doctrine, political question doctrine, failure to join necessary and indispensable parties, and on the grounds that equity does not require a useless act.

Judge Schwartz dealt with each of the grounds for dismissal in a lengthy and scholarly opinion. He turned to the principal Second Circuit ATCA decision: *Filartiga, Kadic*, and *Wiwa*, to dispose of the federal subject matter jurisdiction question. Talisman objected

²⁶² *California Code of Civil Procedure* §354.6.

²⁶³ *Taiheiyō Cement Corporation v. Superior Court*, 105 Cal. App. 4th (The Second Appellate District held that the political question did not apply); *Mitsubishi Materials Corporation v. Superior Court*, 2003 Cal. App. LEXIS 182 (2003) (The Fourth Appellate District held that the statute impermissibly interfered with foreign policy powers of the U.S. by contravening the 1951 peace treaty with Japan).

²⁶⁴ *Deutsch v. Turner Corporation*, 317 F.3d 1005, 1027 (9th Cir. 2003), aff'g *In re: World War II Era Japanese Forced Labor Litigation*, 164 F.Supp. 2d 1160 (N.D.Ca. 2001): ("Because California lacks the power to create a right of action for war-related claims against our former enemies and those who operated in their territories, and section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states, we hold that section 354.6 is unconstitutional.")

²⁶⁵ *The Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., et al.*, 2003 U.S. LEXIS 4085 (S.D.N.Y. March 19, 2003) [hereinafter *Talisman*].

²⁶⁶ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 17: ("Defendants' concerted actions are purportedly demonstrated by, *inter alia*, a May 7, 1999 communication from the Government's Petroleum Security Office in Khartoum to a satellite office in Heglig. *Id.* at court opinion 27. This directive, denominated as "very urgent," reads as follows: 'In accordance with directives of His Excellency the Minister of Energy and Mining and fulfilling the request of the Canadian Company ... the armed forces will conduct cleaning up operations in all villages from Heglig to Pariang.'")

²⁶⁷ *Id.*, at court opinion 3.

that the “law of nations” did not bind corporations; the court held that numerous domestic and international authorities, including *Wiwa, Jota, Aguinda, Beanal*, the language (although not the holdings, since the IMT’s jurisdiction only extended to individuals) of decisions of the International Military Tribunals, and major conventions and treaties, all implicated corporations within the reach of international law for gross violations of human rights.

The court dismissed Talisman’s claim that ATCA does not extend to “aiding and abetting” by again referring to the Second Circuit cases, international decisions, the works of international scholars and the Statute of Rome creating the International Criminal Court.²⁶⁸ It dealt with Talisman’s claim that “displacement” and loss of property through confiscation were not violations of international law by pointing out that these injuries occurred as part of a program of genocide, which is such a violation. As to Talisman’s claim that it had not acted “under color of law” for TVPA purposes, the court found that there had been a “substantial degree of cooperation” between Talisman and the Sudanese military.²⁶⁹

The court dismissed Talisman’s claim of lack of personal jurisdiction by pointing to allegations in the complaint that Talisman, in addition to being listed on the NYSE, also maintained operations in New York via a subsidiary which it so thoroughly dominated that it could be seen as a “department or agent” of Talisman, and therefore sufficient contacts with the forum exist to provide for general jurisdiction.²⁷⁰

Talisman challenged the standing of the Presbyterian Church to bring the action on behalf of its members, claiming that it could only assert claims on its own behalf. The court dismissed this objection by pointing out that a church may bring an action as a representative where religious issues are involved, and, since the ethnic cleansing in this case was aimed at non-Muslims, that requirement had been met.²⁷¹ Talisman’s claim that individual plaintiffs could not assert the claims of third parties was held to be premature: since this is a class action, such a challenge could only be made at the time the plaintiffs move for class certification.²⁷²

The court had little difficulty with Talisman’s argument that the doctrine of *forum non conveniens* required dismissal. The court found that neither the courts of Sudan nor those of Canada provided an adequate and available forum for this action. In the case of Sudan, the court found that Sudanese courts applying *Shari’a* law would be highly unlikely to

²⁶⁸ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 76-91.

²⁶⁹ *Id.*, at 104.

²⁷⁰ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 109.

²⁷¹ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 114.

²⁷² *Id.*, at 122. Because this paper is asked to address the standing issue generally, we include a portion of the *Talisman* decision referring to a Supreme Court standing case which articulated the elements of standing, which the *Talisman* court applied. *Id.*, at 112. (“Any analysis of standing must be guided by the Supreme Court’s decision in *Allen v. Wright*, 468 U.S. 737, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). In that case, the Court held that in order to meet the standing requirement, ‘[a] plaintiff must allege [1] personal injury [2] fairly traceable to the defendant’s allegedly unlawful conduct and [3] likely to be redressed by the requested relief.’ *Id.* at 751.”)

provide justice to these non-Muslim plaintiffs.²⁷³ Nor would Canada be an adequate forum because Canadian courts do not apply international law, and thus could apply only Canadian law, which, in turn, would be bound to apply the law of the *locus*, i.e. Sudanese law. The court observed: “In this case, that would mean that the Alberta court would apply Sudanese, *Shari'a* law. However, as noted above, under Sudanese law, plaintiffs as non-Muslims would enjoy greatly reduced rights. Given this fact, it is difficult to see how a Canadian court applying *Shari'a* law would be a great improvement over a Sudanese court applying *Shari'a* law.”²⁷⁴ The court found that it would not be a serious hardship for Talisman to litigate in New York, as opposed to either Canada or the Sudan, and the inconvenience to the plaintiffs in having to litigate outside of New York outweighed any inconvenience to Talisman.²⁷⁵

The court disposed of Talisman’s claim that international comity required dismissal by pointing out that comity is an entirely discretionary doctrine which, in this case, would serve no compelling Canadian or Sudanese interest, and, owing to the political situation in Sudan, could put the plaintiffs in danger.²⁷⁶ As to Talisman’s “act of state” objection, the court ruled that the violations of international law in this case were sufficiently understood and clear-cut to be amenable to a decision by a U.S. court,²⁷⁷ and that U.S. foreign policy, if anything, favored the elimination of human rights abuses by adjudication of acts such as this in the U.S.²⁷⁸ Regarding Talisman’s argument that the

²⁷³ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 126: (“Putting aside for the moment the fact that Sudan has been classified as a state sponsor of terrorism, *see* Amended Complaint, at P 13, at this stage, the Court is obligated to accept the allegations of plaintiffs as true. It would be rather surprising if the government of Sudan conducted a war of ‘ethnic cleansing’ against plaintiffs and at the same time granted them a fair judicial process to remedy those injuries. In addition, it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them. The Second Circuit has been cognizant of this fact and has not required alleged victims of gross human rights violations to file suit in the place where the alleged violations occurred: One of the difficulties that confront victims of torture under color of a nation’s law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as “not our business.” *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).”)

²⁷⁴ *Id.*, at 125.

²⁷⁵ *Id.*, at 144: (“While it might be more convenient for Talisman to litigate this case in its home forum, this inconvenience is substantially outweighed by the much greater inconvenience plaintiffs would face if they were forced to litigate this action in Canada. Having considered all of the relevant factors, the Court holds that Talisman has failed to justify its motion to dismiss this action on the grounds of *forum non conveniens* because it has not shown that pertinent factors ‘tilt strongly’ in favor of trial in the foreign forum. *Wiwa*, 226 F.3d at 100.”)

²⁷⁶ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 145.

²⁷⁷ *Id.*, at 154.

²⁷⁸ *Id.*, at 157.

case involved “political questions,” the Court cited other ATCA cases for the proposition that the *Baker v. Carr* factors were simply inapplicable in this case.²⁷⁹

Regarding Talisman’s claim that the Sudanese military, the Sudanese government and the other partner in the Sudanese oil operation were each indispensable parties that had been joined, the court ruled that the relief sought, namely to prevent Talisman from further violations, could be granted without the presence of such parties.²⁸⁰

Finally, the court dismissed Talisman’s claim that equity will not require a useless act. Talisman argued that the court lacked power to issue an injunction binding on the Sudanese government; the court had earlier addressed this issue in the context of ruling on the issue of whether indispensable parties had not been joined. Talisman argued that it did not control the entity that was actually operating in Sudan; the court ruled that the question of how much control Talisman exerted in Sudan was a matter for later determination and it would suffice to assume that all allegations regarding such control contained in the complaint were true.²⁸¹

Estate of Rodriguez v. Drummond Co. (2003).

In *Estate of Rodriguez v. Drummond Co.*,²⁸² the estates of three deceased union workers who were killed in Colombia and the trade union of which they had been members sued the Drummond Company, an Alabama company, its wholly-owned subsidiary and Gary Drummond, president of Drummond Company (collectively, “Drummond”). The complaint alleged that Drummond had employed Colombian paramilitary forces as agents to murder the decedents in order to prevent the unionization of their Colombian facility. The plaintiffs asserted claims for extrajudicial murder under ATCA, for denial of the right of association under ATCA, for extrajudicial killing under TVPA, and state law claims for wrongful death and aiding and abetting. The court, ruling on motions to dismiss, held that a corporation may be sued under the TVPA²⁸³ and that the union had standing to assert claims for under ATCA and the TVPA because it alleged harm resulting from defendants’ activities.²⁸⁴ The court, following *Filartiga* for the proposition that a norm is actionable under ATCA if it is “specific, universal and obligatory,” held that a claim for denial of “the fundamental right to associate and organize” was cognizable under ATCA because it was a right recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and in International Labor Organization Conventions 87 and 98.²⁸⁵ The conduct of the paramilitary forces constituted “state action” in order to give rise to individual claims under international law, because the complaint alleged that the paramilitary forces had a “symbiotic relationship” with the Colombian military.²⁸⁶ Brushing aside the objection

²⁷⁹ *Id.*, at 160-169.

²⁸⁰ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion at 168-181.

²⁸¹ *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 181-182.

²⁸² *Estate of Rodriguez v. Drummond Co.*, 256 F.Supp.2d 1250 (N.D.Ala. 2003) [hereinafter *Drummond*].

²⁸³ *Id.*, at 1267.

²⁸⁴ *Id.*, at 1259.

²⁸⁵ *Id.*, at 1263.

that the U.S. had not signed the two ILO Conventions, the court stated: “Although this court recognizes that the United States has not ratified ILO Conventions 87 and 98, the ratification of these conventions is not necessary to make the rights to associate and organize norms of customary international law.”

Alvarez-Machain v. U.S. (2003).

*Alvarez-Machain v. U.S.*²⁸⁷ involved the transborder abduction of Humberto Alvarez-Machain, a Mexican physician who was indicted by a federal grand jury in Los Angeles for participating in the 1985 murder of DEA Special Agent Enrique Camarena-Salazar in Guadalajara, Mexico. Following unsuccessful negotiations with Mexican authorities for the arrest and extradition of Alvarez, the DEA arranged for his forcible abduction and return to the U.S., where he stood trial. He was subsequently acquitted.

Alvarez sued the Mexican national and others who participated in his abduction, alleging, among other claims, that the transborder abduction violated international law and was thus actionable under ATCA. The U.S. government was substituted for several of the defendants in the action. The district court entered summary judgment against Sosa under ATCA, holding that both the kidnapping and the arbitrary detention involved were violations of international law.

On appeal, the Ninth Circuit upheld the summary judgment on the basis that the arrest in Mexico was legally flawed, and hence constituted an arbitrary arrest under international law. It reversed the summary judgment on one ATCA claim, holding that, although transborder kidnapping was a violation of international law, the matter involved only the governments of the U.S. and Mexico, and an individual had no standing to assert a claim for such a violation. However, it upheld the summary judgment on the claim that the arrest and detention of Alvarez in Mexico constituted arbitrary arrest and detention under international law.

Finding that the arrest was carried out pursuant to a warrant that, on its face, was limited to the territory of the U.S., it held that there was no apparent legal authority for the arrest, hence the arrest was “arbitrary” within the meaning of the international legal standard for “arbitrary arrest and detention,” and sustained the summary judgment and the \$25,000 damage award. The majority opinion contains a lengthy analysis of the judicial test for which international law norms give rise to ATCA claims. Judge Fisher wrote a concurring opinion, in which three other judges joined, in which he argued that the arrest lacked authority because it was executed by the DEA, not by the Attorney General personally or another high-ranking Justice official.

The dissent by Judge O’Scannlain, in which three other judges joined, disputed the majority’s holdings that the arrest was unauthorized as well as its holding that a transborder arrest could become a breach of the “law of nations” within the meaning of

²⁸⁶ *Id.*, at 1254.

²⁸⁷ *Alvarez-Machain v. U.S.*, 331 F.3d 606 (9th Cir. 2003), certiorari granted by *Sosa V. Alvarez-Machain*, 2003 U.S. LEXIS 8572 (U.S., Dec. 1, 2003).

ATCA. Regarding the authorization issue, the dissent asserted that federal law granted sufficiently broad authority to the DEA to make arrests to authorize the arrest in question. Regarding the issue of whether an ATCA claim could be made for such an arrest, the dissent asserted that ATCA claims can be made only for “universally-recognized” international norms. Since the U.S. had never signed a treaty or otherwise consented to the creation of a tort for a transborder abduction, there was no “universal recognition” of this tort, thus the arrest in question did not give rise to an ATCA claim.

The Ninth Circuit decision was appealed to the U.S. Supreme Court, and on June 30, 2004, the Court rendered its decision.²⁸⁸ In an opinion written by Justice Souter, the Court addressed two issues: whether Alvarez-Machain had a claim under the Federal Tort Claims Act, and whether he had a claim under ATCA. The Court held that neither statute provided a remedy.

The Court’s ATCA analysis turned on the issue of whether the arrest and confinement of Alvarez-Machain were acts of sufficient gravity to be actionable within the scope of the “law of nations” recognized by ATCA. The Court determined, at the outset, that ATCA was only a jurisdictional statute “in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”²⁸⁹ The grant of jurisdiction to the federal courts encompasses the entertainment of suits based on the law of nations, which “for two centuries” has been recognized by the Court as a part of federal law.²⁹⁰ The law of nations is not confined to international law as it existed in 1789, since the general judicial principles applied the Court in previous cases imply an ongoing process of recognizing international law at the time particular judicial claim arises.

The Court stated: “Whatever the ultimate criteria for accepting a cause of action subject to § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norms with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. Measured against this standard, Alvarez-Machain’s claim for “arbitrary arrest” must fail because it is based in part upon the Universal Declaration of Human Rights, which is not self-executing and was expressly conditioned by the U.S. upon ratification as creating no judicial right cognizable within the U.S.”²⁹¹ Nor did Alvarez-Machain’s citation of other authorities rise to the level of international recognition of a claim for an illegal detention (eg. it was not a “prolonged detention” within the meaning of the Restatement (Third) of Foreign Relations Law).

The Court concluded: “Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. [footnote omitted] Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. [footnote omitted] It is enough to hold that

²⁸⁸ *Sosa v. Alvarez-Machain*, 159 L. Ed. 2d 718, 124 S.Ct. 2739, 542 U.S. ____ (2004) [hereinafter *Sosa*].

²⁸⁹ *Sosa*, 159 L. Ed. 2d 718, at 740, 124 S.Ct. 2739, at 2755, 542 U.S. ____, at ____.

²⁹⁰ *Id.*, 159 L. Ed. 2d 718, at 752, 124 S.Ct. 2739, at 2755, at 2764, 542 U.S. ____, at ____.

²⁹¹ *Sosa*, 159 L. Ed. 2d 718, at 755, 124 S.Ct. 2739, at 2766, 542 U.S. ____, at ____.

a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”²⁹²

²⁹² *Sosa*, 159 L. Ed. 2d 718, at 757, 124 S.Ct. 2739, at 2769, 542 U.S. ____ .