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# Article

## Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims

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*Suing corporations in U.S. courts for environmental harms abroad may soon be possible under the Alien Tort Claims Act (ATCA). While several cases have been brought alleging environmental torts under the ATCA, no case has yet yielded corporate liability. Until courts accept environmental principles as part of the “law of nations,” and therefore actionable under the ATCA, plaintiffs should use remedies available for human rights claims as proxies for their environmental claims. Because corporate international environmental law violations are frequently linked to human rights abuses, well-established human rights causes of action should be used to usher in the emerging justiciability of environmental claims.*

### I. INTRODUCTION

When a multinational corporation operating in a developing country strips a hillside of its rainforest, forcibly removes the local population, carves a chasm in the earth and mines with chemicals that are washed into rivers and leached into the groundwater, plaintiffs are unlikely to find redress in U.S. courts. Although corporate environmental abuse abroad is common, successful litigation of the abuse is not. This Article examines why this is so, and argues that plaintiffs should benefit from a

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globalization of justice, just as corporations have benefited from a globalization of resources and labor.

Plaintiffs could use four methods in U.S. courts to seek redress and create accountability for corporate environmental abuses abroad. This Article discusses each method, focusing primarily on the Alien Tort Claims Act (ATCA)<sup>1</sup>—the best among four very weak alternatives for seeking redress of environmental wrongs. The other three methods for achieving corporate environmental accountability in U.S. courts include applying U.S. environmental law extraterritorially, using environmental treaties or customary international environmental law directly as causes of action, and applying foreign environmental law. These alternatives prove even *more* elusive than the ATCA and are not meaningful solutions to the problem of lack of corporate environmental accountability in U.S. courts.

Although each of the four methods has failed to create corporate environmental accountability, the ATCA failures are less substantive and more political and procedural in nature. For example, *Sarei v. Rio Tinto*,<sup>2</sup> an environmental ATCA case regarding environmental abuses on the island of Bougainville, Papua New Guinea, discussed in depth below, failed because the U.S. State Department intervened in the case and urged its dismissal based on the political question doctrine. There was a viable international environmental claim in *Sarei*<sup>3</sup>—demonstrating that without political or procedural obstacles, the ATCA may create international environmental corporate liability. However, due to *Sarei's* status as the only case to articulate a viable—yet politically untenable—environmental ATCA claim, this Article examines other methods of bringing ATCA claims that could create corporate environmental accountability—namely, using human rights litigation as a proxy for environmental claims.

The ATCA is valuable not because it is a solid cause of action against environmental abuses, but because it has evolved into a viable cause of action for *human rights* abuse committed abroad. Causes of action under the ATCA generally mirror development of international law. For ATCA purposes, state and individual practices and treaties must become “specific, universal, and obligatory” before they transform into customary international law. This standard creates a distinction between the principles recognized as international law generally, and the principles recognized, one at a time, by judges interpreting the “law of nations” under the ATCA. Until environmental law is recognized as part of the “law of nations,” as human rights law is, there can be no actionable violations of environmental law under the ATCA. Depending on how the remedies are crafted, however, the ATCA may be used as a successful proxy for the

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1. See 28 U.S.C. § 1350 (1994). “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.”

2. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) [hereinafter *Sarei*].

3. As discussed below, the plaintiffs’ U.N. Convention on the Law of the Seas (UNCLOS) claim would have created liability if the case had not been dismissed based on the political question doctrine.

environmental claims where human rights abuses and environmental wrongs overlap. Although the ultimate goal is recognition of international environmental principles as actionable independently under the ATCA, this Article discusses what methods can be used in the meantime so that corporate environmental harms may be addressed.

While recognition of international environmental law as actionable under the ATCA is desirable so that corporations do not benefit from low or no environmental standards in foreign countries, it is more appropriate given the state of the law at present to focus on litigation of the human rights violations that naturally flow from mass scale environmental degradation.

Section II of this Article examines the four possible substantive areas of law that could be used to sue corporations in U.S. courts: the ATCA; extraterritorial application of U.S. law; claims based on international environmental treaties and customary international law; and application of foreign environmental law. The focus of Section II is on the ATCA because it provides the most appropriate cause of action for plaintiffs, among other poor alternatives, and its complex issues deserve in depth examination. Particularly, Section II explores the ATCA cases that have contained environmental claims—*Amlon v. FMC*,<sup>4</sup> *Aguinda v. Texaco*,<sup>5</sup> *Beanal v. Freeport McMoRan*,<sup>6</sup> *Bano v. Union Carbide Corp.*,<sup>7</sup> *Flores v. Southern Peru Copper Corporation*<sup>8</sup> and *Sarei v. Rio Tinto*<sup>9</sup>—and discusses why the environmental claims have failed.

Section III concludes that the ATCA is the most powerful of the litigation options and discusses how plaintiffs' attorneys should use it for environmental ends. This section argues that, although the ATCA is not yet a fully viable independent cause of action for most environmental claims, it could be effective to address environmental claims where they are combined with human rights claims. Because judicial recognition of environmental principles as actionable under the ATCA is overdue, Section III argues for further development of international environmental law to urge courts toward this finding.

Finally, Section IV concludes with discussion of the development of each of the potential causes of action in the future. As international environmental principles become accepted as part of the "law of nations" under the ATCA, which has already happened in the broader field of international law, the ATCA will become an even more important tool for plaintiffs seeking redress for corporate environmental harms abroad.

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4. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991).

5. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) [hereinafter *Aguinda VIII*].

6. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997).

7. *Bano v. Union Carbide Corp.*, 273 F.3d 120 (C.A.2 (N.Y.) 2001).

8. *Flores v. Southern Peru Copper Corporation*, 2002 U.S. Dist. LEXIS 13013 (S.D.N.Y. 2002).

9. *Sarei*, 221 F. Supp. 2d 1116.

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## II. POSSIBLE CAUSES OF ACTION

### A. The Alien Tort Claims Act

The ATCA is currently the strongest vehicle for bringing claims against corporations for environmental abuses abroad. Moreover, under the ATCA, in some cases corporate officers may be held *individually* liable for environmental torts abroad.<sup>10</sup> While there are severe hurdles to bringing a claim under current ATCA jurisprudence,<sup>11</sup> it is possible to find relief for plaintiffs seeking redress for environmental harms. This section discusses (i) a brief history of the ATCA, (ii) the statute's elements and legal standards, (iii) who may sue and be sued under the ATCA, and (iv) how the ATCA is used for suing corporations for environmental abuses abroad based on recent case law. Because much has been written on parts (i), (ii) and (iii),<sup>12</sup> this section focuses primarily on part (iv).

#### 1. ATCA Background

The ATCA, created under the Judiciary Act of 1789, states: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>13</sup> During the 190 years following its passage, the ATCA was used only 21 times.<sup>14</sup> Those cases include a few from shortly after the Act's passage in the late 1700s,<sup>15</sup> cases in 1907<sup>16</sup> and 1958,<sup>17</sup> several cases in

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10. See *Bano*, 273 F.3d at 132 (assessing the environmental torts of Union Carbide in Bhopal, India and applying New York corporate law, under which "a corporate officer who commits or participates in a tort, even if it is in the course of his duties on behalf of the corporation, may be held individually liable.").

11. *Forum non conveniens* and the "state action" doctrines have halted the majority of ATCA cases in their tracks.

12. See generally Armin Rosencranz and Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145 (1999); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81 (1999); Joanna E. Arlow, *The Utility of the ATCA and the "Law of Nations" in Environmental Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L.J. 93 (2000); Andrew Ridenour, *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 TUL. J. INT'L & COMP. L. 581 (2001); Jean Wu, *Pursuing International Environmental Tort Claims Under the ATCA: Beanal v. Freeport-McMoRan*, 28 ECOLOGY L.Q. 487 (2001); Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Actors*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 193 (2001).

13. 28 U.S.C. § 1350 (1994).

14. See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries Into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4-5, n15 (1985).

15. See *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (finding a violation of international law in a curious slave trading and piracy situation under a treaty with France).

16. See *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1907).

17. See *Pauling v. Mc Elroy*, 164 F. Supp. 390 (D.D.C. 1958) (seeking an injunction against "Commissioners of the Atomic Energy Commission and the Secretary of Defense from

the 1960s,<sup>18</sup> and a handful of cases from the 1970s.<sup>19</sup> The latter cases involve mainly commercial disputes, a case seeking to enjoin nuclear testing on the Marshall Islands, and one child custody case where the law of nations regarding passports was violated. Then, in 1980, a Paraguayan father and sister used the ATCA against a former Paraguayan police inspector general for the torture and death of their son and brother, Joelito Filartiga. *Filartiga v. Peña-Irala*,<sup>20</sup> opened the door to subsequent use of the ATCA for litigation of human rights abuses. At the time of this writing, there have been at least sixty-two post-*Filartiga* ATCA cases brought in U.S. courts. The vast majority of these involve litigation of human rights abuses.

## 2. Structure and Elements of the ATCA

The ATCA contains a jurisdictional grant, but also provides a substantive cause of action for violations of U.S. treaties and the law of nations.<sup>21</sup> There are three elements to an ATCA claim. Plaintiffs must assert that (1) they are aliens, (2) they are suing for a tort, and (3) the tort violates the “law of nations.” The third element is the focus of dispute in most cases, as it is the most difficult element for plaintiffs to show, and for judges to discern. The law of nations, as it was defined in 1789, is thought to have encompassed what we now call international law—both treaty-based and customary international law.<sup>22</sup> In ascertaining whether a tort violates the law of nations under the ATCA, courts claim to look to *all* the traditional sources of international law.<sup>23</sup> In practice, however, courts apply

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detonating any nuclear weapons that produce radiation or radioactive atomic nuclei, on the grounds that such radiation will inflict serious genetic and somatic injury upon plaintiffs and the population of the world in general, including unborn generations”).

18. See *Khedivial Line v. Seafarers’ International Union*, S.A.E, 278 F.2d 49 (2d Cir. 1960); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292 (E.D. Pa. 1963); *Damaskinos v. Societa Navigacion Interamericana, S. A., Panama*, 255 F. Supp. 919 (S.D.N.Y. 1966); *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1966).

19. See *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d 142 (7th Cir. 1973); *IIT v. Vencap*, 519 F.2d 1001 (2d Cir. 1975); *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976).

20. See *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

21. The Second, Ninth and Fifth Circuits have all affirmed the jurisdictional and substantive nature of the ATCA. See *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litigation* [hereinafter *Hilao II*], 25 F.3d 1467, 1475-76 (9th Cir. 1994); *Sarei*, 221 F. Supp. 2d at 1130; *Beanal*, 969 F. Supp. at 366 (“The current view of § 1350 is that it grants a federal cause of action as well as a federal forum in which to assert the claim.”).

22. See generally *The Paquete Habana*, 175 U.S. 677 (1900) (defining customary international law as state practice stemming from a legal obligation, or *opinio juris*). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) & cmt. c (1987).

23. These sources have determined whether the tort in question has been (a) codified as international law through international treaties or conventions, (b) established as customary international law, (c) determined to be the law of nations in scholarly writings and judicial decisions, or (d) has been accepted as a general principle of law. See *Sarei*, 221 F. Supp. 2d 1116, citing Fifth, Ninth and Second Circuit cases. See also ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 45-53 (1999). See also *Filartiga*, 630 F.2d at 881. The *Filartiga*

a definition of the law of nations to ATCA cases that is narrower than what international lawyers consider as customary international law. Because the ATCA additionally defines the law of nations as “specific, universal, and obligatory,” some conduct that international lawyers may view as violating customary international law may not yet be recognized as a violation of the “law of nations” for purposes of the ATCA. Certain international environmental principles, such as the principle of sustainable development, exemplify norms recognized in the international law community but not under the ATCA as part of the law of nations.<sup>24</sup>

*Filartiga* and its progeny have clarified the distinction between drawing on all sources of international law and selecting the subset of laws that apply under the ATCA. For example, although the “general principles of law recognized by civilized nations” include a universal, or near universal, prohibition on theft, the *Filartiga* Court declared that theft was not actionable under the ATCA. It went on to state: “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.”<sup>25</sup> Thus, the *Filartiga* Court began the narrowing of actionable international law violations for human rights purposes under the ATCA.

### 3. Who May Be Sued Under the ATCA

Under the ATCA, the question of who may be sued depends on the harm they are alleged to have conducted. If the individual or entity is alleged to have perpetrated a tort that falls into the most severe category, referred to as a *jus cogens* violation, each may be sued regardless of its status as an individual, corporation, state or non-state actor. However, if the violation falls into a lesser category, the question of who may be sued becomes more complex and depends on whether the individual is a state or non-state actor.

The term *jus cogens* is often used to refer to the subset of international

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Court derived the appropriate sources of international law from Article 38 of the Statute of the International Court of Justice, 59 Stat. 1055, 1060 (1945), which states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

international conventions ...;

international custom ...;

the general principles of law recognized by civilized nations; [and]

judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law.

24. Although not recognized in the ATCA cases discussed in Section II (v) *infra*, the principle of sustainable development has been recognized in bodies such as the International Court of Justice. See Case Concerning The Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J., (25 Sept.) (“International law in the field of sustainable development is now sufficiently well established, and both parties appear to accept this.”) (citations omitted).

25. *Filartiga*, 630 F.2d at 888.

law that consists of “rules from which no derogation is permissible.”<sup>26</sup> Like a three-stepped pyramid – with *jus cogens* norms at the pinnacle, the law of nations in the middle, and customary and treaty-based international law as the foundation – this hierarchy of norms has arisen to determine which claims are and are not actionable under the ATCA.<sup>27</sup> While any actor – private or state – may be liable for a violation of a *jus cogens* norm under the ATCA, only state actors may be liable for violations of the more general law of nations. The test that has evolved for determining the law of nations is described in *Sarei v. Rio Tinto*: “(1) whether plaintiffs identify a specific, universal, and obligatory norm of international law; (2) whether that norm is recognized by the United States; and (3) whether they adequately allege its violation.”<sup>28</sup>

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26. Robert Jennings & Arthur Watts, *Oppenheim’s International Law*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 225 (Henry J. Steiner and Philip Alston eds., 2000).

27. There has been some debate as to whether *jus cogens* violations are the only torts actionable under the ATCA, or whether they are just a subset of the torts actionable under the ATCA that are the most severe and that anyone is capable of violating – regardless of whether they are a state or non-state actor. The Central District of California’s 2000 *Doe v. Unocal* decision, regarding human rights violations associated with Unocal’s construction of a natural gas pipeline in Burma, states that “actionable violations of international law must be of a norm that is specific, universal, and obligatory,” *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1305 (C.D. Cal. 2000) [hereinafter *Unocal II*], though declines to attach the *jus cogens* label to the scope of the laws actionable under the ATCA. The *Unocal II* Court further states:

[J]us cogens norms, norms derived from values taken to be fundamental by the international community, enjoy the highest status within customary international law and are binding on all nations [...] While the Ninth Circuit has not expressly held that only *jus cogens* norms are actionable, the Circuit’s holding in [*In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994)] that actionable violations are only those that are specific, universal, and obligatory is consistent with this interpretation [...] It is well accepted that torture, murder, genocide and slavery all constitute violations of *jus cogens* norms. *Id.* at 1304.

Two years later, in *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, 28-29 (9th Cir. 2002) [hereinafter *Unocal III*], the Ninth Circuit affirmed that “torture, murder, and slavery are *jus cogens* violations and, thus, violations of the law of nations. [...] Rape can be a form of torture. [...] Moreover, forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation.” The Ninth Circuit foreshadowed the *Unocal III* holding in *Alvarez-Machain v. United States* in Sept., 2001, stating that “[t]his Court has held that a *jus cogens* violation satisfies the ‘specific, universal and obligatory standard,’ [...] but it has never held that a *jus cogens* violation is required to meet the standard.” *Alvarez-Machain v. United States*, 266 F.3d 1045, 1050 (9th Cir. 2001). This leaves the standard under the ATCA narrower than simply violations of international law as understood by the multiple sources of international law, such as customary international law, treaties and general principles of law, but wider than just *jus cogens* norms such as torture, murder, genocide and slavery. *Accord Unocal III*, 2002 U.S. App. LEXIS at \*29 n. 15 (“although a *jus cogens* violation is, by definition, ‘a violation of ‘specific, universal, and obligatory’ international norms’ that is actionable under the ATCA, any ‘violation of ‘specific, universal, and obligatory’ international norms’ – *jus cogens* or not – is actionable under the ATCA.”).

28. *Sarei*, 221 F. Supp. 2d at 1132. *But cf.* *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1359 (S.D. Fla. 2001). The court in *Cabello* finds that Article 6 of the International Covenant on Civil and Political Rights (ICCPR) “is a customary international law, which violations may be remedied by suits filed under the ATCA.” This Eleventh Circuit position is a recent departure from other circuits in that the *Cabello* court did not discuss whether Article 6 of the ICCPR has formed a specific, universal, and obligatory norm before finding it actionable under the ATCA. Instead, the court uses a test of whether the rule is both “accepted by a ‘generality’ of the states” and “accepted by them as law (i.e., a ‘sense of legal obligation’).” *Id.* at 1359 (citations omitted). In essence, the *Cabello* court excludes the

Corporations may be sued under two theories of liability—either as private or state entities for *jus cogens* violations, or as a state actor if the alleged conduct violates the law of nations but has not risen to the level of a *jus cogens* violation. In other words, while state actors may be sued for violations of international law that are merely specific, universal and obligatory, claims against private individuals with no connection to the state must rise to the non-peremptory level of a *jus cogens* violation for the private defendant to be liable under the ATCA.<sup>29</sup> The rationale behind the distinction is that private actors are generally not capable of violating international law because most international laws create duties for states, not private individuals. For a private party to violate the law of nations, they must have committed one of the “handful of crimes”<sup>30</sup> that are violations of customary international law no matter who has committed them.

The landmark 1995 case cited for the proposition that the ATCA covers violations of customary international law by private, non-state actors is *Kadic v. Karadzic*.<sup>31</sup> *Kadic* involved suit against Bosnian-Serb leader, Radovan Karadzic, for “genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor....”<sup>32</sup> The court based its holding of Karadzic’s liability on the early use of the ATCA against pirates, and then subsequently against slave traders and perpetrators of certain war crimes.<sup>33</sup> In addition, the court referred to the Third Restatement of the Foreign Relations of the United States, which says “individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”<sup>34</sup> Because it has been fairly well established that corporations may be sued in their private capacity if they fall into the “handful of crimes” category,<sup>35</sup> the

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“specific” prong of the test usually applied.

29. See *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 313 (S.D.N.Y. 2001) [hereinafter *Tachiona* I] (“cases have entailed the application of widely recognized international human rights standards to impose individual liability on organized non-state actors under two distance circumstances: (1) when the individuals’ deeds are done in concert with governmental officials or with their significant assistance, which thus may be deemed to constitute state action or conduct taken under the color of state law; and (2) when the individuals commit acts independently of any state authority or direction, especially encompassing more egregious conduct, such as genocide, war crimes or other crimes against humanity.”).

30. *Kadic*, 70 F.3d at 240 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984)). The “handful of crimes” includes piracy, slave-trading and certain war crimes such as genocide.

31. *Id.* at 239 (“We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”).

32. *Id.* at 236.

33. *Id.* at 239.

34. *Kadic*, 70 F.3d at 240 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, introductory note (1986)).

35. See *Kadic*, 70 F.3d at 240; *Tel-Oren*, 726 F.2d at 795. See also *Developments in the Law – International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV.L.REV. 2025, 2037 (2001) [hereinafter *Corporate Liability*] (“If a corporation commits piracy, slave trading, genocide, or war crimes, then it may be held liable under the ATCA

more challenging inquiry is how corporations may be found liable under the ATCA if their conduct falls outside the “handful of crimes” but still violates international law. If a corporation’s actions fall into this broader category, plaintiffs must show that the corporation acted under “color of law.”

#### 4. ATCA State Action Analysis

Mass scale, irreparable environmental harms—because they are often so severe—should arguably be recognized as *jus cogens* violations for which all actors could be liable. However, because the state action test is currently used to address ATCA environmental claims, when the claims are entertained at all, the following section discusses the approaches the federal circuits have taken to the state action test.

To show that a corporation’s conduct is attributable to the action of a state, courts have turned to domestic jurisprudence, namely 42 U.S.C. § 1983. In applying § 1983, courts have used four tests: (1) the nexus test,<sup>36</sup> (2) the symbiotic relationship test,<sup>37</sup> (3) the joint action test,<sup>38</sup> and (4) the public function test.<sup>39</sup> Courts diverge, however, on which of the four tests—if any—apply to determine state action for ATCA purposes.

When plaintiffs seek to sue a corporation for environmental abuses abroad in the U.S., they choose the venue (if they have a choice) with the least stringent state action test. Of the ATCA cases brought since *Filartiga* in 1980, roughly twenty-four have been brought in the Second Circuit and fourteen have been brought in the Ninth. The D.C. Circuit has had ten cases and the Eleventh and Fifth Circuits have had roughly seven and six cases respectively.<sup>40</sup> Since the majority of cases have been brought in the

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even absent state action...”).

36. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10<sup>th</sup> Cir. 1995).

37. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (“The State has so far insinuated itself into a position of interdependence with [the challenged entity] that it must be recognized as a joint participant in the challenged activity...”).

38. See *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

39. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974). For a discussion of all four tests, see *Unocal II*, 110 F. Supp. at 1305; *Sarei*, 221 F. Supp. 2d at 1144-1148. See also *Rosencranz and Campbell*, *supra* note 12, at 160.

40. The Second Circuit cases include: *Abdullahi v. Pfizer, Inc.*, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. 2002); *Topo v. Dhir*, 2002 U.S. Dist. LEXIS 17190 (S.D.N.Y. 2002); *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002); *Manliguez v. Joseph*, 2002 U.S. Dist. LEXIS 15277 (E.D.N.Y. 2002); *Ahmed v. Hoque*, 2002 U.S. Dist. LEXIS 14852 (S.D.N.Y. 2002); *Tachiona v. Mugable*, 2002 U.S. Dist. LEXIS 11979 (S.D.N.Y. 2002) (hereinafter *Tachiona II*); *Flores v. Southern Peru Copper Corporation*, 2002 U.S. Dist. LEXIS 13013 (S.D.N.Y. 2002); *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); *Bano*, 273 F.3d 120; *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001); *Remoi v. Immigration and Naturalization Service*, 2001 U.S. Dist. LEXIS 2197 (S.D.N.Y. 2001); *Doe v. Karadzic*, 2001 U.S. Dist. LEXIS 12928 (S.D.N.Y. 2001); *Kruman v. Christie's International PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001); *Bigio v. Coca Cola Co.*, 239 F.3d 440 (C.A.2 (N.Y.) 2000); *Bodner v. Banque Paribas*, 114 F.Supp.2d 117 (E.D.N.Y. 2000); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Amlon*, 775 F.Supp. 668; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Jaffee v. Boyles*, 616 F. Supp. 1371

Second and Ninth Circuits and there are now enough examples of application of § 1983 to see patterns, section (a) below focuses on the treatment of the state action tests for private entities in those two circuits. Section (b) then addresses the various other tests for state action applied in other circuits where no patterns can yet be identified.

a. Evolution of the State Action Test in the Second and Ninth Circuits

i. Second Circuit Cases

The three seminal Second Circuit cases that have applied the state action test are the 1995 case, *Kadic v. Karadzic*,<sup>41</sup> the 2001 case, *Tachiona v. Mugabe*,<sup>42</sup> and the 2002 decision in *Wiwa v. Royal Dutch Petroleum Company*.<sup>43</sup> In *Kadic*, the plaintiffs sought to hold Bosnian-Serb leader Radovan Karadzic liable for genocide, war crimes and crimes against humanity in his private capacity. To do so, the *Kadic* Court applied § 1983 color of law jurisprudence, stating that it “is a relevant guide to whether a

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(W.D.N.Y. 1985); *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613 (S.D.N.Y. 1983); *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

Ninth Circuit cases include: *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002); *Sarei*, 221 F. Supp. 2d 1116; *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002); *In re World War II Era Japanese Forced Labor Litigation*, 164 F.Supp.2d 1153 (N.D.Cal. 2001); *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001); *Bowoto v. Chevron*, No.: C99-2506 (N.D. Cal. 1999); *Doe v. Gap*, No. 99-329 (C.D. Cal., filed Jan. 13, 1999); *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995); *In re Estate of Ferdinand Marcos*, 978 F. 3d 493 (9th Cir. 1992); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987); *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986); *De Blake v. Republic of Argentina*, 1985 U.S. Dist. LEXIS 21985 (C.D. Cal. 1985); and *Trans-Continental Inv. Corp. S. A. v. Bank of Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980).

D.C. Circuit cases include: *Doe v. Lumintang*, Civil Action No. 00-674 (D.D.C. 2001); *Arias v. DynCorp*, Case No. 1:01CV01908 (D.D.C. filed Sept. 11, 2001); *Bao Ge v. Li Peng*, 2000 U.S. Dist. LEXIS 12711 (D.D.C. 2000); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998); *Brancaccio v. Reno*, 964 F. Supp. 1 (D.D.C. 1997); *Telesat De Panama, S.A. v. United States Dep't. of Def.*, 1992 U.S. App. LEXIS 18469 (D.C. Cir. 1992); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990); *Sanchez-Espinoza v. Reagan*, 248 U.S. App. D.C. 146 (D.C. Cir. 1985); *Tel-Oren v. Lybian Arab Republic*, 726 F.2d 774 (U.S. App. D.C. 1984); and *Ramirez de Arellano v. Weinberger*, 233 U.S. App. D.C. 11 (D.C. Cir. 1983).

Fifth Circuit cases include: *Robert v. Bell Helicopter Textron Inc.*, 2002 U.S. Dist. LEXIS 9904 (N.D. Tex. 2002); *Mendonca v. Tidewater*, 159 F. Supp. 2d 299 (E.D. La. 2001); *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp.362 (E.D. La. 1997); *Faulder v. Johnson*, 178 F.3d 741 (5th Cir. 1999); *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988); and *Cohen v. Hartman*, 634 F.2d 318 (5th Cir. 1981).

The Eleventh Circuit cases include: *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002); *Rosner v. United States*, 2002 U.S. Dist. LEXIS 17632 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 2002 U.S. Dist LEXIS (N.D. Ga. 2002); *Ralk v. Lincoln County, Ga.*, 81 F.Supp.2d 1372 (S.D. Ga. 2000); *Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078 (S.D. Fla. 1997); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); and *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994).

41. See *Kadic*, 70 F.3d at 245.

42. See *Tachiona I*, 169 F.Supp.2d at 312.

43. See *Wiwa*, 2002 U.S. Dist. LEXIS at 37.

defendant has engaged in official action for the purposes of jurisdiction under the [ATCA].”<sup>44</sup> The Court held that the proper inquiry for § 1983 purposes is whether the defendant “acts together with state officials or with significant state aid.”<sup>45</sup> The Court also described the requirement as acting “in concert with [state] officials.”<sup>46</sup> This definition of state action is a restatement of the “joint action” test. Though *Dennis v. Sparks*—the Supreme Court case that illuminates the joint action test—is not mentioned in *Kadic*, the Second Circuit appears to have chosen this test.

It is unclear whether the joint action test was chosen because it is most amenable to the *Kadic* facts, or whether a case with different facts would have failed to fit into the Second Circuit’s application of the joint action test. The *Kadic* Court appears to have adopted the § 1983 color of law test for state action from *Forti v. Suarez-Mason*, a 1987 Northern District of California case regarding torture, murder, summary execution, disappearance and arbitrary detention during the Argentine “Dirty War.”<sup>47</sup>

In the 2001 *Tachiona v. Mugabe* case,<sup>48</sup> the Court referred to the *Kadic* holding to find that the ruling political party of Zimbabwe could be held liable for torture and terror because it had acted “in concert with Zimbabwe officials or with significant assistance from state resources sufficient, under *Kadic*’s instruction, to satisfy the standard of what constitutes involvement by government officials in the conduct of non-state actors.”<sup>49</sup> Again, the language in *Tachiona* suggests that the Second Circuit applies the joint action test. It is not clear whether the Second Circuit would apply other tests in addition to the joint action test if facts lent themselves to other tests. While there have been a number of cases that were ripe for state action analysis in recent years, all but *Wiwa* have either been dismissed on *forum non conveniens* grounds or the discussion did not reach the state action issue.<sup>50</sup>

*Wiwa v. Royal Dutch* arose out of the atrocities committed in Nigeria in the 1990s against a group of people opposed to “coercive appropriation of Ogoni land without adequate compensation, and the severe damage to the local environment and economy, that resulted from Royal Dutch / Shell’s operations in the Ogoni region.”<sup>51</sup> Among those targeted by Royal Dutch / Shell was the noted activist Ken Saro-Wiwa who was hanged after being convicted of murder in 1995 in a proceeding the court found Royal Dutch / Shell to have rigged.<sup>52</sup> Claims under the ATCA included “(1) summary execution with respect to the hangings of Ken Saro-Wiwa and John Kpuinen; (2) crimes against humanity...(3) torture...(4) cruel, inhuman, or

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44. See *Kadic*, 70 F.3d at 245.

45. *Id.*

46. *Id.*

47. See *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987). See below for discussion of the Court’s use of 42 U.S.C. §1983 in *Forti*.

48. See *Tachiona v. Mugabe*, 169 F. Supp. 259, 315 (S.D.N.Y. 2001).

49. *Id.* at 315 (citing *Kadic* at 244-245).

50. See *Bano v. Union Carbide Corp.*, 273 F.3d 120 and *Aguinda VIII*, 142 F. Supp. 2d 534.

51. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, 4.

52. *Id.* at 5.

degrading treatment...(5) arbitrary arrest and detention...and (6) violation of the rights to life, liberty and security of person and peaceful assembly and association..."<sup>53</sup>

In contrast to the recent Ninth Circuit decision in *Unocal III*,<sup>54</sup> the Southern District of New York in *Wiwa* followed *Kadic* and held that "[t]orture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."<sup>55</sup> Therefore, *Wiwa* required state action analysis. As with *Kadic* and *Tachiona*, the Court found that "[t]he relevant test in this case is the 'joint action' test, under which private actors are considered state actors if they are 'willful participant[s] in joint action with the State or its agents.'"<sup>56</sup> The Southern District of New York also took the opportunity in *Wiwa* to confirm that it derives its test from *Dennis v. Sparks*.<sup>57</sup> Interestingly, the Court then quoted *Unocal I* (from the Ninth Circuit) to support its definition of joint action: "Where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights, state action is present."<sup>58</sup>

The plaintiffs in *Wiwa* offered two theories under the joint action test; first:

[T]he facts alleged demonstrate a substantial degree of cooperative action between corporate defendants and the Nigerian government in the alleged violations of international law. Second,...Shell Nigeria and the Nigerian government engaged in significant cooperative action that violated plaintiffs' rights, and that corporate defendants had sufficient knowledge of this conduct that they may be held liable for Shell Nigeria's conduct.<sup>59</sup>

The Court determined that the plaintiffs' allegations were sufficient to state a claim that "defendants were 'willful participant[s] in joint action with the state or its agents,' and can hence be treated as state actors for the purpose of the ATCA."<sup>60</sup>

## ii. Ninth Circuit Cases

In the Ninth Circuit, however, cases discussing application of § 1983 begin with *Forti v. Suarez-Mason*,<sup>61</sup> and evolve into the versions of the

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53. *Id.* at 6-7.

54. See *Unocal III*, 2002 U.S. App. LEXIS at 28-29.

55. *Wiwa*, 2002 U.S. Dist. LEXIS at 39 (citing *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995)).

56. *Id.* at 40.

57. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

58. *Id.* (citing *Unocal I*, 963 F.Supp. at 891).

59. *Id.* at 41.

60. *Id.* at 43.

61. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987)..

“color of law” test applied in *Unocal II*<sup>62</sup> and *Sarei v. Rio Tinto*.<sup>63</sup> As stated *supra*, *Forti* was the first Ninth Circuit case to apply § 1983 to the ATCA. With little discussion, the Court stated: “Claims for tortious conduct of government officials under 28 U.S.C. § 1350 may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983, where plaintiffs must allege both deprivation of a federally protected right and action ‘under color of’ state law.”<sup>64</sup> While this analogy is useful, the court did not address alternative tests that might have been of service.

*Unocal I*,<sup>65</sup> which came ten years later, involved a class of plaintiffs from Burma who sued the Unocal Corporation—among others—for international human rights violations that surrounded construction of the Yadana natural gas pipeline project in the Tenasserim region of Burma. In *Unocal I*, Judge Richard A. Paez noted the Ninth Circuit and Supreme Court view that state action cases “have not been a model of consistency.”<sup>66</sup> Judge Paez described the four tests reviewed above, but then focused solely on the “joint action test.”<sup>67</sup> The only explanation given for choosing one test over the other three or a combination of tests was that “[w]hether the concerns are treated as separate tests or as factors for consideration, courts must necessarily make a fact-bound inquiry.”<sup>68</sup> There was no discussion about which facts trigger which test, though this probably means that the facts of each case should be analogized to the cases that have established each test. According to the *Unocal I* opinion, courts would seem free to use any of the tests and in any combination if there is a factual basis to do so. In *Unocal I*, Judge Paez appears to address only the joint action test because the plaintiffs’ complaint alleges facts, such as Unocal’s cooperation with the state, which lend themselves to the joint action inquiry.

*Unocal I* leaves the question open whether plaintiffs alleging facts

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62. See *Unocal II*, 110 F. Supp. at 1305. *Unocal II* was appealed to the Ninth Circuit where summary judgment was reversed in part on Sept. 18, 2002 in favor of the plaintiffs in *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002) [hereinafter *Unocal III*].

63. See *Sarei v. Rio Tinto*, PLC, 2002 U.S. Dist. LEXIS 16234, 71 (C.D. Cal. 2002). A case similar to *Sarei* is *Bowoto v. Chevron*, which is currently in discovery phase in the Northern District of California. *Bowoto v. Chevron*, No. 99-2506 (N.D. Cal. filed 1999). *Bowoto* “arises as a result of a series of three brutal, machine gun attacks upon unarmed protesters and unarmed innocent citizens occurring in Nigeria between May 1998 and January 1999.” The protesters were demonstrating against Chevron’s exploitation of Nigeria’s natural resources. Brief for Plaintiffs at 2, *Bowoto v. Chevron* (N.D. Cal. filed 1999) (No. 99-2506). In oral arguments, Judge Legge stated that the plaintiffs “clearly alleged action under color of authority” because “the harms are alleged to have occurred at the hands of the Nigerian military or the Nigerian police, and the Defendants allegedly took part with them.” *Bowoto* Record at 8, *Bowoto* (N.D. Cal. 2000) (No. 99-2506). Thus, at this stage in the litigation, the state action test applied in *Bowoto* is one of “taking part” with the state, not the more rigid “control” standard that was applied in *Unocal II* which has an analogous fact pattern. Since there has not yet been a ruling in *Bowoto*, the parties must wait to see which state action test will be applied by Judge Legge.

64. *Forti*, 672 F.Supp. at 1546.

65. See *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal. 1997) [hereinafter *Unocal I*].

66. *Id.* at 890 (citing *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995)).

67. *Id.*

68. *Id.*

amenable to all four tests would trigger the application of all four tests necessarily, or only a choice among all four tests. This distinction is foreseeably important because a plaintiff who is able to allege facts that fall under only one test may be unsuccessful in a claim in a federal circuit where that test has not been adopted and may be better poised to bring a successful suit in a circuit that has a history of treatment of all four tests.

One year later, District Judge Lew confirmed in *Unocal II* that § 1983 is an appropriate model for finding liability of a state actor, and again the Court described the four tests. In *Unocal II*, however, the court focused not only on the “joint action” test, but applied the “proximate cause” test as well.<sup>69</sup> Although the proximate cause test shares some features with the nexus, symbiotic relationship and public function tests, the proximate cause test is arguably a fifth and more stringent test for finding state action for ATCA purposes. The cases cited for the “proximate cause” test had been imported from outside the ATCA context.<sup>70</sup> The *Unocal II* court looked beyond previous ATCA state action tests to the “proximate cause” test because, while the “joint action” test is appropriate for the private individual acting “in concert” with the government, the “proximate cause” test is appropriate when it is only the government that has committed the violation and the private individual is implicated by proximately causing the government’s violation.<sup>71</sup> *Unocal II* makes clear that the court excluded the other tests because the facts of the case required both the joint action and the proximate cause tests.<sup>72</sup> While judges in the Ninth Circuit have discretion about which test to use based on the facts, they do not seem to have discretion to use no test at all or to use a broader test as occurs in other circuits.<sup>73</sup>

After the in-depth discussions of the state action tests in *Unocal I* and *II*, the Ninth Circuit came to a surprising conclusion in *Unocal III* by holding that “all torts alleged in the present action are *jus cogens* violations and, thereby, violations of the law of nations.”<sup>74</sup> Thus, the *Unocal III* decision did not require any discussion of state action. The Ninth Circuit reached this conclusion after recognizing that “torture, murder, and slavery are *jus cogens* violations, and, thus, violations of the law of nations. [...] Rape can be a form of torture. [...] Moreover, forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation.”<sup>75</sup>

In *Sarei v. Rio Tinto*, a case in the Ninth Circuit discussing the state action doctrine, Judge Margaret Morrow recounted the “color of law”

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69. See *Unocal II*, 110 F. Supp. at 1305-1307. See also Zia-Zarifi, *supra* note 12, at 107-108.

70. See *Unocal II*, 110 F. Supp. at 1307 (citing *Brower v. Inyo County*, 817 F.2d 540, 547 (9th Cir. 1987); *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986); and *Arnold v. International Bus. Machines Corp.*, 637 F.2d 1350, 1356 (9th Cir. 1981)).

71. *Unocal II*, 110 F. Supp. at 1306-1307.

72. *Id.* at 1306-07 (finding that to establish proximate cause, the plaintiff must prove that private individuals exercised control over the government decision).

73. See *infra* Section II(a)(iv)(b).

74. *Unocal III*, 2002 U.S. App. LEXIS 19263, at \*29 (9th Cir. 2002).

75. *Id.* at \*28-29.

jurisprudence from *Kadic* through *Unocal I* and *Unocal II*.<sup>76</sup> First, the plaintiffs asserted that the government of Papua New Guinea (PNG) committed the war crimes, but at the direction of defendant, Rio Tinto. In discussion of the war crimes allegation, Judge Morrow distinguished between “action in concert” with a government, warranting the “joint action” test, and the “proximate causation of the action by the private party exercising control over the government,” triggering the “proximate cause” test.<sup>77</sup> Judge Morrow then cited *Sutton v. Providence St. Joseph Medical Center* for the proposition that “[r]egardless of the label, the inquiry is the same: There must be some nexus between the wrongful act and the private entity.”<sup>78</sup> The nexus test, however, was not discussed further. Judge Morrow based her finding that the allegations of war crimes are “sufficient to state a claim and confer jurisdiction under the ATCA” on the joint action and proximate cause tests: “if proved, these facts in combination are sufficient to permit a jury to find that the acts of PNG [Papua New Guinea] are ‘fairly attributable’ to Rio Tinto, that it was ‘willful participant’ in those acts, and/or that it exercised some ‘control’ over them.”<sup>79</sup>

The second claim in *Sarei* that requires state action inquiry is for racial discrimination.<sup>80</sup> The court found that because plaintiffs lodged this claim against the private actor, Rio Tinto, and not the government of Papua New Guinea, the inquiry differs from the war crimes analysis that used the “joint action” and “proximate cause” tests. In the racial discrimination analysis, the court stated:

In § 1983 cases [...], courts use one of four approaches to determine whether the state was sufficiently involved that the conduct may be treated as state action. These are: (1) whether the private entity is performing a traditional public function; (2) whether the entity acts under state compulsion; and (3) whether there is a sufficiently close nexus between the government and the challenged action; and (4) whether the private entity and the state were joint participants in the act.<sup>81</sup>

The court went on to state that it is “unclear whether these approaches are different in operation or merely alternative ways of characterizing the fact intensive decision as to whether state action is present.”<sup>82</sup> Despite the court’s confusion, Judge Morrow analyzed the facts of the case under the

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76. See *Sarei*, 221 F. Supp. 2d 1116, 1144 (C.D. Cal. 2002). *Sarei* was decided two months prior to *Unocal III*.

77. *Id.* at 1146 (quoting *Arnold v. Int’l Business Machines Corp.*, 637 F.2d 1350, 1356 (9th Cir. 1978)).

78. *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999).

79. *Sarei*, 221 F. Supp. 2d at 1149.

80. *Id.* at 1151.

81. *Id.* at 1153, citing *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995); *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000); *Sutton*, 192 F.3d at 835-36.

82. *Sarei*, 221 F. Supp. 2d at 1153.

joint action and nexus tests, and found that plaintiffs stated a claim for racial discrimination based on the joint action test.<sup>83</sup> In essence, for the war crimes analysis, the court stated that the joint action and proximate cause tests were appropriate because the action was by the Papua New Guinea government. The court stated, however, that the state action test is *different* when the private actor is directly alleged to have violated the law of nations,<sup>84</sup> but went on to apply the *same* joint action test and the nexus test.

While the Second Circuit has focused on the joint action test, as seen in *Kadic*, *Tachiona* and *Wiwa*, the Ninth Circuit has taken a different approach, emphasizing the joint action test (seen in *Unocal I* and *II* and *Sarei*), but also paying attention to the proximate cause test when the facts lend themselves to such analysis (as seen in *Unocal II* and *Sarei*). The *Sarei* Court's final discussion of all four tests demonstrates that the Ninth Circuit has not settled on one test as appears to have happened in the Second Circuit.

#### b. The State Action Test in Other Circuits

In *Beanal v. Freeport McMoRan, Inc.*,<sup>85</sup> a group of Indonesian plaintiffs brought suit in the Fifth Circuit against a mining company for genocide, other human rights violations, and environmental torts. The *Beanal* Court took a different approach to the state action question than the one taken in either the Second or Ninth Circuits. The court first addressed whether the factual allegations passed the state action test as described in section 207 of the Restatement (Third) of the Foreign Relations Law of the United States.<sup>86</sup> Under this test, the Court judged state action based on "all the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for public purpose or for private gain, and whether the persons acting wore official uniforms or used official equipment."<sup>87</sup> Since analysis of the facts under the Restatement proved inconclusive, the Court then turned to § 1983 analysis.

Unlike the cases examined above, the *Beanal* Court discussed the four tests, "(1) the nexus test, (2) the symbiotic relationship test, (3) the joint action test, and (4) the public function test,"<sup>88</sup> before proceeding to examine the facts pursuant to *each* test in detail.<sup>89</sup> Only when analysis under each of the four tests failed did the Judge determine that there was no state action under "color of law" jurisprudence.<sup>90</sup>

Whereas the other circuits only discussed the facts under one or two tests, the *Beanal* Court did a painstaking inquiry into each test. The Fifth

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83. *Id.* at 1155.

84. *Id.* at 1153-54.

85. *See Beanal*, 969 F.Supp. 362 (E.D. La. 1997).

86. *Id.* at 374.

87. *Id.* at 375.

88. *Id.* at 377 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1988)).

89. *Beanal*, 969 F. Supp. at 377-380.

90. *Id.* at 380.

Circuit's approach in *Beanal* suggests a more hospitable atmosphere for plaintiffs than the other circuits. Because the court is willing to look at all tests, the plaintiff's claim will not fail just because they are unable to meet, for example, the joint action or proximate cause tests. Plaintiffs are given a better chance when all possible § 1983 tests are applied.

In *Iwanowa v. Ford Motor Company*,<sup>91</sup> the Court had to decide whether to find Ford a state actor based on its use of forced labor in Nazi Germany. In the first Third Circuit case to deal with state action on the part of a private corporation under the ATCA, Judge Greenaway asked whether Ford was a "de facto state actor."<sup>92</sup> The Court then listed several facts about a Nazi leader who "encouraged [and caused] German industries to bid for forced laborers in order to meet production quotas and to increase profits," and concluded that

the Complaint alleges that Defendants acted in close cooperation with Nazi officials in compelling civilians to perform forced labor. This constitutes an allegation that Defendants were de facto state actors and are therefore, liable under all possible interpretations of the ATCA.<sup>93</sup>

Thus, the Third Circuit found a claim for state action based neither on the Restatement, nor any specifically named "color of law" tests used by the other circuits, but on an amalgamation of tests and on facts leading to the conclusion absent more formal state action reasoning.

Of all the circuits, the Second Circuit seems to be the most difficult place for a plaintiff to demonstrate state action, since its analysis has been limited to the joint action test. On the contrary, based on *very* limited evidence, the Fifth Circuit may be the most hospitable since it appears to consider all four tests. In the middle lies the Ninth Circuit, where the joint action test predominates but other tests are considered, and the Third Circuit, where a more nebulous test has been used.

##### 5. Applying the ATCA to Environmental Abuses Abroad

With this structure in mind, this section turns to examples of how environmental wrongs abroad have been litigated in U.S. courts. Although no ATCA case asserting environmental harms has yet been fully heard on the merits, several plaintiffs have attempted to make a claim for violations of international environmental law. As international environmental law crosses into the realm of customary international law and meets the additional requirement of becoming 'universal, definable, and obligatory,' it will be a viable cause of action under the ATCA: "courts must interpret international law not as it was in 1789, but as it has evolved and exists

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91. See *Iwanowa*, 67 F. Supp. 2d 424 (D.N.J. 1999).

92. *Id.* at 445.

93. *Id.* at 445-446.

among the nations of the world today.”<sup>94</sup> The courts’ treatment of the environmental claims in the cases below demonstrates that, despite plaintiffs’ efforts, environmental torts have not been recognized under customary international law.

a. *Amlon Metals, Inc. v. FMC Corp.*

The first case to attempt to use the ATCA for environmental torts was *Amlon Metals, Inc. v. FMC Corp.*<sup>95</sup> The case involved a shipment of copper residue from the United States to England. When the materials arrived in England, the plaintiff realized that the substances were not merely copper residue, but hazardous waste, and refused to receive the shipment. The court looked to the U.S. environmental statute, the Resource Conservation and Recovery Act (RCRA),<sup>96</sup> Principle 21 of the Stockholm Declaration<sup>97</sup> and the Third Restatement on Foreign Relations<sup>98</sup> as possible bases for finding a violation of customary international environmental law.<sup>99</sup> After dismissing RCRA as an unacceptable independent basis for a cause of action,<sup>100</sup> the court examined whether Principle 21 and the Third Restatement reflected customary international law for the ATCA claim.

Principle 21 asserts that states have a responsibility “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>101</sup> The Restatement echoes this assertion and further states that if the activities have “caused significant injury” or risk of injury extraterritorially “the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state.”<sup>102</sup> Although Principle 21 and the Restatement were directly on point in *Amlon*, the court found that both sources failed to reflect binding sources of international law. The court found that Principle 21 was only meant as a guiding principle, and that the Restatement was too specific to the U.S.,

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94. *Filartiga*, 630 F.2d. at 881.

95. *See Amlon*, 775 F.Supp. 668.

96. Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6992 (2000).

97. Stockholm Declaration, United Nations Conference on the Human Environment, June 16, 1972, Principle 21, U.N. Doc. A/CONF.48/14 (1972).

98. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 602(2) (1987). *See* “Remedies for Violation of Environmental Obligations.”

99. *Amlon*, 775 F.Supp. at 671. *See infra* for discussion of RCRA in *Amlon* and the extraterritorial application of US environmental law. Curiously, the court did not analyze the case under the Basel Convention. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126 (1992). The most likely reason is that *Amlon* arose out of incidents in 1988 and 1989, prior to the Basel Convention’s entry into force on May 5, 1992.

100. *See Amlon*, 775 F.Supp. at 676, note 12 (“This court also notes that while no commentators have given extensive examination to the question of whether RCRA applies extraterritorially, those who have considered the question concur that RCRA’s provisions in general and the citizen suit provision in particular, do not apply to waste located abroad.”).

101. Stockholm Declaration, *supra* note 96.

102. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 602(2) (1987).

and therefore not a reflection of a universal norm. Because the plaintiff's case was based only on RCRA and Principle 21, neither of which were cognizable under the ATCA, it was dismissed.<sup>103</sup>

Although *Amlon* demonstrated what is insufficient to allege environmental torts that violate the law of nations, it did not state what is sufficient to state such a claim. *Amlon* suggests that while international environmental treaties might be used as a basis for finding customary international law, it must be a treaty that delineates specific obligations on member nations—thus creating a universal, definable and obligatory norm.

b. *Aguinda v. Texaco*

In *Aguinda v. Texaco (Aguinda I)*,<sup>104</sup> Ecuadorian plaintiffs sued Texaco for severe long-term contamination and destruction of Ecuadorian tropical rain forests.<sup>105</sup> In addition, the complaint alleged harm to forest-dwelling indigenous peoples and destruction of their property and the stability of Amazon basin habitats.<sup>106</sup> As in *Amlon*, the largest hurdle in *Aguinda I* was alleging an international environmental law violation that is "definable, obligatory (rather than hortatory), and universally condemned."<sup>107</sup> When *Aguinda I* was brought in 1994, the most recent equivalent to Principle 21 of the Stockholm Declaration was Principle 2 of the Rio Declaration.<sup>108</sup> *Aguinda I* relied on Principle 2, under which states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction."<sup>109</sup> Judge Vincent L. Broderick also found persuasive the fact that U.S. domestic environmental law would have prohibited Texaco's conduct had it been in the United States. He stated that the U.S. laws are

...relevant as confirming United States adherence to international commitments to control such wastes. This tends to support the appropriateness of permitting suit under 28 U.S.C. § 1350 if there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law.<sup>110</sup>

103. *Amlon*, 775 F. Supp. at 671.

104. See *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994) [hereinafter *Aguinda I*].

105. See generally, Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 547 (2000) ("Texaco dumped massive quantities of toxic byproducts onto roads and into streams and wetlands local people used for drinking, fishing and bathing. Texaco also filled over 600 pits with toxic waste, which often washed out in heavy rain.") (citation omitted).

106. *Aguinda I*, 1994 U.S. Dist. LEXIS at \*1-2.

107. *Beanal*, 969 F.Supp. at 370.

108. Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, June 13-14, 1992, Principle 2, U.N. Doc. A/CONF.151/26 (vol. I), reprinted in 31 I.L.M. 874 (1992).

109. *Aguinda I*, 1994 U.S. Dist. LEXIS at \*22.

110. *Id.* at \*24. See also Rosencranz and Campbell, *supra* note 12, at 156 ("The court referred

This statement was the closest any court had come to recognizing a violation of the law of nations rooted in practice inconsistent with domestic environmental law that has an international “soft law” corollary.<sup>111</sup> Judge Broderick suggested that, if the hazardous waste “misuse” were large enough, plaintiffs could establish a violation of the law of nations sufficient to state a claim under the ATCA. He limited the statement, however, by carving out “detailed statutes and regulations” for fear that if they became part of customary international law, they would supersede legislative intent of contrarily detailed statutes and regulations.<sup>112</sup> Further, he stated that steps “initiated or assisted in the United States” would be the most probative and would limit discovery along these lines.<sup>113</sup>

Following *Aguinda I*, the case was dismissed on grounds of *forum non conveniens* (FNC), comity and failure to join an indispensable party.<sup>114</sup> On appeal, the Republic of Ecuador and the state-owned oil company Petoecuador’s untimely motions to intervene in the case were denied.<sup>115</sup> Shortly thereafter, *Jota v. Texaco*<sup>116</sup> was filed and the Second Circuit Court of Appeals reversed the lower court’s dismissal on FNC and comity grounds and partially reversed the lower court on the joinder issue. The Second Circuit remanded the case back to the hands of Judge Rakoff who ordered further briefing on the FNC and comity issues.<sup>117</sup> Following denial of a motion to disqualify Judge Rakoff for conflict of interest<sup>118</sup> and affirmation of the denial on appeal to the Second Circuit,<sup>119</sup> Judge Rakoff dismissed the case once again on the same grounds upon which the Second Circuit had earlier reversed Judge Rakoff—*forum non conveniens*.<sup>120</sup> Most recently, the appeal from Judge Rakoff’s *Aguinda VIII* decision reached the Second Circuit who affirmed dismissal of the case on *forum non conveniens* grounds with a modification permitting the plaintiffs more time to re-file their actions in Ecuador.<sup>121</sup>

In its eight-year history of litigation, the only decision that addressed whether a violation of international environmental law provides a cause of

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to the Rio Declaration of 1992 as possibly reflecting customary international law and observed that misuse of hazardous waste of sufficient magnitude might violate international law.”).

111. “Soft law” refers to treaties or agreements that do not create binding commitments on the part of governments.

112. *Aguinda I*, 1994 U.S. Dist. LEXIS at \*24 (citing *Amlon*, 775 F.Supp. at 668).

113. *Id.* at \*25.

114. See *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) [hereinafter *Aguinda II*].

115. See *Aguinda v. Texaco, Inc.*, 175 F.R.D 50 (S.D.N.Y. 1997) [hereinafter *Aguinda III*].

116. See *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998) [hereinafter *Aguinda IV*].

117. See *Aguinda v. Texaco, Inc.*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. 2000) [hereinafter *Aguinda V*].

118. See *Aguinda v. Texaco, Inc.*, 139 F. Supp. 2d 438 (S.D.N.Y. 2000) [hereinafter *Aguinda VI*]. The plaintiffs moved to disqualify Judge Rakoff because of his attendance at a conference that had been funded by Texaco.

119. See *Aguinda v. Texaco, Inc.*, (In re *Aguinda*), 241 F.3d 194 (2d Cir. 2001) [hereinafter *Aguinda VII*].

120. See *Aguinda VIII*, 142 F. Supp. 2d at 534.

121. See *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002) [hereinafter *Aguinda IX*].

action under the ATCA was in dicta in the initial case, *Aguinda I*.<sup>122</sup> Even though the issue was never debated in further *Aguinda* appeals for procedural reasons, it is unlikely that the case could have been affirmed on international environmental law grounds. As noted by Armin Rosencranz and Richard Campbell, “[l]ack of international consensus on environmental norms is one reason why courts have been reluctant to recognize environmental abuses, absent accompanying human rights violations, as causes of action under the ATCA.”<sup>123</sup> Nonetheless, Judge Broderick’s dicta – which seemed to approve of Principle 2 of the Rio Declaration as at least a partial basis for the claim<sup>124</sup> – may serve, and has served, as a starting point for analysis of environmental claims in subsequent ATCA cases.

c. *Beanal v. Freeport McMoRan, Inc.*

As discussed above, in 1997, *Beanal v. Freeport McMoRan, Inc.*<sup>125</sup> was filed in the Fifth Circuit and concerned human rights violations and environmental torts conducted against the Amungme tribe of Indonesia as a result of Freeport’s mining operations there.<sup>126</sup> Like *Aguinda*, *Beanal* was dismissed, but not before substantial discussion of whether international environmental law has risen to the level of customary international law for ATCA purposes. From the outset, it would seem that *Beanal* was better positioned to survive a motion to dismiss than *Aguinda* because it involved environmental *and* human rights claims. Particularly because the human rights claims were related to the environmental harm, it would have seemed likely that even if the environmental claims were dismissed, some of the human rights claims – if successful – would remedy some of the same grievances as alleged in the environmental claims.

In *Beanal*, the court considered whether “Freeport’s alleged environmental practices [violated] the law of nations.”<sup>127</sup> The environmental harms specifically alleged included:

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122. See Rosencranz and Campbell, *supra* note 12, at 157 (“The court’s remarks about what may comprise international law were dicta because the *Aguinda* claim was ultimately dismissed on the grounds of international comity, [FNC], and failure to join indispensable parties.”).

123. *Id.* at 156.

124. See Arlow, *supra* note 12, at 103 (“Justice Broderick’s comments in 1994 are a key indicator of the applicability of international doctrines and the ‘law of nations’ in suits against U.S. entities for environmental torts committed in other nations.”).

125. See *Beanal*, 969 F.Supp. at 362.

126. See generally, Herz, *supra* note 104, at 548 (“[Freeport] has removed the top 400 feet of a mountain sacred to the local Amungme people. It currently dumps 160,000 tons of untreated, toxic mine tailings into the local waterways each day, a figure that will soon rise to 285,000 tons, the equivalent of a ten ton dump truck-full every three seconds. This massive release of sediment has created an artificial floodplain on a local river, destroying the river and inundating surrounding rainforests. The mine has also devastated lakes and polluted ground and surface water with toxins.”) (citations omitted).

127. *Beanal*, 969 F.Supp. at 382.

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...that defendant corporations have failed to engage in a zero waste policy, unacceptable enclosed waste management system, have failed to maximize environmental rehabilitation, have failed to engage in an appropriate acid leachate control policy, have failed to adequately monitor the destruction of the natural resources of Irian Jaya and have disregarded and breached its international duty to protect one of the last great natural rain forests and alpine areas in the world.<sup>128</sup>

Once again, the court found that these facts did not allege a violation of a “universal, definable, and obligatory” international norm.<sup>129</sup> The court did, however, cite dicta in *Aguinda I* for the proposition that Section “1350 may be applicable to international environmental torts.”<sup>130</sup> The challenge in *Beanal* was that once the court reached the environmental claims, it had already concluded that Freeport was not a state actor. Therefore, any environmental torts that had the potential to lead to Freeport’s liability would have to have been recognized as one of the “handful of crimes” that are actionable for private as well as state actors.

The *Beanal* plaintiffs relied on principles of international environmental law to support their environmental claims—namely, the Polluter Pays Principle; the Precautionary Principle; the Proximity Principle; the good-neighborliness principle and Principle 21 / Principle 2 from the Stockholm and Rio Declarations.<sup>131</sup> The court then ironically offered Philippe Sands’ critique of these principles in support of why the plaintiffs failed to state a claim:

Of these general principles and rules only Principle 21 / Principle 2 and the good neighborliness / international cooperation principle are sufficiently substantive at this time to be capable of establishing the basis of an international cause of action... The status and effect of the others remains inconclusive, although they may bind as treaty obligations or, in limited circumstances, as customary obligations.<sup>132</sup>

The court rejected Sands’ notion that any of the alliterative principles formed the basis for an environmental cause of action under the ATCA. Instead, the court held that, “standing alone, [the principles] do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content.”<sup>133</sup>

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128. *Id.* at 383.

129. *Id.*

130. *Id.*

131. *Beanal*, 969 F.Supp. at 383-384. For definitions and discussion of these international environmental law principles, see generally PHILIPPE SANDS, GREENING INTERNATIONAL LAW xxxii (1994). See also Wu, *supra* note 12, at 502.

132. *Id.* at 384 (quoting PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 184 (Phillipe Sands ed., 1995)).

133. *Id.* at 384 (citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 186 (D. Mass. 1995)).

Finally, the court pointed out that the principles apply to states, not “non-state corporations.”<sup>134</sup> Because the principles only bind states, only state actors could violate them. Since the Freeport Corporation was not found to be a state actor, even principles binding on states would have failed to provide a cause of action for the plaintiffs in *Beanal*.

As was the case in *Amlon* and *Aguinda I*, the *Beanal* court did not preclude environmental torts from eventually becoming customary international law and thus actionable under the ATCA.<sup>135</sup> All three courts agreed, however, that at this stage in the development of international environmental law, the declarations, restatements and principles were not universal, definable and obligatory.

d. *Bano v. Union Carbide Corp.*

In *Bano*, plaintiffs who suffered from the devastating 1984 chemical disaster in Bhopal, India sued Union Carbide Corporation for the tremendous loss of life and environmental harms associated with the accident.<sup>136</sup> *Bano v. Union Carbide Corp.*, decided in November, 2001, dismissed the plaintiffs’ environmental claims under the ATCA based on the theory that the claims “were fully litigated and settled in India,” and therefore, did not reach the issue of whether the “complaint failed to allege a violation of well-established norms of international law as required under the ATCA.”<sup>137</sup> This case was a lost opportunity for evaluating environmental principles as part of the law of nations because the facts were a dramatic example of the link between human rights and the environment. Because the environmental pollution in *Bano* wiped out large segments of the local population, claims for human rights violations might have been successful and the damages may have worked to remedy the environmental harm.

e. *Flores v. Southern Peru Copper Corporation*

*Flores* is another case of plaintiffs alleging a mining corporation’s violations of international environmental law. In *Flores*, eight Peruvian citizens claimed that the Southern Peru Copper Corporation’s (“SPCC”) mining operations in and around Ilo, Peru caused environmental pollution resulting in their asthma and lung disease, which “violated their rights to

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134. *Id.*

135. See Wu, *supra* note 12, at 499-500 (“Thus, the courts left open the possibility that environmental torts could be actionable under the ATCA in the future—as soon as the international community itself treats the choice to protect the environment as a legal obligation.”).

136. See *Bano*, 273 F.3d at 122 (“On the night of December 2-3, 1984, the UCIL Bhopal chemical plant leaked a large quantity of methyl isocyanate, a highly toxic gas, into the City of Bhopal, State of Madhya Pradesh, Union of India. Winds blew the gas into densely populated neighborhoods, resulting in thousands of deaths and more than two hundred thousand injuries.”).

137. *Bano*, 273 F.3d at 127.

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life, health, and sustainable development.”<sup>138</sup>

According to Judge Haight, the plaintiffs in *Flores* “attempt to distinguish the present case from those discussed above [*Aguinda*, *Amlon* and *Beanal*] by characterizing their claims as based on human rights law, rather than environmental law, and by pointing to the specific rights they invoke, i.e. the right to life, right to health, and right to sustainable development. But the labels plaintiffs affix to their claims cannot be determinative.”<sup>139</sup> The plaintiffs in *Flores* fail to use human rights as a proxy for environmental claims (if they are indeed making this attempt as the court alleges) because they base their action on human rights claims that are not actionable under the ATCA.

The Court concludes, “plaintiffs have not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development *within a nation’s borders*, violate any well-established rules of customary international law.”<sup>140</sup> *Flores* thus holds that plaintiffs in the Southern District of New York must demonstrate that the environmental harm they allege is trans-boundary in nature. More significantly, *Flores* suggests that claims under international environmental law will not be successful when guised as human rights claims unless the human rights claims themselves are well-established as part of the “law of nations.”

In *Flores*, as in many of the cases above, the court granted the defendant’s motion to dismiss because, according to Judge Haight, the rights to life, health, and sustainable development have not yet become non-derogable.

f. *Sarei v. Rio Tinto plc*

*Sarei v. Rio Tinto plc*<sup>141</sup> addressed whether environmental torts may violate the law of nations under the ATCA, but in the end, the case has little precedential value because the entire case was dismissed based on the political question doctrine.<sup>142</sup> Despite its dismissal, *Sarei* contains important analysis of environmental claims under the ATCA. As discussed above, *Sarei* involves claims for redress of human rights and environmental torts by residents of the Papua New Guinea island of Bougainville against the British mining company Rio Tinto plc and the Australian corporation Rio Tinto Limited.

The environmental harms alleged in *Sarei* are divided into two categories: (a) rights to life and health and (b) sustainable development and

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138. *Flores*, 2002 U.S. Dist. LEXIS at 6.

139. *Id.* at 22.

140. *Id.* at 23 (emphasis added).

141. *Sarei*, 221 F. Supp. 2d 1116.

142. Rio Tinto, represented by Morrison & Foerster, urged Judge Morrow to solicit a Statement of Interest from the State Department. The State Department’s statement caused the court to conclude that “the United States’ interests are aligned, or at least not inconsistent, with those of PNG, in a way that suggests it would be appropriate to refrain from exercising jurisdiction in this case.” *Sarei*, 221 F. Supp. 2d at 1204.

the U.N. Convention on the Law of the Sea (UNCLOS). In the rights to life and health section of the decision, the plaintiffs rely on statements by an international law expert,<sup>143</sup> who in turn cites international and regional human rights conventions.<sup>144</sup> This is the first ATCA case that has attempted to use such treaties to make an explicit appeal to 'environmental human rights.' It is a logical point at which to meld already accepted human rights norms with emerging environmental norms to create human rights and environmental protection under the ATCA. The plaintiffs argue, quoting an Inter-American Commission report "Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being."<sup>145</sup> As further evidence of a human right to environmental protection, the plaintiffs invoke the famous *Gabcikovo Dam Case*, where the International Court of Justice held that environmental protection is "a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself."<sup>146</sup>

Judge Morrow rejected plaintiffs' rights to life and health claims on the grounds that none of them were universal, definable and obligatory.<sup>147</sup> As she concluded in granting the motion to dismiss for the rights to health and life claims, "Courts addressing the issue have consistently determined that allegations of environmental harm do not state a claim under the law of nations."<sup>148</sup>

For reasons that parallel the analysis in the rights to life and health section, the Court granted the defendants' motion to dismiss the sustainable development claims.<sup>149</sup> The final environmental claim, but for the political question doctrine, would have survived the motion to dismiss. Judge Morrow found that "plaintiffs have adequately stated a claim for violation of the customary international law reflected in UNCLOS."<sup>150</sup>

The plaintiffs' claim under UNCLOS would have survived, not because UNCLOS is a treaty of the United States that creates a cause of action under the ATCA, but because, with 166 ratifications (*excluding* the United States which is only a signatory), UNCLOS has become part of customary international law. The relevant provisions of UNCLOS provisions in *Sarei* are: (1) that "states take 'all measures... that are

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143. See *Sarei*, 221 F. Supp. 2d at 1156. The plaintiffs rely heavily on the declaration of Professor Gunther Handl.

144. Handl cites the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the African Charter of Human and Peoples' Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union.

145. *Sarei*, 221 F. Supp. 2d at 1156.

146. *Id.* at 109 (quoting the Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 ICJ (Sept. 25)).

147. *Id.* at 117.

148. *Id.*

149. *Id.* at 121.

150. *Id.* at 127.

necessary to prevent, reduce and control pollution of the marine environment' that involves 'hazards to human health, living resources and marine life through the introduction of substances into the marine environment;" and (2) that states "adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources."<sup>151</sup>

The court held that, if the plaintiffs' allegations are correct, UNCLOS is a viable cause of action. Rio Tinto's actions that allegedly violate the provisions above include: "polluting a major bay dozens of miles away, and the Pacific ocean as well"; depositing tailings in the Empress Augusta Bay causing destruction of the fish as a food source; and leaving an estimated 8,000 hectares of Empress Augusta Bay covered with "tailings to a copper concentration greater than 500ppm (parts per million)."<sup>152</sup> Similar to the court's ruling in *Flores*, in *Sarei*, despite dismissal based on the political question doctrine, the plaintiffs' success on the UNCLOS claim would have depended on environmental science proving that the contamination of waters off Bougainville extended into UNCLOS "open sea" territory, and also on a finding of state action. Because it is highly unlikely that the customary international law created by UNCLOS has risen to one of the "handful of crimes," or a "jus cogens" violation that may be violated by a private corporation, the plaintiffs would have had to show that Rio Tinto acted under 'color of law' in polluting Empress Bay to succeed on the merits.

Although it is possible that the sheer magnitude of the environmental harm caused by Rio Tinto could have elevated the tort into the "handful of crimes" for which Rio Tinto could be held liable without state action, it is more likely that state action would have been required. As discussed above, the court in *Aguinda I* also seems to have left open the possibility that an environmental tort of a gargantuan magnitude may lift the tort to a level actionable under the ATCA.<sup>153</sup>

Despite its dismissal, *Sarei* is important because it established that UNCLOS reflects customary international law.<sup>154</sup> While this case fell victim of domestic political sabotage, not all cases will. In the future, corporations may be held liable for environmental wrongs that violate UNCLOS.

## B. Applying U.S. Law Extraterritorially

In addition to the ATCA, U.S. corporations may be sued in the U.S. for environmental torts abroad under certain limited conditions based on

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151. *Id.* at 122-123.

152. *Id.* at 126-127.

153. *Aguinda I*, 1994 U.S. Dist. at 24.

154. *Sarei*, 221 F. Supp. 2d at 1161-1162 ("Although the United States has not ratified UNCLOS, it has signed the treaty. Moreover, the document has been ratified by 166 nations and thus appears to represent the law of nations....Because UNCLOS reflects customary international law, plaintiffs may base an ATCA claim upon it.").

extraterritorial application of U.S. environmental law.<sup>155</sup> Although courts have found strong policy reasons for extraterritorial application of U.S. laws in many situations,<sup>156</sup> such application in the environmental context may not be feasible. Due to jurisdictional barriers, foreign plaintiffs may find particular difficulty bringing suit in U.S. courts.<sup>157</sup> The following section first discusses the presumption against extraterritorial application of U.S. law and how the presumption may be rebutted, and then examines, through examples of seminal cases, which U.S. laws may be applied extraterritorially to U.S. corporations and to U.S. government actions that impact U.S. corporate conduct abroad.

### 1. The Presumption Against Extraterritoriality

No U.S. environmental statute that applies to corporations acting in the U.S. has yet been applied to find a corporation liable for their actions abroad.<sup>158</sup> To determine whether a U.S. statute applies abroad, courts first look to the language of the statute to determine the congressional intent.<sup>159</sup> If the statute is ambiguous as to whether the law applies abroad (i.e., when the statute is silent on the matter), courts will then look to express or implied congressional intent.<sup>160</sup> Unless there is evidence that Congress

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155. United States courts have followed the Second Circuit's explicit abandonment of jurisdiction based solely on the territoriality principle in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). Territoriality refers to jurisdiction over conduct on U.S. soil. Extraterritorial jurisdiction refers to jurisdiction over conduct occurring outside the territory of the United States. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281 n. 2 (1990) (dissent describing abandonment of the territoriality as a basis for jurisdiction "for at least 45 years" in the context of The Sherman Act.); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-796 (1993) ("Although the proposition was perhaps not always free from doubt...it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

156. See *United States v. Larsen*, 952 F.2d 1099, 1100 (9th Cir. 1991) ("The Supreme Court has explained that to limit the *locus* of some offenses 'to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.'") (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)). See also *Thomas & Betts Corp. v. Panduit Corp.*, 71 F. Supp. 2d 838, 841 (N.D. Ill. 1999) ("It has long been established that 'the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.'") (quoting *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-286 (1952) (quoting *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941))).

157. See *Rosencranz and Campbell*, *supra* note 12, at 174 ("Foreign plaintiffs have tried to convince U.S. federal courts to hear their claims by arguing that violations of U.S. environmental statutes raise federal questions, thereby creating federal question jurisdiction under 28 U.S.C. 1331. Foreign plaintiffs often make this argument because they are unable to sue, for a variety of reasons, under the citizen suit provision contained in most environmental statutes. This approach has not been successful.").

158. See *Kalas*, *supra* note 12, at 193-94.

159. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 250-51 (1991); *Smith v. United States*, 507 U.S. 197, 203 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

160. See *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) ("Courts look to congressional intent, express or implied, to determine whether a given statute should have

intended the law to apply abroad, there is a presumption against extraterritorial application of the law.<sup>161</sup> Furthermore, “courts generally look to international law principles to ensure that an extraterritorial application of United States laws is ‘reasonable.’”<sup>162</sup>

In 1991, the District Court for the Southern District of New York affirmed in *Amlon* the “well-established principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”<sup>163</sup> To rebut the presumption for a U.S. environmental statute, a plaintiff must assert that Congress *intended* the statute to apply abroad to hold corporations accountable for environmental law. The burden of rebutting the presumption against extraterritoriality may be alleviated if the corporation in question has undertaken “significant conduct within the territory.”<sup>164</sup> In the 1972 *Amlon* case, the court noted this important caveat when it discussed the plaintiff’s proposition that when the conduct is significant, “a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.”<sup>165</sup> In the end, the *Amlon* court rejected the significant conduct test. However, courts have not foreclosed the option of invoking the significant conduct test. The test has been applied to fraud cases,<sup>166</sup> though no case has yet expressly prohibited application of the “significant conduct” test to environmental statutes.

Finally, it is important to note that the application of environmental statutes extraterritoriality in U.S. courts has been inconsistent.<sup>167</sup> Although

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extraterritorial application.” (citing *United States v. Bowman*, 260 U.S. 94, 98 (1922); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (1984)).

161. *See Larsen*, 952 F.2d at 1100.

162. *See Felix-Gutierrez*, 940 F.2d at 1204 (citing *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (1984)).

163. *Amlon*, 775 F. Supp. at 672 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))). *See also Larsen*, 952 F.2d at 1100 (affirming that the presumption applies to penal statutes as well: “Congress is empowered to attach extraterritorial effect to its penal statutes so long as the statute does not violate the due process clause of the Fifth Amendment [citations omitted]. There is a presumption against extraterritorial application when a statute is silent on the matter [citation omitted]. However, this court has given extraterritorial effect to penal statutes when congressional intent to do so is clear.”).

164. *Amlon*, 775 F. Supp. at 672 (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972)).

165. *Id.* (citing *Leasco*, 468 F.2d at 1334).

166. *See Leasco*, 468 F.2d 1326; *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (1989) (“The anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States.”).

167. *See Mark P. Gibney, The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT’L & COMP. L. REV. 297, 301 (“The problem, however, is that the judiciary has been no more consistent, on the surface at least, than Congress. In some instances the courts have read very ambiguous statutory language quite expansively, but in other cases they have taken equally broad language and given it a territorial interpretation.”).

there are exceptions, in general, if the regulation furthers economic interests domestically or abroad, courts seem willing to apply U.S. laws.<sup>168</sup> If the matter in question concerns civil or environmental rights, however, courts seem unwilling to apply U.S. laws.<sup>169</sup> Mark Gibney has called this dual treatment “an irrebuttable presumption against extraterritoriality in so-called ‘nonmarket’ cases,” while in “market” cases, courts “readily allowed the extraterritorial application of U.S. law.”<sup>170</sup> This trend is not necessarily the result of an evolving common law bifurcating these domains. Rather, it may be the result of self-serving political realism,<sup>171</sup> resulting in courts’ bias toward protecting U.S. economic interests even at the expense of trampling sovereignty,<sup>172</sup> and hesitancy toward imposing social and environmental protections beyond our borders—the latter being conceived of as areas that sovereign nations should control territorially. Given the bias against extraterritorial application of U.S. law in the environmental context, it is tempting to disregard it as a viable litigation tool against corporations. However, because there are a few exceptional cases that have left the door slightly ajar, extraterritorial application as a strategy is examined below.

## 2. U.S. Environmental Laws and Cases Determining Extraterritoriality

Only a limited number of cases have addressed the extraterritorial application of U.S. environmental law. Of those, most have been brought against U.S. government *agencies* for violations of the National Environmental Policy Act (NEPA).<sup>173</sup> This section first discusses the extraterritorial application of NEPA, and then follows with a discussion of other environmental statutes.

NEPA suits against government agencies require an environmental

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168. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (regarding U.S. antitrust law’s application to the London reinsurance industry); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (regarding extraterritorial application of the Sherman Act). There are exceptions to extraterritorial application in the intellectual property arena. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 507 (1997).

169. See *EEOC v. Arabian*, 499 U.S. 244 (1991) (discussing whether Title VII of the 1964 Civil Rights Act applied extraterritorially to a naturalized citizen working in a foreign country who worked for an American corporation). See also *Amlon*, 775 F. Supp. at 676 (where the court found that RCRA does not apply extraterritorially). See also *United States v. Mitchell*, 553 F.2d 996, 1002-04 (5th Cir. 1977) (applying the Marine Mammal Protection Act).

170. See Gibney, *supra* note 166, at 304.

171. *Id.* at 304 (“U.S. law has been applied extraterritorially when that has served the national interest of the United States or its corporate actors, and it has been given a territorial application when a restrictive interpretation would serve those same ends.”).

172. See *id.* (“A second, and more important, reason why the extraterritorial application of U.S. law will continue to be applied inconsistently is that this seeming inconsistency serves some very useful political ends.”).

173. See *Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999); *Environmental Def. Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993); *Greenpeace USA v. Stone*, 748 F.Supp. 749 (D. Haw. 1990); *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981) [hereinafter *NRDC v. NRC*]; *Nat’l Org. for the Reform of Marijuana Laws (NORML) v. United States Dep’t of State*, 452 F. Supp. 1226 (D.D.C. 1978);

impact statement (EIS) for all “major federal actions significantly affecting the quality of the human environment.”<sup>174</sup> When federal agencies cooperate with U.S. corporations and are joint sponsors, financiers or guarantors of development projects abroad, there may be sufficient basis for a claim under NEPA; that claim, in return, may impact a corporation’s environmental conduct abroad. While the claim’s defendant, by definition, could only be a U.S. government agency, a case could have tremendous impact on corporate environmental practice abroad. If, for example, plaintiffs were to succeed in bringing a NEPA claim for an EIS violation where federal agency support was a key component of a development project, a court might well order cessation of the project until the violation was remedied—a result that is potentially more powerful than suing the corporation directly for environmental torts under the ATCA.

Agencies particularly relevant for examination under NEPA are the U.S. Export-Import Bank (ExIm Bank) and the Overseas Private Insurance Corporation (OPIC). To date, neither of these agencies has been found liable for violations of NEPA’s EIS requirement in their actions abroad, and both “have refused to acknowledge such an application.”<sup>175</sup> However, in the future, courts may still be willing to hold one of these agencies liable—particularly where their actions have created a large foreign impact. In the 1981 case *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*,<sup>176</sup> the court, in dicta, stated:

NEPA jurisprudence indicates that exclusively foreign impacts do not automatically invoke the statute's environmental obligations....I find only that NEPA does not apply to NRC nuclear export licensing decisions and *not necessarily* that the EIS requirement is inapplicable to some other kind of *major federal action abroad*.<sup>177</sup>

This tentative language followed a series of early NEPA cases that accepted its extraterritorial application nearly without question.<sup>178</sup> Doubt as to the applicability of NEPA abroad became more pronounced in the 1990 case, *Greenpeace v. Stone*.<sup>179</sup> In *Greenpeace*, the court held that NEPA did *not* apply to the U.S. Army and Department of Defense’s chemical munitions transport from West Germany to the Johnson Atoll, but limited

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174. National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4332(2)(C).

175. Silvia M. Riechel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT’L L. 115, note 45 (1994) (citing Note, *The Extraterritorial Scope of NEPA’s Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 350 (1975)).

176. *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 647 F.2d 1345 (D.C. Cir. 1981) [hereinafter *NRDC v. NRC*].

177. *Id.* at 1366 (emphasis added).

178. *NORML*, 452 F. Supp. 1226 (finding federal agencies in violation of NEPA with respect to their participation in a poppy plant and marijuana herbicide spraying program in Mexico); *People of Enewetak v. Laird*, 353 F.Supp. 811 (D. Haw. 1973) (granting an injunction of the Pacific Cratering Experiments on Enewetak Atoll until completion of an EIS).

179. *See Greenpeace*, 748 F. Supp. 749.

its finding to the facts of that case. In the 1993 case *Environmental Defense Fund, Inc. v. Massey*,<sup>180</sup> the D.C. Circuit Court held that NEPA does apply to the incineration of food wastes in Antarctica, although the holding was weakened by the “court's assertion that it does not decide how NEPA may apply to cases involving actual foreign sovereigns unlike Antarctica.”<sup>181</sup>

The most recent cases addressing the issue generally do not favor applying NEPA abroad when there is proof of a major federal action. However, the precedential value of the decisions is unclear.<sup>182</sup> Because recent cases have been so fact specific, plaintiffs are unable to use general principles from them for future lawsuits. As courts have found in certain cases that NEPA applies extraterritorially, plaintiffs seeking redress of environmental harms abroad may want to chance the patchwork of precedent and bring suit against federal agencies. Particularly with ExIm Bank and OPIC, a successful claim may have dramatic results. Lastly, extraterritorial application of NEPA would be one of the only contexts in which plaintiffs could *prevent* corporations supported by a federal agency from causing environmental harm. Unlike the ATCA and other U.S. environmental statutes, NEPA is prophylactic: instead of stopping projects all together, it just mandates that they are done with environmental assessment.

In addition to the Marine Mammal Protection Act (MMPA) of 1972 which has been held not to apply outside U.S. territorial waters,<sup>183</sup> U.S. environmental statutes that may be tools against corporate environmental torts abroad include the Endangered Species Act (ESA), the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Although no case has been affirmed that has applied the ESA abroad, *Defenders of Wildlife v. Lujan*,<sup>184</sup> which allowed such application, was overturned on different grounds,<sup>185</sup> thus leaving the question open. Proponents argue that there are “numerous arguments in favor of extraterritorial application”<sup>186</sup> of the ESA in future cases. *Amlon* held that RCRA does not apply extraterritorially.<sup>187</sup> Similarly, CERCLA is

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180. See *Massey*, 986 F.2d 528.

181. Riechel, *supra* note 174, at 129.

182. *Massey* seems to have been limited by *NEPA Coalition of Japan*, 837 F. Supp. 466, which held that the presumption against extraterritoriality did apply to Navy operations in Japan. See also Cyril Kormos, Brett Grosko, and Russell Mittermeier, *U.S. Participation in International Environmental Law and Policy*, 13 GEO. INT'L ENVTL. L. REV. 661, 670 (2001) at 667 (“There is a substantial gray area between the facts of the two cases cited above, and courts will certainly be confronted by agencies that resist complying with NEPA requirements simply because they are potentially onerous rather than because of a genuine concern about international relations. Indeed, many commentators have noted that there is strong support for the claim that NEPA should apply to U.S. government action even in sovereign foreign nations.”).

183. See *Mitchell*, 553 F.2d at 1002-04.

184. See *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).

185. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

186. Kormos, Grosko, and Mittermeier, *supra* note 182, at 670.

187. See *Amlon*, 775 F. Supp. 668.

inapplicable outside the territory of the U.S.<sup>188</sup> None of these “nonmarket” statutes—those that would be most directly applicable for finding corporate liability abroad—have received the generous application that is seen in the “market” context.

A final, crucial note about the application of RCRA and possibly CERCLA abroad is that corporate conduct amounting to a RCRA or CERCLA violation abroad, while not actionable under RCRA or CERCLA, may be actionable under the ATCA. According to Judge Broderick in *Aguinda I*, RCRA:

may well prohibit the conduct alleged in the complaint if carried out in the United States. While this would not necessarily inhibit actions in the United States leading to conduct abroad permitted by foreign law, it is relevant as confirming United States adherence to international commitments to control such wastes. This tends to support the appropriateness of permitting suit under 28 U.S.C. § 1350 if there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law.<sup>189</sup>

Unfortunately, this remarkable statement has never leapt from the land of dicta. Under Judge Broderick’s method, if conduct were to violate RCRA and were of a sufficient magnitude to violate international law, presumably, RCRA would be redundant. There would still have to be a finding under the ATCA that the “misuse of hazardous waste of sufficient magnitude” fell under a specific, universal and obligatory international legal standard. Refining his point, Judge Broderick stated, “Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations [citing *Amlon*].”<sup>190</sup> Left with only shaky grounds under NEPA and preclusion from bringing suit under the MMPA, ESA, RCRA or CERCLA, extraterritorial application of U.S. law is currently a dismal option for plaintiffs seeking corporate environmental liability.

### C. Claims Based Solely on Treaties or Customary International Law

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188. See Kalas, *supra* note 12, at 193-194 (“Although industrialized nations establish stringent environmental regulations for corporations operating within their borders, these regulations do not apply extraterritorially to similar operations in foreign countries. For instance, in the United States, the Resource Conservation and Recovery Act (RCRA) regulates the treatment, storage and disposal of hazardous wastes from ‘cradle to grave.’ Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict liability for the cleanup of hazardous wastes on all potentially responsible parties. However, neither of these statutes apply to the operation of U.S. or other foreign corporations abroad.”) (footnotes omitted). See also Peggy Rodgers Kalas, *The Implications of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT’L L. REV. 47, 66 (Spring 2000) (“However, neither [RCRA or CERCLA] applies to the operation of US or other foreign corporations abroad.”).

189. See *Aguinda I*, 1994 U.S. Dist. at 24.

190. *Id.*

Claims in U.S. courts based solely on a corporation's alleged violation of international customary or treaty law face several grave problems. First, "[a]s a general rule, international treaties, as agreements among sovereign nations, do not create personal rights that an individual may enforce.... The United States Supreme Court has acknowledged, however, that this general rule has exceptions."<sup>191</sup> The exception allowing a private right of action cited by the court in *Jogi v. Piland* allows a claim under Article 36 of the Vienna Convention on Consular Relations of 1963,<sup>192</sup> which requires that a government officer "notify a foreign national who has been arrested, imprisoned or taken into custody of his right to contact a consulate from his country of origin."<sup>193</sup> However, apart from this exception—which itself has not always been respected in U.S. courts as a private right of action<sup>194</sup>— "[n]o court has addressed the issue in context of a civil claim for monetary damages."<sup>195</sup> The rationale behind this general rule is that treaties are between states and impose duties on states rather than individuals. In recognition of this fact, treaties are often described as 'non-self-executing.'

If a non-self-executing treaty provision were claimed as a cause of action in a U.S. court, that treaty provision would have to rely on congressional implementing language. The ATCA has been considered implementing language for treaties in certain contexts,<sup>196</sup> but this emphasizes that non-self-executing treaties may not *alone* provide causes of action. Plaintiffs face a tremendous challenge because no international environmental treaty or custom (if such custom is recognized) is self-executing and therefore part of U.S. federal common law, independently cognizable in U.S. courts.<sup>197</sup>

Even if a treaty were found to create a private right of action, a second problem is that bringing suit in U.S. courts for such violations requires the court to find subject matter jurisdiction<sup>198</sup> over the claims. Although it might seem plausible that claims asserting violations of international law

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191. *Jogi v. Piland*, 131 F. Supp.2d 1024, 1026 (C.D. Ill. 2001) (citing *Alvarez-Machain*).

192. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(b), 21 U.S.T. 77. See *United States v. Santos*, 235 F.3d 1105, 1107 (2000); *Jogi*, 131 F. Supp. 2d at 1026.

193. *Jogi*, 131 F. Supp.2d at 1025.

194. See *Breard v. Greene*, 523 U.S. 371 (1998).

195. *Jogi*, 131 F. Supp. 2d at 1026.

196. See *Estate of Cabello*, 157 F. Supp. 2d at 1359. See also *Ralk*, 81 F. Supp. 2d at 1380-81 (stating that the plaintiff could have brought his ICCPR claim under the ATCA but because he did not and the treaty is non-self-executing, his claim was dismissed).

197. See *Rosencranz and Campbell*, *supra* note 12, at 171 ("[P]laintiffs alleging international human rights and environmental violations against U.S. multinationals must contend that the source of law that provides them with the private right to action is the 'law of nations,' as incorporated into the laws of the United States and treaties to which the United States is a party. U.S. courts have recognized that a private right of action exists under the laws of the United States because the 'federal courts have the authority to imply the existence of a private right of action for violations of jus cogens norms of international law.'" (citing *White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998) and *The Paquete Habana*, 175 U.S. at 700).

198. See Federal Rule of Civil Procedure 12(b)(1) (requiring subject matter jurisdiction over a defendant in a civil action). Subject matter jurisdiction may be attained either through 28 U.S.C. § 1331 if the case presents a federal question, or § 1332 if there is diversity jurisdiction and the amount in controversy exceeds \$75,000.

present federal questions, as described by the Eleventh Circuit in *Linder v. Portocarrero*, “[t]he district court concluded first that 28 U.S.C. § 1331 does not confer federal jurisdiction over claims for relief by an individual predicated upon an alleged breach of customary international law.”<sup>199</sup> Although the Eleventh Circuit in *Linder* did not itself reach the issue of whether § 1331 provides federal question jurisdiction for such claims, the district court’s rule is generally accepted.<sup>200</sup>

In summary, environmental harms that violate international law—either through treaty or custom—do not form cognizable claims for relief in U.S. courts. Because the treaties are non-self-executing and such customs have not been recognized through precedent as creating a federal common law cause of action, plaintiffs are better off seeking redress of their international environmental claims under the ATCA.

#### D. Application of Foreign Environmental Law in U.S. Courts

Because foreign states with environmental laws applying to corporations are likely to enforce those laws domestically, the only time they would have them litigated in U.S. courts is if: (1) their domestic forum proved inadequate, (2) the U.S. court had jurisdiction over the defendant, and (3) the plaintiffs were successful at fending off a *forum non conveniens* challenge. U.S. courts are hesitant to apply foreign law if the foreign forum is available and U.S. judges are uncomfortable and often inexperienced in applying foreign law. In order to overcome a motion to dismiss on *forum non conveniens* grounds, the plaintiffs must show that the foreign forum is for some reason inadequate to hear the claim and if it is found to be adequate, “the court considers a number of private and public interest factors to determine which forum is more convenient.”<sup>201</sup>

The application of foreign environmental law in U.S. courts to corporations operating abroad is rare, if not unheard of.<sup>202</sup> Although, “[w]hen necessary, a court can interpret and apply foreign laws to a controversy,”<sup>203</sup> because *forum non conveniens* has institutionalized dismissal if application of foreign law is likely, most cases that might have applied foreign environmental law have been dismissed.<sup>204</sup>

In conclusion, because of the doctrine of *forum non conveniens*, plaintiffs are highly unlikely to have their claim heard in U.S. courts based on the

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199. *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992). See also Rosencranz and Campbell, *supra* note 12, at 171.

200. See Rosencranz and Campbell, *supra* note 12, at 171 (“The ‘laws’ of the United States as defined in section 1331 include the federal common law, which in turn incorporates international law. [Section 1331] does not create a cause of action, but only confers jurisdiction to adjudicate those actions arising from other sources. The availability of general federal question jurisdiction under section 1331 is still an unresolved question in cases involving violations of international law.”) (citations omitted).

201. *Id.* at 179-180

202. My research of federal cases uncovers none where foreign environmental law has been applied.

203. *McDonalds v. Bukele*, 960 F. Supp. 1311, 1320 (N.D. Ill. 1997).

204. See, e.g., *Aguinda I*, 1994 U.S. Dist. LEXIS 4718.

application of foreign environmental law.

### III. LITIGATION STRATEGIES

As seen above, the ATCA provides plaintiffs with the best chances of success in suits against corporations for violations of the law of nations. However, compared to suits that allege human rights violations, success has not yet been borne out in claims alleging environmental torts in violation of the law of nations. Of the six main cases that have directly alleged environmental torts under the ATCA—*Amlon*, *Aguinda*, *Beanal*, *Bano*, *Flores* and *Sarei*—all had the environmental claims dismissed—either substantively or because of a procedural dismissal of all claims. In *Amlon*, the environmental claims alleged under Principle 21 of the Stockholm Declaration and the Third Restatement of Foreign Relations Law of the United States were dismissed for failure to establish a violation of the law of nations. In *Aguinda*, Judge Broderick asserted that there may well have been a violation of the law of nations for the environmental torts alleged, but in the end, the appellate court dismissed the claims on the grounds of *forum non conveniens*. In *Beanal*, after some discussion of whether the conduct alleged violated the environmental principles discussed by the plaintiffs, the court dismissed the action for failure to allege violation of a universal, definable and obligatory international norm. *Bano* never reached the issue due to the court's determination that the claims had been settled in India. In *Flores*, as in *Beanal*, the court found that the environmental allegations were not violations of the law of nations.

In *Sarei*, Judge Morrow dismissed the plaintiffs' claim for a violation of the rights to life and health, and *would* have sustained the plaintiffs' claim based on UNCLOS if the entire case had not been dismissed based on the political question doctrine. If *Sarei* had reached a hearing on the merits, the UNCLOS claim would have been the first instance of an environmental claim yielding liability under the ATCA.<sup>205</sup>

#### A. Human Rights Remedies as Proxies for Environmental Claims

Until U.S. courts interpret environmental principles as part of the "law of nations" so that such principles become actionable under the ATCA, plaintiffs' attorneys should focus on the remedies available for human rights violations under the ATCA. If a case arises where there are both human rights and environmental claims, as frequently occurs, the plaintiffs should focus on shaping the remedies around the human rights claims so that if the environmental claims are dismissed, there is still some redress of the environmental harm. To be sure, the environmental claims should still be brought. However, when they are brought, they should be brought in a way that strategically allows the human rights claims to serve as a proxy

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205. For an excellent and in-depth examination of environmental causes of action under the ATCA, see generally, Herz, *supra* note 104.

for the environmental claims.

Critics of the ATCA have focused on enforcement of remedies, arguing that suits against corporations “are devoid of any prospect of an appropriate remedy because federal courts have no authority to control, punish, or regulate the policies of a sovereign nation and the actions of its military security forces.”<sup>206</sup> This argument, however, misses the point. The state action and *jus cogens* analysis, discussed *infra*, ensures that corporations are only held liable if they have in some way acted with the state to perpetrate the abuses or if the abuse is of such an egregious nature that *all* actors are potentially liable for the violation. While military groups are not parties to the litigation, corporations—with the threat of ATCA judgments for compensatory, punitive, and equitable damages—are likely to be more respectful of international law and, in turn, corporations are unlikely to hire military groups to perpetrate the abuses.<sup>207</sup> Remedies against corporations can be valuable not only in terms of compensation to plaintiffs, but because of the “general deterrent effect on corporate conduct,”<sup>208</sup> and the potential “benefits for the plaintiffs through legal and political settlements.”<sup>209</sup>

Far from posing the “threat of advisory opinions,”<sup>210</sup> judgments against corporations provide individual relief for plaintiffs harmed – just as the statutory language intends. The essential fear is that “these suits provide only the potential for large monetary damages award [sic] for a sliver of those who have suffered from the alleged harms, while MNCs with sufficient contacts to U.S. soil suffer the consequences of actions they cannot—and should not—be able to control.”<sup>211</sup> But these “large monetary damages” are warranted and the corporations are only made to pay if they are found liable for not only controlling, but *causing* the harm. While it is true that only a portion of those harmed find relief in ATCA remedies, this portion is a problem of under-inclusiveness, not over-inclusiveness.

## 1. Choosing ATCA Remedies

ATCA jurisprudence provides that “courts may fashion domestic

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206. Demian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 196 (2001).

207. See *Corporate Liability*, *supra* note 35, at 2041 n.104 (“In principle, the ATCA offers plaintiffs both compensatory and punitive damages, as well as equitable relief. No relief has yet been awarded in an ATCA case against a corporation because no such case has reached a final judgment... judgments against corporations will probably be enforceable because the corporations must, by virtue of the personal jurisdiction requirement, be either U.S. corporations or foreign multinationals with significant U.S. contacts.”).

208. *Id.* at 2042.

209. *Id.* at 2041.

210. Betz, *supra* note 206, at 185.

211. *Id.*

common law remedies to give effect to violations of customary international law.”<sup>212</sup> Traditionally, in ATCA cases, plaintiffs have sought compensatory and punitive money damages to redress specific human rights violations.<sup>213</sup> While monetary damages may be an adequate remedy for cases that solely concern human rights violations linked to individual perpetrators, they may be inadequate when environmental harms are involved, or the human rights violations are ongoing and stem not just from individual action, but from a complex source such as suppression of dissent regarding a development project.<sup>214</sup> In that case, the most desirable remedy may be an injunction.<sup>215</sup> For example, enjoining a corporation from constructing a pipeline that is found to be at the root of human rights violations will also have the side effect of enjoining the corporation from the negative environmental conduct associated with the pipeline construction. Injunctions, while a potentially powerful tool against corporations engaging in human rights and environmental abuses abroad, are also difficult to obtain as a remedy. Plaintiffs seeking to halt the alleged harm immediately would likely seek a preliminary injunction,<sup>216</sup> followed by a permanent injunction at a later stage in the litigation.

The Ninth Circuit has held that the "basis of injunctive relief in the

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212. *Abebe-Jira v. Negewo*, 72 F.3d at 844 (11th Cir. 1996). *See also Alvarez-Machain v. United States*, 266 F.3d at 1045, 1062 (9th Cir. 2001) (“Potential violators of human rights norms should know that they will pay for their actions. Choosing federal common law enhances the certainty, predictability, and uniformity of damage awards under the ATCA, because the remedy will not depend on the laws of the country in which a violations occurred.”).

213. *See, e.g., Kormos, Grosko, and Mittermeier, supra note 182*, at 678 (“The complaint in *Aguinda* sought more than US \$ 1 billion....”).

214. In addition to money damages and injunctive relief, disgorgement of profits could be a useful equitable remedy in the environmental context because it would deter corporations from externalizing the costs of environmental pollution by requiring them to pay back the profits earned as a result of the violative conduct. While disgorgement of profits has been sought in the ATCA context, it has never been awarded as a remedy in an environmental ATCA case. *See Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 432 (D.N.J. 1999) (where plaintiff sought “disgorgement of all economic benefits which have accrued to Defendants as a result of [plaintiff’s] forced labor, compensation for the reasonable value of her services and damages for the inhuman conditions [Ford] inflicted upon her.”).

215. In *Doe v. Unocal Corp.*, 67 F. Supp. 2d 1140 (C.D. Cal. 1999), although the case did not reach the damages phase, “the plaintiffs sought class-wide relief in the form of a Rule 23(b)(2) injunction ordering the corporate defendants to cease payments to the military government and to cease their participation in the joint enterprise until the resulting human rights violations ceased....The plaintiffs also sought an injunction ‘precluding Unocal from selling its shares to a corporation which [would] not waive any objections to the court’s exercise of personal jurisdiction or prohibit the transfer of Unocal’s interest to any entity which [would] not agree to be bound by the terms of the Court’s injunction.’ The plaintiffs also suggested ‘that Unocal might be ordered to disgorge its profits from the pipeline.’” Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1184, n. 206 (1999) (citations omitted).

216. *See AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 619 n.14 (7th Cir. 1993) (“The traditional preliminary injunction test used by this court requires: 1) no adequate remedy at law, 2) irreparable harm, 3) the harm to the movant if not granted outweighs the harm to the nonmovant if granted, and 4) consideration of the public interest” (citation omitted)).

federal courts is irreparable harm and inadequacy of legal remedies."<sup>217</sup> When environmental claims are able to stand on their own without human rights claims as their proxy, irreparable harm should be fairly easy to demonstrate for environmental harm where the damage is severe and lasting. Demonstrating the closely related concept of inadequacy of legal remedies should naturally follow. Plaintiffs should argue that money damages—the legal remedy—are inadequate because in many cases no amount of money can repair irreparable environmental destruction. Further, making a case for the linkage between human rights and the environment, plaintiffs could argue that money cannot compensate them for elimination of their right to life and health caused by an ongoing development project. While this claim has failed in past cases, if pled narrowly and with specificity, some jurisdictions may soon recognize the validity of this claim.

## 2. Enforcing ATCA Remedies

Compensatory and punitive damages have been awarded in numerous ATCA cases, but few of the plaintiffs have collected on the judgments.<sup>218</sup> The September 10, 2001 case, *Doe v. Lumintang*, addressed the standard for damages under the ATCA when it awarded plaintiffs from East Timor \$66 million in compensatory and punitive damages against an Indonesian General for “summary execution, torture, crimes against humanity, and cruel, inhuman, or degrading treatment of plaintiffs and their relatives.”<sup>219</sup> In assessing the damages, United States Magistrate Judge Alan Kay, held that the

Plaintiffs should be awarded monetary damages to compensate them for all the pecuniary and non-pecuniary injuries, both direct and indirect, sustained as a result of Lumintang's violations of their internationally secured human rights. [...] Finally, plaintiffs are entitled to an award of punitive damages in order to punish and deter such egregious violations of international law. It is now well established that victims of human rights violations and their relatives may obtain compensatory and punitive damages under

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217. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

218. For example, 39 plaintiffs received a judgment against General Karadzic of \$4.5 billion *Doe v. Karadzic* 93 Civ. 878 (S.D.N.Y. Oct. 4, 2000). William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1. In a rare case, a \$1.8 billion award against Ferdinand Marcos yielded a \$1 million recovery by plaintiff's attorneys some five years later. Henry Weinstein, *U.S. courts uphold damages against Marcos*. LOS ANGELES TIMES (December 18, 1996). Ralph G. Steinhardt, *Litigating Corporate Responsibility*, Presentation at the Human Rights and Corporate Responsibility Seminar, London School of Economics Global Dimensions Seminar Programme (June 1, 2001), at <http://www.globaldimensions.net/articles/cr/steinhardt.html>.

219. *Doe v. Lumintang*, Civil Action No. 00-674 (D.D.C. Aug. 13, 2001), at <http://www.dcd.uscourts.gov/00-674.pdf>.

the ATCA and TVPA.<sup>220</sup>

In support for this holding, the Judge Kay cited the precedent of previous ATCA cases that have all involved torture, as well principles from Inter-American Court of Human Rights and Permanent Court of International Justice cases.<sup>221</sup> Because courts are now comfortable awarding compensatory and punitive damages, the question is how these judgments can be enforced.

Enforcing federal court judgments against corporations with assets in the United States should be easier than enforcement against individual war criminals and torturers who are essentially estopped from having further contacts with the United States. In *Forti v. Suarez-Mason*, for example, only \$400 was collected and this is seen as a success compared with the numerous multi-million dollar judgments that have not been collected at all.<sup>222</sup> Part of the difficulty is that enforcement of judgments against individual defendants is stymied when the defendant's host state refuses to accept the court's judgment, as is the case with *Doe v. Lumintang*. In October, 2001 the Indonesian Foreign Minister referred to the judgment as "more symbolism than substance."<sup>223</sup>

Corporations with assets in the United States, however, have the most to lose from ATCA judgments against them. Not only will they have to part with large sums of money if such damages are awarded, but the negative publicity and pressure on the corporation to change its conduct will be enormous. Although corporate human rights cases from the Holocaust era have settled with large sums,<sup>224</sup> none of the recent cases regarding present corporate conduct have led to judgments of any kind. Enforcement of remedies, such as injunctive relief or disgorgement, could be very difficult because the harm the plaintiffs seek to enjoin and the profits earned were all abroad. Although U.S. courts may not directly enjoin violative conduct abroad, courts may hold non-complying corporations in civil contempt, which will generally mean a fine per day of noncompliance. Therefore, corporations with sufficient U.S. assets to be

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220. *Id.* (citing *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1996); *Paul v. Avril*, 901 F. Supp. 330 (D. Fla. 1994); *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1994); and *Filartiga v. Pena Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984)).

221. *Id.*

222. Lisa Lambert, *At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 112 n. 17 (2000) (citing BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 218 (1996)).

223. Lindsay Murdoch, *Indonesia to ignore US court ruling against top general*, SYDNEY MORNING HERALD, Oct. 6, 2001. See also Stephen Collinson, *US judge slaps 66 million dollars in damages on Indonesian general*, AFP, Oct. 4, 2001 Westlaw Allnewsnet. ("The court victory looks set to be purely symbolic however, unless financial assets of Lumintang can be discovered and frozen in the United States. The US court has no jurisdiction in Indonesia.").

224. Bert Neuborne was recently awarded \$4.4 million in settlement fees for "his work on a series of cases against German companies and the German government by people forced into slave labor by the Third Reich." Glaberson, *supra* note 218.

bound to the court's jurisdiction should be similarly vulnerable to enforcement of such a remedy.

#### B. The Need for Development of Environmental Law as Customary International Law

Until environmental principles are recognized as part of the 'law of nations' for ATCA purposes, advocates should push for further development of international environmental law. The relatively recent entrance of human rights law into the 'law of nations' provides a hopeful example.<sup>225</sup> Steps that could influence the perception of judges when determining whether environmental principles are actionable include: an increase in signatories to environmental treaties;<sup>226</sup> judgments against environmental wrongdoers in foreign national courts based on violations of customary international environmental law; judgments of international tribunals and regional courts such as the ICJ, the Inter-American Court or the European Court of Justice affirming the existence of customary international environmental law; and further writings of international law scholars affirming environmental principles as part of the law of nations.<sup>227</sup> Advances in environmental science and an increase in political will to implement environmental principles would bolster all of the above.<sup>228</sup>

Just as the ICCPR, and now possibly UNCLOS, have achieved their status among the law of nations,<sup>229</sup> other international environmental treaties may soon follow suit. This internalization will only be possible, however, if plaintiffs continue to bring ATCA cases that allege violations of international environmental treaties.

#### C. Environmental Torts as Human Rights Violations

The egregious fact patterns of the failed environmental ATCA cases call out for recognition of severe environmental degradation as *itself* a

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225. See Kormos, Grosko, and Mittermeier, *supra* note 182, at 682 ("However, fifty years ago international human rights law was in a similar state of infancy to international environmental law today, and as with human rights law in years past, the forces driving the development of international environmental law are varied and numerous.").

226. As noted in Kormos, Grosko, and Mittermeier, even though the U.S. has failed to ratify the Convention on Biological Diversity, the Basel Convention, the Convention on Environmental Impact Assessment in a Transboundary Context, "a number of other Transboundary pollution treaties" and the Kyoto Protocol, U.S. participation in other areas suggest a trend that "U.S. domestic action and international environmental law and policy seem to be converging around a pair of overarching legal principles: the *precautionary principle*, i.e., that nations should act to prevent ecological harm even in the absence of full scientific certainty, and the *equivalence principle*, i.e., that environmental harm caused within a nation's borders should be treated equally, as a legal matter, to damage caused outside of a nation's political boundaries." *Id.* at 662, 664-665 (emphasis added and citations omitted).

227. See ICJ Article 38(1)(d), *supra* note 23.

228. See Kormos, Grosko, and Mittermeier, *supra* note 182, at 684.

229. See *Estate of Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1359 (S.D. Fla. 2001) (ICCPR); *Abdullahi v. Pfizer, Inc.*, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. 2002) (ICCPR); and *Sarei v. Rio Tinto PLC*, 2002 U.S. Dist. LEXIS 125 (C.D. Cal. 2002) (UNCLOS).

human rights violation. Because human rights violations such as “summary executions and torture” are so often used to “suppress opposition to ecologically destructive projects,”<sup>230</sup> and because some environmental abuses so degrade peoples’ habitats as to amount to forcible relocation and even genocide, these wrongs should be recognized as torts in violation of the law of nations. Although plaintiffs making this argument will be faced with some of the same challenges as those arguing that environmental principles are part of the law of nations, if plaintiffs succeed in explicitly linking human rights and environmental claims, it will make it more difficult to dismiss claims with an environmental component.

Although a clear standard for the level of environmental harms actionable under the ATCA has not yet been articulated, the ATCA should be reserved for cases of severe environmental degradation. Cases in which entire local populations are displaced or suffer severe health effects or even death should be brought under the ATCA, whereas cases where an already polluted area has become more polluted should not. A case filed by 10,000 Ecuadorian Indians against DynCorp in the D.C. District Court on September 11, 2001 is an example of a case that was correctly brought under the ATCA.<sup>231</sup> In this case, the plaintiffs charged that the U.S.-based DynCorp carried out reckless fumigation of illicit crops in Colombia that resulted in illness, death and destruction of the crops that local people rely on for survival. The law of nations violations alleged include the destruction of a resource base that is tied to a population’s means of survival.

The *most severe* cases of environmental destruction, many examples of which are described above, clearly violate customary international law and should be considered violations of *jus cogens* norms, which do not require state action for prosecution under the ATCA. It is in the interest of all nations that the environment be protected from irreparable harm. Therefore, the ATCA is an appropriate jurisdictional statute for adjudication of these claims in the U.S. More scholarship and research is needed, however, to discern where the line should be drawn for cases that are not actionable under the ATCA. Until clear standards are developed, courts will rely on case-by-case analysis for cases that are “questionable.” The resulting uncertainty for ATCA litigants is a necessary phase in the evolution of the scope of environmental torts actionable under the ATCA.

#### D. Crafting Environmental Claims Under the ATCA

For attorneys choosing to bring environmental claims independent of human rights claims under the ATCA, crafting the complaint is a delicate

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230. Herz, *supra* note 104, at 549.

231. Arias v. DynCorp, Civil Action No. 1:01CV01908 (D.D.C. filed Sept. 11, 2001) (complaint, available at <http://www.laborrights.org/projects/corporate/dyncorp/dyncorpcomplaint.doc> and motion to dismiss, available at <http://www.drugwar.com/motion%20to%20dismiss.pdf>).

process. According to EarthRights International attorney Richard Herz, “[t]he narrower the scope of plaintiffs’ claims, the less a court may be concerned that a ruling for the plaintiffs will allow future claims that the court might consider overly broad.”<sup>232</sup> Claims alleging violations of broad principles, such as in *Beanal*, are dismissed because judges are wedded to the notion that ‘law of nations’ violations are specific and definable. Herz’s 2000 article, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, presents plaintiffs’ attorneys with a guide on how to bring environmental claims under the ATCA.<sup>233</sup> In addition to suggestions regarding the scope of the complaint, Herz discusses which environmental claims are feasible under the ATCA and how they should be plead. Application of such scholarship will inevitably lead U.S. courts to recognize the actionable environmental principles that have already been recognized outside U.S. courts as part of customary international law.

#### IV. CONCLUSION

Suing corporations in U.S. courts for environmental abuses abroad requires creative lawyering. Because ATCA jurisprudence has not yet embraced customary or codified international environmental law, the ATCA is currently only on the verge of becoming a viable cause of action. Extraterritorial application of U.S. environmental law is also unavailable to plaintiffs. Claims based solely on customary international law and treaty-based law are similarly unlikely to prevail due to subject matter jurisdiction problems and because the vast majority of treaties are non-self executing, and claims based on customary international law require implementing legislation such as the ATCA. Finally, the doctrine of *forum non conveniens* is a nearly insurmountable hurdle for plaintiffs seeking application of foreign environmental law in U.S. courts.

Until international environmental law is recognized as part of the law of nations in ATCA jurisprudence, as it is in the general field of international law, plaintiffs should attempt to bring environmental law claims under the ATCA only in coordination with human rights claims arising from the same case or controversy. Even if the environmental claims are dismissed, plaintiffs could carefully craft remedies for the human rights claims to redress environmental harms.

With the decision in *Sarei*, we see that environmental claims, such as those for violations of UNCLOS, do have the potential to stand on their own. If ever there was a tort alleged by an alien for a violation of the law of nations, it was alleged by the citizens of Bougainville against Rio Tinto. The mass-scale environmental destruction documented in *Sarei* warranted not only affirmation of the UNCLOS claim, but of the claims that Rio Tinto has violated the principles of sustainable development on the island and has endangered the environmental rights to life and health of all its

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232. Herz, *supra* note 104, at 572.

233. See generally Herz, *supra* note 104.

inhabitants. Perhaps as a result of further codification of customary international law into treaties, more literature on the subject by respected scholars, and more foreign, regional and international bodies affirming that environmental law is part of customary international law, U.S. courts will come to recognize environmental claims and hold U.S. corporations accountable for their environmental conduct abroad. Until that day, plaintiffs should seek accountability through human rights litigation and should craft remedies to alleviate the effects of environmental destruction.