Do you think in the 18th century if they brought Pirates, Inc., and we get all their gold, and Blackbeard gets up and says, ‘oh, it isn’t me; it’s the corporation,” do you think that they would have then said, ‘oh, I see, it’s a corporation. Good-bye. Go home.’?

Justice Stephen Breyer

What with trans-national corporations with unlimited exploitative appetites, infra-national industrialists with initiative, tactics and money power at various levels wooing political power and white collar, we have unconscionable ecocides who seduce politicians, smog the vision of governments, lubricate the wheels of the bureaucracy and propagandize pollution as a necessary evil for the salvation of the nation.

V.R. Krishna Iyer

A wave of suits by victims of human rights abuses abroad suing large corporations in U.S. federal courts, UK and the Dutch Court raised eye brows of not only defendant i.e. TNCs but also of the legislature in these countries. Even they observed that it is affecting the normative and procedural development of domestic and international law. Corporations have become the defendants of choice for classes of foreign plaintiffs suing in the various courts for international law and especially international human rights violations. Large entities, including Unocal, Texaco, Degussa, Ford, Daimler-Chrysler, Volkswagen, and Swiss, German, French, and Austrian banks have all been targeted in international human rights suits in the various courts by classes of plaintiffs alleging that their rights have been violated under customary international law and demanding large-

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3 In the past two decades, more than 120 lawsuits have been filed in U.S. courts against 59 corporations for alleged wrongful acts in 60 foreign countries. <http://www.chicagotribune.com/news/politics/tn-us-usa-corporations-humanrightstre81r1pc-20120228,0,2488943.story> Accessed on May 02, 2012.
scale monetary and injunctive relief. The alleged offences take place in faraway places and often in faraway times.\(^4\)

Moreover, the plaintiffs allege violations of international law, not U.S., U.K. or the Dutch law. For example, families of Holocaust victims have filed class actions for abuses that occurred over fifty years ago in Europe when Swiss banks and other corporate entities cooperated with the Nazi government.\(^5\) Convergence of the uniquely American class action procedure and the substantive international law of human rights not only affects the development of international human rights norms but may finally achieve the elusive goal of compliance with international norms.\(^6\)

This new trend of “mass tort” transnational litigation is an inevitable development both in human rights litigation in the U.S. and the U.K. and in the realm of international human rights law in general. While federal courts since long been the forum for litigation of private rights and economic disputes involving corporations, this “new wave” of class litigation involves public international norms in a new context.\(^7\)

Private civil tort remedies have been available in the U.S. for almost twenty years since the Second Circuit ruled that the dormant Alien Tort Claims Act (ATCA) could be the basis of federal court subject matter jurisdiction over an action brought by an alien against a foreign government official for violations of Customary International Law (CIL), or “violations of the law of nations.”\(^8\) However, only such development often results in


\(^5\) Several class action suits were brought (and settled) against Swiss banks (Union Bank of Switzerland, Credit Suisse, and Swiss Bank Corporation as joint defendants) by Holocaust survivors and the relatives of Holocaust victims in an effort to recover money deposited in Swiss bank accounts prior to and during World War II. Joined were Holocaust survivors who were forced by Nazis to engage in slave labor and Holocaust survivors and heirs of Holocaust victims who had property looted by Nazis. The “Holocaust Plaintiffs” claimed that Swiss banks actively financed and knowingly accepted profits derived from slave labor as well as looted assets. For details see: Amended Complaint, World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switz., No. 97-CV-0461 (E.D.N.Y. filed July 1997); Amended Complaint, Friedman v. Union Bank of Switz., No. 96-CV-5161 (E.D.N.Y. filed Oct. 21, 1996); Amended Complaint, Weisshaus v. Union Bank of Switz., No. 96-CV-4849 (E.D.N.Y. filed Oct. 3, 1996), consolidated as Telling-Grotch v. Union Bank of Switz., No. 96-5161 (E.D.N.Y. filed 1996).


\(^7\) Supra note 4, at 1140-41.

\(^8\) Ibid.
conditions that are inimical to human rights. Moreover, governments curtail human rights for the sake of economic development.9

Increasingly, the public has pressured U.S. companies to avoid marketing products produced by forced labor. Moreover, the companies have decided to restrict investments in countries known for human rights abuses (such as Burma and China). These decisions reflect an increasing sensitivity toward corporate involvement in international law violations. Those victimized by corporate activity now seek private redress for alleged violations of public law norms, further evidencing a commitment to the idea that both the authority of State and the role of market, in principle, are limited by legal commitments to human rights. Disagreement and debate about the role and significance of companies in this geo-political realm is the backdrop of the new wave of class litigation.10

6.1 Development of Legislations Relating to Alien Tort

6.1.1 Alien Tort Claims Act

As early as 1781 the Second Continental Congress of the United States passed a resolution recommending that the states provide for a mechanism for the punishment of violations of the law of nations. The treatment of aliens and the respect for the law of nations became a matter of urgency in the following years, because of a number of assaults on foreign diplomats. Finally, in 1789, after the US Constitution was passed and a more centralized federal government had been implemented, the First US Congress did not have to rely on the state governments to pass a law for the protection of the law of nations.11

Moreover, the Congress was deeply concerned about the need to enforce international law and to punish those who violated international norms. One of the first statutes passed in 1789 by the first session of the US Congress, the ‘Alien Tort Statute’ also known as the ‘Alien Tort Claims Act’ (ATCA) authorized civil lawsuits for money damages by those injured by violations of international law.12 The ATCA was adopted as a

9 Id., at 1143.
10 Id., at 1143-44.
part of the original ‘Judiciary Act’\textsuperscript{13}. The ninth clause of the Act, sets forth jurisdiction of the newly formed federal district courts reads:\textsuperscript{14}

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

By enacting the ATCA as a means of determining what claims are cognizable before the courts, Congress chose to exercise its constitutional power to incorporate international law by reference, which Supreme Court cases have recognized is a congressional prerogative not to be second-guessed by the judiciary.\textsuperscript{15} The novelty of the ATCA is that the statute authorizes federal court jurisdiction over such torts, and defines the tort by reference to the law of nations, or international law.\textsuperscript{16}

The main purpose of the ATCA at the time of its inception was possible the removal of a potential cause for international conflict with the mercantile European powers at a time when the US was still a weaker economic and military power. Alexander Hamilton, one of the most influential founding fathers of the US Constitution, stated that “the peace of the whole (the federal state) ought not to be left at the disposal of a PART (the state). The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.\textsuperscript{17}

\begin{notes}
\item[13] As one of its first official duties, the First Congress undertook to create a system of courts to implement Article III of the Constitution. The effort culminated in the Act of September 24, 1789 establishing the Judicial Courts of the United States, now known as the Judiciary Act of 1789.
\item[14] Alien Tort Statute, 28 U.S.C. § 1350 (2004). The Alien Tort Statute was earlier amended in the year 1878 and 1911. The current language appeared in the 1948 revision of the judicial code, with minor changes. For details see: <http://www.policyarchive.org/handle/10207/bitstreams/18 64.pdf> Accessed on May 09, 2012. Further, the 1789 version used the phrase “all causes where an alien sues for a tort only.” It is not known whether word “treaty” can extend to international agreements of the United States that do not rest on two-thirds consent of the U.S. Senate and were most likely unknown in 1789, such as congressional-executive or sole-presidential executive agreement. For details see: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497122> Accessed on May 09, 2012.
\item[16] Nicola M.C.P. Jagers, Corporate Human Rights Obligations: In Search of Accountability, 179 (2002).
\item[17] Supra note 11, at 114.
\end{notes}
For the 190 years following the passage of the ATCA, the statute was invoked only twenty one times, remaining an unremarkable provision of the Judiciary Act of 1789. In the past more than twenty four years, however, the ATCA has been invoked and led to published decisions in about eighty cases. Its original passage was prompted by circumstances or purposes that legal historians seem unable to agree upon. Many who oppose current uses of the ATCA argue that current applications run far afield of the farmer’s intent. Both sides of the debate are able to find indirect support for their argument in historical documents and early case law, but most acknowledge the lack of a clear statement of congressional intent.18

6.1.1.1 Theories on Framer’s Intent

The ATCA was one of four sections in the Judiciary Act of 1789 that addressed the right of an alien to commence litigation in US courts. Although limited records exists concerning the legislative history of the ATCA, most historians accept that the basis for the ATCA’s enactment was the Framers’ desire to give the federal government supremacy over foreign affairs and avoid international conflict arising from disputes about U.S. treatment of aliens. Scholars and judges have advanced several theories to explain what sort of threat the statute was meant to avert.19

Protection of Foreign Diplomats: Focusing on a limited number of offences against the law of nations that were clearly recognized as such at the time of the First Congress, some theorists interpret the Alien Tort Statute as a means to protect the rights of foreign ambassadors. Presuming that, in general, international law was viewed in the eighteenth century as a body of principles regulating States’ interaction with one another and not the rights of individuals, they reason Congress could not have meant to provide a cause of action for individual aliens for suits against States.20

Those advancing this theory invoke Blackstone’s definition of the “law of nation” as encompassing only “a limited universe of seriously egregious infractions.” A broader

position still would have courts treat customary international law as general law, “a third
category of law, neither state nor federal in nature.” Professor Bradley argues that the law
of nations portions of the ATCA was simply intended to implement Article III alienage
jurisdiction, and that the First Congress “implicitly intended to limit the Alien Tort Statute
to suits involving at least one U.S. citizen defendant.” The propagators of this theory
took into consideration the two high-profile incidents.

The first event was the 1784 Marbois affair. The incident involved a clash between
Chevalier de Longchamps, a former French military officer, who attacked Francis
Marbois, the French consul, on a Philadelphia, Pennsylvania, street. The episode was
considered not only a serious crime but also a blatant violation of the law of nations,
which mandates the protection of diplomats. US federal law, however, provided little
recourse, and the Continental Congress had no option but to defer to the Commonwealth
of Pennsylvania to address and remedy the situation.

The second incident occurred in 1787, when New York police officers entered the
home of a Dutch minister in order to arrest a domestic servant, violating the minister’s
diplomatic immunity. Again, due to the inadequacies of US federal law, the Continental
Congress could only ask the state of New York to address the offense. The Mayor of New
York complied with Congress’ wishes to prosecute, but expressed concern to the US
Secretary of State, John Jay, that the US Congress and the New York legislature had yet to
address the “breach of privileges of ambassadors.” Moreover, this crime fall under the
purview of law of nations, which was not yet a part of US law. Both episodes emphasized
to the Continental Congress the importance of federal jurisdiction over incidents involving
aliens in order to avoid international embarrassment, protect national security, and
preserve international relations.

Prize Cases: Another type of cases implicating international law that would have
been familiar to drafters of the Judiciary Act. It was the cases involving the law of prize, in
which the wartime capture of a merchant vessel is disputed. While these disputes about
rightful ownership of seized vessels and their cargoes would have been covered under
admiralty jurisdiction clause, some argue that the phrase “tort only” was meant to cover

21 Supra note 18, at 152.
22 Theresa (Maxi) Adamski, “The Alien Tort Claims Act and Corporate Liability: A Threat to the United
States’ International Relations”, Fordham International Law Journal, Vol. 34, Issue 6, 1502-43 at 1508
(2011).
23 Id., at 1508-09.
prize claims involving damage or injury to property. However, the statute does not appear to have been invoked in many prize cases.24

_Denial of Justice:_ It was apprehended that state courts deciding issues involving aliens, presumably lacking in understanding for national concerns related to foreign policy, might render decisions biased in favor of their own citizens. Citizens of foreign countries would then have grounds to complain that they were denied the opportunity to seek redress in U.S. courts, in disregard for U.S. responsibility under international law, giving their home country the right to seek diplomatic redress or, in extreme cases, perhaps the right to declare war. There is evidence that this concern was a motive for including the alienage provision of the Diversity Clause in Article III of the Constitution. The Alien Tort Statute would have been an incomplete remedy, however, because it is limited to cases in which an alien is a plaintiff suing for a tort that implicates international law. Denial of justice cases could arise as easily in contractual disputes and cases where an alien is sued as defendant charged with a crime, even in cases not implicating international law. The diversity jurisdiction clause in section 13 of the Judiciary Act filled some of this void by granting jurisdiction to federal courts in cases where the amount in controversy exceeded $500 and one party to the suit was an alien. It has been suggested that the Alien Tort Statute was a compromise between those who advocated full diversity jurisdiction and those who wanted to preserve for states the right to apply their own contract law to disputes involving international contracts.25

_Fulfillment of State Responsibility._ Related to the “denial of justice” theory is the theory that the Alien Tort Statute (ATS) was meant to provide remedies for aliens injured by U.S. citizens in ways that would implicate the responsibility of the United States for a breach of a treaty or violation of customary international law. This would have been one way for the United States to fulfill its obligations under international law, which generally leaves it up to States to implement means to fulfil those obligations and to remedy breaches. At a minimum, States were said to be obligated to enforce treaties by enacting criminal statutes to penalize conduct by its citizens that would contradict international. Under this theory, the alien’s right to sue was intended to apply to cases in which the defendant is a U.S. citizen or alien residing in the United States. Jurisdiction for such cases

would find constitutional support in the alienage clause of Article III. However, the ATS does not specifically require that the defendant be a U.S. citizen. Moreover, the ATS has never been construed to imply a waiver of U.S. sovereign immunity.  

Universal Jurisdiction: A broader version of the state responsibility theory, one that would not rest on alienage jurisdiction or require a U.S. connection to the tortious activity giving rise to a suit, presumes that the courts of all nations have jurisdiction to address certain breaches of the law of nations. Under this view, the ATS provides a means to assert a type of “universal jurisdiction,” which defines a category of crimes that are so egregious as to be the object of universal concern, regardless of the situs of the offense and the nationalities of the offenders or victims. The theory of universal jurisdiction is rooted in international law allowing any state to punish pirates and slave traders, who have long been considered hostis humani generis – enemies of all humanity. Universal jurisdiction is ordinarily associated with criminal prosecutions rather than civil suits; however, there is authority to support the view that civil suits providing redress for those crimes covered by universal jurisdiction is a proper exercise of a State’s jurisdiction.

6.1.1.2 Salient Features of The ATCA

Just as the impetus behind the ATCA has been questioned and extensively analyzed, there has also been much speculation about the Act/statute's meaning and purpose. The language of the ATCA is simple and imprecise. It is comprised of three key phrases: “by an alien,” “a tort only,” and “in violation of the law of nations or a treaty of the United States.” A brief analysis of each phrase provides further insight into the Act’s application.

The plaintiff in an ATCA case must be an alien. Additionally, the ATCA does not require that the plaintiff be present in the United States or that the tort occur within the

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26 Supra note 19, at 10.
27 Ibid. Legal experts continue to debate the extent to which the theory of universal jurisdiction is accepted by States, with some arguing that international law may require a nexus between the crime (or accused criminal) and the State that seeks to assert jurisdiction in order for that jurisdiction to be valid. The controversy over the validity of universal jurisdiction recently gained prominence when the United States objected to a Belgian law that would have given Belgian courts jurisdictions over war crimes that occurred outside Belgium, where neither the victims or perpetrators had any connection to Belgium. The Belgian Parliament withdrew the law under international pressure. Some observers compared the ATS to the Belgian statute, arguing that the ATS allows U.S. courts to accomplish what was deemed objectionable in the case of Belgium. For details see: Jeremy Rabkin, “Constitutional Opinions: Getting It in U.S. Courts”, The American Spectator, (June-July 2003). Also see: Courtney Richard, “Belgium Waffles”, The American Enterprise, Vol. 14, No. 6, 7 (September 1, 2003).
28 Supra note 22, at 1509.
The charged offence must arise in tort and offend the law of nations or a treaty of the United States. In 1789, when the Judiciary Act and accompanying ATCA were passed, such actionable offences, as mentioned earlier, were limited to 1) violations of safe conduct; 2) infringement of the rights of ambassadors; and 3) piracy. The ATCA, however, is not a static doctrine, and scholars and judges alike recognize evolving and expanding definitions of both international law and ATCA torts. They agree that the ATCA should be considered in light of modern definitions of international law. International law has primarily been drawn from international agreements and customary law. Further, torts in violation of the law of nations are actionable in US courts, as international law is now considered part of federal common law.

The ATCA contains no list or limitations of applicable customary international law or treaties of the United States and expressly applies to ‘any’ civil action for a tort in violation of international law. For 223 years, Congress has chosen not to impose any limits on the ATCA’s scope, including limits as to subject matter, its extraterritorial reach, or its provision of a cause of action or right to a remedy. At least for a quarter century, there has been a ‘history of congressional acquiescence in’ judicial application and the reach of the ATCA, ‘Congress has implicitly approved,’ and ‘Congress has not disapproved’ general patterns of judicial use of the statute. More recently, it appears that Congress reaffirmed the reach of the ATCA, since House and Senate Reports concerning other legislation in 1991 expressed congressional resolve that the ATCA ‘should remain intact’.

### 6.1.1.3 ATCA and Human Rights Litigations

There are essentially three different periods in the ATS’s history: (1) Dormant Pre-Filartiga period from 1789 to 1980; (2) the Filartiga period from 1980 to 2004; and (3) after 2004. From 1789 to 1980, the statute was invoked only twenty one times, remaining an unremarkable provision of the Judiciary Act of 1789. In the last thirty two years,

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29 Id., at 1510.
30 Id., at 1511.
31 Supra note 15, at 256.
however, the ATCA has been invoked and let to published decisions in about ninety cases. And during this period, the provision of ATCA was invoked mostly against the TNCs for human rights abuses in the least developed or developing countries. In this section, discussion includes only a number of landmark decisions which compel the US Congress to ponder over the issue relating to the ATCA and even to adopt a new legislation. A separate section is devoted to include other cases.

Filartiga v. Pena-Irala

Largely dormant for almost 200 years, the ATCA was revived in 1980 in a lawsuit by the family of a young man tortured to death in Paraguay, Joel Filartiga. The Filartigas discovered that the police officer who had tortured Joel to death, Americo Norberto Pena-Irala, had moved to New York City. The Filartigas sued Pena-Irala under the ATCA. The plaintiffs’ alleged violations of “wrongful death statutes; the U.N. Charter; the Universal Declaration of Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents, and practices constituting the customary international law of human rights and the law of nations.”

The trial court initially rejected the claim, holding that human rights abuses committed by a government against its own citizens did not involve international law. The court further ruled that although the proscription of torture had become “a norm of customary international law,” and the court was bound to follow appellate precedents which narrowly limited the function of international law only to relations between states.

The appellate court disagreed, reinstating the lawsuit. Holding that the statute permits aliens to sue for violations of international law about there is an international consensus, the court found such a consensus prohibiting the torture of an individual by an official of his own government. The court concluded, ‘there are few, if any, issues in international law, today on which opinion seems to be so united as the limitation on a
state’s power to torture persons held in its custody’. The Filartiga court placed its decision squarely within the post-World War II development of international human rights norms:

In the modern world, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. ... Indeed, for purposes of civil liability, the torturer has become - like the pirate and slave trader before him - hostis humani generis, an enemy of all mankind. Our holding today ... is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence.

To support its contention that international law is part of federal common law, the Filartiga Court cited Blackstone’s Commentaries, a decision of the Pennsylvania Court of Oyer and Terminer at Philadelphia under the Article of Confederation, and a law review commentary on the subject. The idea of incorporating international law into the law of the land sprung from “the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries.” The court insisted that incorporation of international law into domestic law is consistent with the Framers’ intent and with early decisions applying international law.

Hence, Filartiga is crucial to the development of the ATCA because it established two important principles. First, the international law applicable to the ATCA should be based not on an understanding of the law in 1789, but on contemporary principles. The Second Circuit clarified that international law is an evolving body of law recognized by the international community. Additionally, according to the court, the law of nations is drawn not only from the works of jurists, but also reflected in the “general usage and practice of nations.” Therefore, the Filartiga court found torture to be in violation of international law based on universal condemnation, customary law, and international treaties and agreements.

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37 Filartiga v. Pena-Irala, 630 F.2d 876 at 881.
38 Id., at 890.
40 Supra note 22, at 1513.
Tel-Oren v. Libya

After Filartiga, other human rights victims sued foreign governments and officials in U.S. courts for offences such as genocide, torture, summary execution, and disappearances, all of which are considered violations of the “law of nations.” It became settled that foreign states and officials were bound by customary international law, for which the Act provides jurisdiction. The likelihood of this was soon dampened by the D.C. Circuit’s dismissal of Tel-Oren v. Libya. The question aroused over interpretation and application of the ATCA in the context of a terrorism case. Plaintiffs in that case were victims or survivors of a terrorist attack on a civilian bus travelling on an Israeli highway, allegedly carried out by members of the Palestine Liberation Organization (PLO) with the assistance of Libya. Each of the three judges on the panel held that the case should be dismissed, but on different grounds.

Judge Edwards concluded that the ATCA permitted federal jurisdiction over cases involving some violations by individuals of established international law, such as genocide, slavery, and systematic racial discrimination. However, he concluded terrorism was not one of those offences, noting that although terrorism is repugnant to many countries, “to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation.” With respect to the PLO, he opined that allegations that its members committed torture did not implicate international law because the PLO is not a State, and it could not have committed the alleged offences under colour of international law. He would have followed Filartiga to find that the ATCA does not require the plaintiff to allege a cause of action specifically defined by Congress or in international law.

Judge Bork followed a more statist approach, inquiring into the intent of the framers of the ATCA to determine the original scope of the statute. He concluded that “in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. Clearly, in his view, cases like Filartiga and Tel-Oren were beyond the framers’ contemplation. In the absence of express legislative enactments or clarifying judicial

41 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
42 Id., at 775.
43 Id., at 781.
44 Id., at 795.
45 Supra note 18, at 163.
decisions, Judge Bork was not prepared to hold that an alien had a cause of action within the jurisdiction of U.S. courts for terrorism, on the ground that terrorism was an unknown phenomenon at the time of the ATS’ creation.46

Judge Robb, on the other hand, would have declined to review the case as non-justiciable. He was adamant that courts should ‘steer resolutely away from involvement in this manner of case’ since there is ‘no obvious or subtle limiting principle in sight.’ He rejected the idea that the courts could have any say in this type of foreign policy matter, which, it should be emphasized, is quite different from an ATCA claim brought against a corporation.47

6.1.2 The Torture Victim Protection Act (TVPA)

In March 1992, the US President signed a new statute containing a modified version of the ATCA, the Torture Victim Protection Act, 1991 (‘TVPA’). The TVPA expends the doctrine to protect US citizens as well as aliens, but only for two specific international law violations: torture and summary execution.48 Only individuals with a certain level of personal responsibility may be sued under the TVPA; other entities are not amenable to suit. Heads of state and others with diplomatic immunity cannot be sued while they are in office, and foreign sovereign immunity is not automatically waived with respect to these claims. The drafters explained that the ATS should remain intact for suits by aliens in cases involving international wrongs other than torture and summary execution.49

The statute also constitutes a modern congressional endorsement of the Filartiga court’s interpretation of the ATCA: In a legislative report, Congress expressed strong support for the ATCA and the Filartiga decision, stating that the case ‘has met with general approval’. The report notes that the ATCA has ‘important uses’ and ‘should not be replaced’ by the TVPA. Rather, the ATCA ‘should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law’. Congress also noted the need to provide enforcement mechanisms to the ‘many thousands of victims of torture and summary execution around the world’.50

46 Supra note 19, at 14.
47 Tel-Oren v. Libyan Arab Republic, 726 F.2d 825.
49 Supra note 19, at 7.
50 Supra note 48.
The importance of the TVPA lies both in its expansion of the civil remedy to US citizens and ringing endorsement of the *Filartiga* line of cases. However, in addition to the limitation to only two human rights abuses, torture and summary execution, the statute requires that the underlying violation be committed 'under actual or apparent authority, or color of law, of any foreign nation'. It thus excludes suits against US government officials, unless they can be shown to be acting under the authority of a foreign State. Moreover, the TVPA limits its reach to an ‘individual’ as a defendant; one court has held that the word ‘individual’ excludes corporate defendants.\(^{51}\) The American President George Bush while signing the TYPA said:\(^{52}\)

This legislation concerns acts of torture and extrajudicial killing committed overseas by foreign individuals. With rare exceptions, the victims of these acts will be foreign citizens. There is thus a danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery. ... It is to be hoped that U.S. courts will be able to avoid these dangers by sound construction of the statute and the wise application of relevant legal procedures and principles.

To sum up, to ensure that the TNCs as well as all individuals must respect the international law in general and international human rights law in particular, the American Congress cleared its intent by enacting the TVPA to plug the loopholes which were highlighted by the various courts while deciding the cases.

### 6.1.3 European Union’s Efforts to Regulate Alien Tort

Under European Community (now European Union) law, the national jurisdictions of the Member States of the European Union are in principle competent to accept service of civil proceedings against TNCs based in the European Union (EU) which (either directly or indirectly, through the control exercised on subsidiaries) are civilly liable for certain acts, wherever these take place, and even if the damage occurs or is caused outside

\(^{51}\) *Supra* note 12, at 212.

the territory of the Member States. This result from the partial harmonization of the conditions of judicial competence in the EU.53

On 15 January 1999, the European Parliament adopted a ‘Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct’.54 In the Preamble, the Parliament mentions that the resolution is adopted ‘having regard to Article 220 of the EC Treaty regarding reciprocal recognition of court judgements,’ to the 1968 Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, usually known as the Brussels Convention,55 and to the Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on EU concerning action to combat trafficking in human beings and sexual exploitation of children’. The operative part of the Resolution does not mention these instruments, but the draft text included a paragraph which stated that the European Parliament:

24. Request the European Council confirm the interpretation in the 1968 Brussels Convention that, for cases of basic duty of care, legal action may be taken against a company in the E.U. country where its registered office is, in respect of any third country throughout the world, and call on the Commission to study the possibility of enacting legislation, which open European courts to lawsuits involving damage done by MNEs, thus creating a precedent for developing customary international law in the field of corporate abuse.

This passage was outvoted by 96 votes to 89, and thus does not appear in the text finally adopted. However, this should not distract from the fact that such a use of the September 27, 1968 Brussels Convention, now consolidated as Community law in Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters could be defended, and indeed appears to face no major obstacle.56

Under Article 2(1) of Regulation No. 44/2001, ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’. Article 2 of the Brussels Convention contained the same rule of forum rei. Article 60(1) of the Regulation simply adds to the rule of the 1968 Brussels Convention, for the sake of predictability with respect to the identification of what is understood by the ‘domicile’ of legal persons, that for the purposes of the Regulation, ‘a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business’.

Regulation No. 44/2001 also provides for two alternative grounds for jurisdiction of the courts of one Member State, which the plaintiff may wish to rely on in certain circumstance. First, ‘in matters relating to tort, delict or quasi-delict’ the plaintiff may sue ‘in the courts for the place where the harmful event occurred or may occur’. Importantly, the European Court of Justice has found that ‘where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event occurred’ in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.

Secondly, ‘A person domiciled in a Member State may, in another Member State, be sued . . . as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated’. This means that a company domiciled in a Member State may be sued in another Member State where is has established a branch, agency, or establishment in cases where, for instance, ‘operations’ of that subsidiary or branch have caused damage for which a tort action seeks compensation. In researcher’s view, such a use of the 1968 Brussels Convention, and now of Regulation No. 44/2001, would be

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58 Supra note 55.
59 Supra note 57.
60 Article 5(3) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968. Supra note 55.
61 Supra note 53, at 264.
analogous to a European ‘Foreign Tort Claims Act’ a expression which can be derived from the ATCA.

A classic example of the application of the Brussels Convention and the principle of *lex loci delicti*, which means the place where the harm has occurred determines the applicable law, is Dutch Civil Courts. The question of jurisdiction of the Dutch civil courts is unproblematic when the defendant is based in the Netherlands. Both under Dutch law and under the Brussels Convention the rule of the so-called *forum rei* applies: jurisdiction of the court of the defendant’s domicile, which is the main rule of the Brussels Convention. However, even though in summary proceedings under the Brussels Convention the defence of *forum non conveniens* is available but in an ordinary civil proceedings the Dutch court does not give any consideration to *forum non conveniens* because the Dutch Private International Law says so.64

In terms of Dutch tort law, a tort has been committed by a corporation when (1) the activities of the corporation in question are directly in violation of an international legal right or duty, or (2) the activities violated a duty of care, as interpreted with reference to international law. Even the Dutch Constitution fulfill the requirement of the application of public international law. Article 93 of the Dutch Constitution provides that: ‘Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published’.65

6.2 Emergence of Legal Doctrines Relating to Alien Tort

A number of recent cases filed in the various courts of United States of America, United Kingdom, The Netherlands have highlighted the protection given to TNCs by the legal principles of “separation of corporate identity” and “forum non conveniens”. The effect of these “principles” has been to enable TNCs to apply “double standards” in developing countries.66 In this part, only these principles are discussed are details and how

these principles have been applied to decide the various cases by the various courts of U.S.A., U.K. and The Netherland.

6.2.1 Parent - Subsidiary Relationship or the Corporation Veil

In the modern global economy, the largest corporations conduct their operations worldwide. They operate in the form of transnational corporate groups organized in ‘incredibly complex’ multi-tiered corporate structures consisting of a dominant parent corporations, subholding companies, and scores or hundreds of subservient subsidiaries scattered around the world. The 2011 World Investment Report estimated that there are almost 85000 TNCs with approximately 900,000 foreign subsidiaries and affiliates. To the economists and the public, the TNC is a single enterprise or firm. However, “In the eyes of the law ... the corporation is a separate legal entity—entirely distinct from the stockholders who make it up.”67

Further “The term ‘legal entity’ is a phrase used to describe the situation where a business enterprise is viewed by the law as being separate and distinct from the owners thereof, and having a personality created either by statute or court decision.”68 And this is how Paton define, “… it should be emphasized that the law views the corporation as an entity, separate and distinct from its members.”69

Since the beginning of the twentieth century, the concept of corporation has been most frequently expressed in judicial decisions (in all countries) is that the corporation is a legal entity separate and distinct from the corporation officers and stockholders. However, according to Robert Sprouse, “it cannot be said with equal confidence, however, that this is the predominant view among authors of treatises on corporation law or writers of articles appearing in legal periodicals. And, among those who regard the corporation as a separate entity, there is considerable disagreement as to whether the entity is created by the state or merely recognized by the state and whether the entity is a fiction or is a reality.”70 As a result various theories of the separate and distinct legal entity emerged with the passage of time.71

69 William A. Paton, Essentials of Accounting, 4-5 (1949).
71 The various theories are discussed in another chapter under the heading of Personality of Corporations.
An important question in corporation law is the effect of the connection between a parent corporation and its subordinate branches, or subsidiaries. When will they be found joined in a union so close as to amount to practical identification, so that the formal separation of legal entities will be disregarded? What system of control exercised by a corporation over its subsidiaries will involve responsibility for their acts and contracts as for those of an agent? One aspect of this many sided question relates to jurisdiction over foreign corporations. A foreign corporation can be personally served with process only when it is doing business within a state. The jurisdictional issue varies from one legal system to other legal system. Here, it more pertinent to discuss the law of the US and the Europe regarding the same as compare to other because till date the reported incident of human rights violations on the part of TNCs mainly belong to these continents.

6.2.1.1 Position in the United States

In the law of the United States, each of the constituent corporations of the group is regarded as a separate juridical person with its own legal rights and duties, separate and distinct from those of its shareholders. This is entity law. Resting on medieval concepts of Roman Law, this view of the corporate legal personality is the foundation of the national corporation laws of every Western State. Similarly, under accepted principles of international law, each of the constituent corporations of a corporate group is a national of the nation-state in which it has been incorporated and subject to the laws of that state. In addition, this conceptual view of the corporate juridical entity is reinforced by a very different principle: the doctrine of limited liability of shareholders that is similarly accepted in all Western countries.

However, over the years, in special areas, American law, particularly statutory law, has responded to the inadequacy of entity law. In these special areas, it has recognized enterprises liability principles relying on concepts of ‘control’ and ‘controlled corporations’ to supplement entity law and deal effectively with the problems presented by corporate groups to achieve effective implementation of statutory law or public policy. For

most purposes, however, traditional doctrines of corporate juridical entity and limited liability still widely prevails.\textsuperscript{74}

6.2.1.2 Position in Europe

The principle of separation of legal identity between different limited companies is a universal legal assumption regarded as fundamental by the commercial world. The central issue in these cases is whether a parent company of TNC owes a legal duty of care to those affected by its subsidiary operations. It must be emphasised that the legal approach of direct negligence, adopted in these cases is not dependent on the parent company’s share holding in its operating subsidiaries - although the shareholding is of course the mechanism by which the parent company exercises control.\textsuperscript{75}

In the context of legal suits alleging the civil liability of a EU-based corporation for acts committed outside the EU, one of most difficult questions is that of the possibility of imputing the violation to the corporations, when it may have only an indirect relationship to the act causing the violation. The nature of the relationship between the direct author of the violation and the EU-based defendant corporation may be either (a) societal or (b) contractual. A societal relationship is obviously present where the direct author of the violation is a mere branch or agency of the defendant corporation. Where the direct author of the violation and the EU-based defendant corporations have distinct personalities, however the issue is more complex.\textsuperscript{76}

The ‘unity of concern’ or ‘enterprise’ approach developed by the European Court of Justice in European Community competition law illustrates one route by which the corporate veil may be pierced where the corporation which is the direct author of the violation and the defendant corporation have distinct legal personalities, and where the latter seeks to shield itself from a legal suit by invoking that separation. The ‘unity of concern’ approach has led the European Court of Justice to consider that actions by subsidiaries could be imputed to the parent company if it appeared that the parent actually acted through its subsidiary.\textsuperscript{77}

\textsuperscript{74} Id., at 495.
\textsuperscript{76} Id., at 262.
\textsuperscript{77} \textit{Supra} note 53, at 277-78.
As Olivier rightly summed up the debate that ‘the question of imputability to the parent company of the acts of the subsidiary is, indeed, not a question of fact, but a normative question. The question is not: typically, what influence does a parent company exercise over the operations of a subsidiary under specified conditions? Rather, it is; which obligations, and of which reach, do we decide we want to impose on parent companies with respect to the acts of their subsidiaries? A presumption of control, and thus of imputability, in certain situations, translates into the imposition of a duty on the parent the human rights of those whom, being affected by the acts of its subsidiary, are within the ‘sphere of influence’ of the parent company. The absence of any presumption of that kind, and the correlative requirement, in each case, to justify the imputability to the parent company of the acts of its subsidiary, will lead, conversely, to imposing on the parent company only an obligation to respect human rights in the course of its activities: as long as the violations committed (elsewhere) by its subsidiary cannot be traced back to the initiative the parent company has taken, it will escape liability, as the legal person remain distinct.’

In English Law, although its precise origin is difficult to trace, but the principle of separation of legal identity between different limited companies is firmly established. This is the position, even where one company owns all the shares in the other. Thus the parent company of a wholly owned subsidiary is, on the face of it, no more responsible, legally, for the unlawful behaviour of the subsidiary, than would be for example a member of the public for the negligence of a company in which he owns a single share. This may be different in exceptional circumstance such as where it can be shown that the company is a “sham” or the “agent” of the shareholder. Whilst it may appear that there is something more to the relationship of for example, Rio Tinto plc and Rio Tinto (London) Ltd, lawyers and the courts have doggedly upheld the principle of separate personality.

Using complex and confusing corporate structures, TNCs have been able to distance and separate the parent company from the local operating subsidiaries, thereby protecting the TNC from legal liability. One only needs to glance at the RTZ Corporate structure to understand the point. Obviously, in order to retain control, TNC organisations invariably include extensive cross-directorship between parent and subsidiaries, formulation of

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78 Supra note 53, at 281.
policy, technological control and financial control but until recently these factors had not
given rise to any fear of legal accountability on the part of TNCs. Where injury is caused
to overseas workers this strategy invariably protects the group as a whole since legal
obstacles and difficulties in obtaining access to justice in local courts, against local
subsidiaries (which are often uninsured in any event) means that the TNC escapes
responsibility altogether and victims go without redress.\(^{80}\)

Richard Meeran suggest that provided there is sufficient involvement in, control
over and knowledge of the subsidiary operations by the parent there is no reason why the
general principles of negligence should not apply so that in certain circumstances such a
duty should exist. Save that one is dealing with ‘processes’ rather than ‘products’, there is
no reason in principle why an analogous should not be imposed (‘process’ liability).
Indeed, the proximity of a TNC to overseas employees of its subsidiaries is arguably
closer than that of a manufacturer to consumers of its products.\(^{81}\)

6.2.2 Forum Non Conveniens

The problem of how to properly deal with a plaintiff who elects to sue the defendant
in a forum which, although technically a proper one, is nevertheless unsuitable from the
point of fairness to the par-ties, is an ancient one in the law. From time immemorial
litigants with a choice of several available forums have chosen the one least favorable to
the other party; mere adherence to rules of procedure has been no insurance against the
taking of unfair advantage. It was from efforts to cope with this problem that the
discretionary doctrine of forum non conveniens (FNC) gradually evolved.\(^{82}\)

The doctrine of FNC is an equitable principle which grants the courts discretionary
power to decline to exercise a possessed jurisdiction over a transitory cause of action
whenever, because of the foreign elements involved, the controversy may be more suitably
tried elsewhere.\(^{83}\) As the U.S. Supreme Court explained in Gulf Oil Corp v Gilbert, that
the principle of FNC is simply that a court may resist imposition upon its jurisdiction even
when jurisdiction is authorized by the letter of a general venue statute. The applicability of

\(^{80}\) Id., at 162.
\(^{81}\) Supra note 75, at 261.
(October, 1948).
the FNC rule also presupposes the existence of two forums in which the defendant may be served with process, and it furnishes the basis for a choice between them.\footnote{John Bies, “Conditioning Forum Non Conveniens”, The University of Chicago Law Review, Vol. 67, No. 2, 489-519 at 492 (Spring, 2000).}

6.2.2.1 Origin and Development in British Law


Another view is that by the early nineteenth century, Scottish estate courts increasingly recognized that the question in these pleas included not simply the competence of jurisdiction but also the expediency of trial in the forum, entailing an assessment of which forum “is the proper forum for accounting.” As the courts began to
recognize convenience and expediency as distinct from competence of jurisdiction, they began to refer to this new discretionary refusal of jurisdiction as “forum non conveniens.” These decisions became the foundation for the development of the doctrine in Scotland, though the leading English case traced the court's discretionary power to Chancery Court decisions that recognized the power of equity courts to stay vexatious suits.91

Whereas the doctrine of FNC, as developed in British law, limited the discretion of the court to dismiss cases in three respects. First, the doctrine only applied where both of the parties to the suit were foreign.” The doctrine also required that some other court in a “civilized” country have jurisdiction over the case. Finally, the burden of proving that the initial forum was so vexatious as to cause an actual hardship rested on the defendant. However, where these conditions were met, it rested in the discretion of the trial court to assess the appropriateness of the forum, with only the general guidance to “consider how best the ends of justice in the case in question and on the facts before it … can be respectively ascertained and served.”92

In the last few decades, the development of the doctrine of FNC is seen by English lawyers as a significant improvement in the rules of jurisdiction: a sophisticated device for ensuring international harmony of decision-making and a proper allocation of resources. With respect to the rest of Europe, only the courts of the UK and Ireland have the power to decline jurisdiction on forum grounds. In the rest of Europe, the position is regulated by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,93 to which UK is party. Article 2 stipulates that a defendant is to be sued in its domicile. In Harrods Ltd. Case,94 the Court of Appeal held that the court retained jurisdiction to stay where the alternative forum was in a non-contracting state, notwithstanding the mandatory language of Article 2. The decision was referred to the European Court of Justice (ECJ) by the House of Lords. Submissions opposing the Court of Appeal ruling were lodged by the German government and the European Commission.

91 Supra note 84, at 494.
92 Id., at 495.
6.2.2.2 Origin and Development in American Law

The *FNC* doctrine has both foreign and domestic antecedents that predate its adoption by the Supreme Court as a general proposition under U.S. federal law. In 1929, a law review writer brought the term *FNC* into American law, contending that all American courts had inherent power to decline jurisdiction under the doctrine. After this article the use of the term became so general that in 1941 Justice Frankfurter referred to the “familiar doctrine of *forum non conveniens*” as a manifestation of a civilized judicial system which is “firmly imbedded in our law”. Yet few American courts have actually accepted the doctrine. In most states it has not even been considered. In others it has been rejected.

In 1933, *FNC* made its first appearance in the federal judicial system in the famous case of *Rogers v. Guaranty Trust Co.* This was a stockholders suit in equity, brought in the Southern District of New York, to compel restitution of the enormous bonuses paid by the American Tobacco Company to certain of its officers. The District Court refused jurisdiction, although diversity requirements had been met, on the ground that since the company was a New Jersey corporation, the courts of that state would be better able to cope with the problem. The Supreme Court affirmed, basing its reasoning on certain admiralty cases and on the principle of state law, already referred to, that the courts of one state will refuse to interfere in the internal affairs of a corporation of another state.

However, the doctrine became “fully crystallized” as a principle of federal law in *Gulf Oil Corp. v. Gilbert* and in a similar case, *Koster v. Lumbermen’s Mutual Casualty Co.* The doctrine was restated and amplified by the Supreme Court in *Piper Aircraft Co. v. Reyno* which specifically considered the application of the doctrine in an international context. Although the lower courts have continued to wrestle with detailed aspects of the

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95 *Supra* note 79, at fn 11.
97 *Supra* note 86, at 388.
99 *Supra* note 82, at 816-17.

\begin{quote}
\ldots a plaintiff’s choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would “establish \ldots oppressiveness and vexation to a defendant \ldots out of all proportion to plaintiffs convenience,” or when the “chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case.
\end{quote}

To guide trial court discretion, the \textit{[Gilbert]} Court provided a list of “private interest factors” affecting the convenience of the litigants, and a list of “public interest factors” affecting the convenience of the forum. The “private interest factors” include:\footnote{330 U.S. 501 at 506-07 (1947); \textit{Piper Aircraft Co. v. Reyno} 454 U.S. 235 at 250-61 (1981).}

\begin{quote}
the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises \ldots; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be question as to enforceability of a judgments\ldots.
\end{quote}

Whereas “Public interest factors” include:\footnote{Ibid., 508-09.}

\begin{quote}
Administrative difficulties for courts when litigation is piled up in congested centers instead of being handled at its origin, Jury duty is a burden that ought not to be imposed upon the people of a community with no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach\ldots.
There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court is some other forum untangle problems in conflict of laws, and in a law foreign to itself.
\end{quote}
The Supreme Court has made it clear that the touchstone of the doctrine is, as suggested by its name, convenience: the relative convenience to the parties and to the courts of having the case tried in a different forum. The *Gilbert* court explained that “the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to [the plaintiffs] own right to pursue his remedy.” Thus, in determining whether the doctrine was properly applied, the court expressly weighed the parties’ competing claims of inconvenience.106 Similarly, in *Koster*, the court referred to the issue as a “balancing of conveniences,” and noted that “a real showing of convenience by a plaintiff who has sued in his home state will normally outweigh the inconvenience the defendant may have shown.”107 Finally, in *Piper*, the court referred to *Gilbert’s* holding “that the central focus of the forum non conveniens inquiry is convenience,” and again emphasized that “the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient...”108

However, according to another recorded view, the concept at the heart of *forum non conveniens* clashes with a much more venerable principle, *judex tenetur impertiri judicium suum* which means a court with jurisdiction over a case is bound to decide it. Chief Justice Marshall’s famous statement of the *judex tenetur* principle illustrates the conflict:109

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should.... With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be [properly] brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

The inconsistency between *FNC* and the arguably more fundamental *judex tenetur* principle is one of the reasons that *FNC* is currently a controversial issue in several states. States vary widely in their approaches to forum non conveniens issues. Thirty-two states and the District of Columbia seem to have adopted either the federal doctrine or something

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106 *Gilbert*, 330 U.S. at 508-11. Also see: *Supra* note 103, at 5.
107 *Id.*, at 524.
very closely resembling it. Four other states have given more equivocal indications of following the federal doctrine. Still four other states have adopted more limited versions of forum non conveniens that might nevertheless be broad enough to lead to dismissal of many transnational personal injury and wrongful death actions. In five states the existence of a forum non conveniens doctrine is a completely open question.\textsuperscript{110}

6.3 Role of Judiciary: Application of Law and Legal Doctrines

Throughout the eighties and particularly nineties, TNCs have been challenged on their social and environmental conduct. Examples are the controversies over BP in Colombia, Texaco in the Ecuadorian Amazon for egregious environmental harm, Wiwa case against Royal Dutch Petroleum in Nigeria, Freeport Mc MoRan in Iryan Jaya, Mitsubishi’s timber logging, the Nestle controversy over baby milk, the cause of worker’s rights and working conditions in Del Monte’s banana plantations and Far Eastern toy factories, the re-emerging issue of child labour (particularly targeting the sports goods industry), the new genetically engineered foods, investment in pariah regimes like Burma’s military dictatorship, “ethical” investments, \textit{Bowoto et al. v. Chevron}, \textit{Doe v. Unocal, NCGUB v. Unocal}, \textit{Pinochet} case etc. Shell has targeted twice, once over the Brent Spar issue, once over its role in Nigeria. However, it is must, to achieve a proper balance, the law must continue to develop to reflect the reality of TNC operations and adapt to counter TNCs methods of avoiding legal responsibility.\textsuperscript{111}

Recently, the implications of the doctrine are noted quite different in a commercial as opposed to personal injury context in various litigation in U.K., U.S.A. and the Netherland. In the former cases, the commercial parties are usually contesting forum because they wish to secure the best deal for themselves. Thus the financial advantage to one party of suing in a particular forum will carry with it a corresponding financial disadvantage to the other party. It is rarely a question of one commercial party being denied justice to altogether.\textsuperscript{112}

Apart from utilising legal procedures to stop actions against them by overseas claimants, TNCs have recently been attempting to undermine claims by seeking to undermine the claimants’ funding and even attempting to discredit the claims and the


\textsuperscript{111} Ibid.

\textsuperscript{112} \textit{Supra} note 79, at 162-63.
claimants’ legal advisers. It has become common practice (accepted by Legal Aid Board) for some years for defendants faced with a legally aided opponent to make representations to the Legal Aid Board inviting a withdrawal of legal aid on the grounds that the claims are unmeritorious or that the likely costs outweigh the benefit.113

In the last two decades, the number of litigation before the courts in U.K., U.S.A., and the Netherland increased many fold regarding human rights abuses by TNCs. As a result, the TNCs (defendants) adopted various strategies to tackle all the dimension. It was reported that lobbyists instructed by Cape Plc had advised in relation to the South African asbestos claims that the claimants’ lawyers should be labelled as ‘ambulance chasers’ and the Lord Chancellor and the Legal Aid Board should be embarrassed into choosing ‘between black workers and multinationals [such that] the detail of the claims are likely to be of secondary interest’.114

Government of India v. Union Carbide Corp.

This involved a massive lethal release of 47 tonnes of methylisocyanate (MIC) from the plant of the 50.9 percent owned Indian subsidiary of the American TNC, Union Carbide Corp. (UCC) on 3 December 1984, killing more than 10,000 people, imposing various degrees of suffering and disability on nearly a quarter of a million human beings and creating extensive environmental damage - is a necessary but difficult enterprise.115 Plaintiff i.e. the Government of India who was representing the victims as well, relied almost entirely on allegations of the direct tort liability of the American parent, but included a final count asserting the parent corporation’s vicarious liability for the negligence of the Indian subsidiary based on its enterprise liability as an integrated multinational enterprise. This count played no apparent role in the decision. Numerous class actions involving claims for the catastrophe against the American parent corporation were instituted in the United States, but were eventually consolidated.116 UCC moved to dismiss for FNC, and the Government of India opposed stressing the limitations of its own legal system.117

113 Id., at 163-64.
114 Ibid.

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The pre-trial discovery documents established several incontrovertible truths. The first phase of Bhopal litigation before Judge Keenan fully confirmed the fact that UCC failed to follow the best industrial practice standards in the manufacture and storage of large quantities of MIC for the production of two brand insecticides/pesticides in a factory located in a densely populated area of the capital city of the state of Madhya Pradesh in India. Second, it was also fully established that UCC also preferred systematically to ignore early warning signals of the potential of massive toxic release, specially demonstrated by the 1982 gas ‘leak’ that killed two workers, and the subsequent in-house safety audit report that stressed the urgency of the need for adequate safety systems at the Bhopal factory. UCC failed to take measures to prevent the subsequent lethal release by replicating the state of art digitalized safety systems installed at its own plant in West Virginia, which produced and stored minuscule amounts of MIC compared with the Bhopal plant. Third, considerations of ‘efficient’ corporate governance led to the closure of the refrigeration plant - essential to the prevention of a runaway chemical reaction. Fourth, in the first weeks of the event, the UCC and the UCIL media operations moved swiftly to minimize the risk-exposure, denying that what was released was MIC and insisting that it was merely harmless phosgene - and also providing misinformation concerning remedial measures, thus further aggravating the plight of the suffering.118

Applying the analysis provided by Piper, the district court concluded that both the private and public interest factors supported dismissal. It concluded that the Indian courts had the capacity to deal with the complex litigation and that India provided an adequate alternative forum. It dismissed the complaint under FNC on condition that (1) the defendant consent to Indian jurisdiction and waive any statute of limitations; (2) satisfy any judgement if comporting with ‘minimal requirements’ of due process; (3) the defendant consent to discovery in accordance with the Federal Rules. On appeal, the Government of India reversed its position and sought to uphold lower court’s order.119

The Court of Appeals for the Second Circuit commended the ‘well-reasoned’ opinion of the lower court and applied much the same analysis. Emphasizing the private interest factors, it noted that the ‘vast majority’ of witnesses and documentary proof bearing on causality and damages were both located in India and involved Hindi or other

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119 Supra note 73, at 515.
Indian languages. Without discussing whether public interest factors pointed the other way, it affirmed dismissal.\textsuperscript{120}

However, the Court of Appeals rejected the condition relating to satisfaction of the judgement, noting that the objective was better served by the provisions of New York law relating to enforcement of foreign judgments. It modified the discovery order to provide for consent to reciprocal discovery under the Federal Rules if so ordered by the Indian court. There was no indication by the court that the dramatic public prominence of the litigation and the fact that a subsidiary of an American transnational group was involved constituted a factor to be considered under the public interest elements being evaluated.\textsuperscript{121}

\textit{Bano v. Union Carbide}

Two decades after the original tragedy, another tragedy unfolds. When Union Carbide fled India after the disaster in 1984 it left behind tons of chemical wastes that have contaminated, slowly but steadily, the groundwater, thereby poisoning thousands of Bhopal residents. In November 1999, one individual and three organizations brought a claim pursuant to the ATCA.\textsuperscript{122} It alleged that Union Carbide and its Chief Executive Officer Warren Anderson, the defendants, violated human rights, as the rights to life, health and security of the person, and they were accused of cruel, inhuman and degrading treatment and violation of environmental rights. In August 2000, Judge Keenan in the District Court for the Southern District of New York dismissed the class action suit mainly on the ground that the Indian Bhopal Act of 1985 prevented individuals or organizations outside of India from bringing an action.\textsuperscript{123}

In November 2001, the Second Circuit Court of Appeals in part affirmed and partly overturned the decision.\textsuperscript{124} Claims on seven counts regarding contamination of ground water and soil were reversed and discovery began. In March 2003, Judge Keenan dismissed the case again, this time because the plaintiffs’ claims were untimely and

\textsuperscript{120} Ibid.

\textsuperscript{121} Ibid.

\textsuperscript{122} Bano \textit{v. Union Carbide Corp.}, 273 F. 3d 120 - Court of Appeals, 2nd Circuit 2001. <http://scholar.google.co.in/scholar_case?case=11780720745313490011&hl=en&as_sdt=2&as_vis=1&oi=scholarr&sa=X&ei=4qG4T-eaIcXhrAeD0dHvBw&ved=0CAcQgAMoADAA> Accessed on April 16, 2012.

\textsuperscript{123} Supra note 11, at 146-7.

directed at improper parties. Having sold its shares, Union Carbide could no longer be held legally responsible.\footnote{Bano v. Union Carbide, 2003 WL 1344884, D.C.S.D.N.Y. (2003).}

In March 2004, the Second Circuit reversed Judge Keenan’s dismissal.\footnote{Bano v. Union Carbide Corp., 361 F. 3d 696 - Court of Appeals, 2nd Circuit 2004. <http://scholar.google.co.in/scholar_case?case=1807279823930588359&hl=en&as_sdt=2&as_vis=1&oi=scholarr&sa=X&ei=4qG4T-eIcYhrAeD0dHvBw&ved=0CAgQgA MoATAA> Accessed on April 16, 2012.} The Court held that Union Carbide could be ordered to clean up individual victims’ property and the plant site itself if the Indian authorities requested such a cleanup. At first the Indian government was reluctant to submit such a statement to the New York District Court. But the threat of an indefinite hunger strike by Bhopal activists made the Government of India bow to the pressure and the site of the Bhopal disaster can now be cleaned up. In October 2005, the District Court of the Southern District of New York denied a motion to certify the claim as class action for all private land owners who are affected by the contamination.\footnote{Supra note 11, at 147.}

In April 2006, leading Congressmen and other lawmakers filed an \textit{amicus} brief stating that it is unacceptable to allow an American company to evade civil liability for environmental pollution and abuses committed overseas. \textquotedblleft It is … a mandate of the US Congress to ensure that US corporations and companies investing abroad or undertaking activities overseas comply with local, national and international laws regarding the environment and do not engage in environmental abuses. [The Members of Congress] request that this Court … accord due consideration to the strong legal and public policy interests of the United States in affording redress to victims of environmental pollution and harm caused by American Corporations.	extquotedblright \footnote{F Pallone, “Eleven Members of Congress File Amicus Brief in Support of Bhopal Victims’ Lawsuit”, (April 04, 2006). <http://pallone.house.gov/press-release/eleven-members-congress-file-amicus-brief-support-bhopal-victims-lawsuit> Accessed on April 19, 2013.}

On November 3, 2008, the U.S. Court of Appeals for the Second Circuit reversed the dismissal, finding that the district court did not give the plaintiffs adequate opportunity to respond to the factual argument the district court raised on its own. The Court of Appeals did not need to reach plaintiffs’ argument that the evidence already in the case is more than sufficient to permit plaintiffs to present their case to a jury.\footnote{<http://www.earthrights.org/legal/bano-v-union-carbide-case-history> Accessed on April 16, 2013.}
Papua New Guinea (PNG) is one of the largest countries in the South Pacific with abundant natural resources. Plaintiffs in this case were 21 individuals who lived on the island of Bougainville, which belongs to PNG.130 The Plaintiffs alleged that the Rio Tinto corporation has violated human rights. Specially, their claim alleged crime against humanity, war crimes, murder, violation of the rights to life and health, racial discrimination, cruel inhuman and degrading treatment, violation of international environmental rights and a consistent pattern of gross violations of human rights. The allegations are atrocious - including the rape and murder of innocent women and men - conducted with the assistance of Rio Tinto.131

Rio Tinto is an international mining group, composed of a British corporation, Rio Tinto plc, and an Australian corporation, Rio Tinto Limited. It operates in 6 product groups including aluminium, diamonds and gold, copper, energy, industrial minerals and iron ore worldwide.132 During the 1960s, the Rio Tinto Group buily a mine in the village of Panguna on Bougainville. Rio Tinto required the approval of the PNG government to remove a village and destroy massive portions of the rain forest for the world’s largest open-cast copper mine, which is approximately 500 meters deep and 7 kilometers wide. Rio Tinto offered 19.1% of the mine’s profits to the PNG government.133 By 1972, the construction was complete and operations began. By the early 1980s, the Panguna mine was responsible for 23% of the Rio Tinto Group’s profit. The mine produced approximately 180,000 tons of copper concentrate and 400,000 ounces of gold annually. 4,000 people were working in the three eight-hour shifts seven days a week.134 The majority of the persons working at the mine were foreign, while the local workers received ‘slave wages’.135

The environmental impact of the operations was enormous. Over a billion tones of toxic waste were dumped into the Jaba River, which has destroyed all aquatic life. The water is no longer safe for drinking or bathing. The pollution of land, water and air caused many Bougainvilleans to suffer health problems. The construction was met by resistance

131 Id., at 1127.
134 Id., at 1123.
135 Id., at 1124.
of the local Bougainvilleans from the inception of the project onwards. In 1998, Rio Tinto threatened to close the mine and withdraw all of its investments if the government did not quell the uprising so that the company could recommence operations. When the local resistance to close the mine was successful, Rio Tinto and the PNG government brought troops to reopen the mine. They allegedly crushed several riots, and many people were killed.\footnote{Id., at 1124-26.}

In 1990, the PNG government with the support and encouragement of Rio Tinto imposed a blockade to force the Bougainville revolutionaries to surrender. The blockade prevented medicine, clothing and other essential supplies from reaching the people. A top Rio Tinto official purportedly encouraged continuation of the blockade. Overall approximately 15,000 people died in the civil war that was fought in Bougainville and which was initiated by the mining activities of Rio Tinto. The war crimes included: (a) aerial bombardment of civilian targets; (b) wanton killing and acts of cruelty; (c) burning of houses and villages; (d) outrages upon personal dignity, acts of rape, humiliating and degrading treatment; (e) perfidious use of the red cross emblem; and (f) pillage.\footnote{Id., at 1126-27.}

In November 2000, Alexis Holyweed Sarei, a current California resident, who lived in Bougainville between 1973 and 1987 and 21 individuals filed a putative class action. In January 2001 the defendants filed a motion to dismiss, asserting that the Court lacked subject matter jurisdiction and on the ground of \textit{FNC}. The defendants also raised the issue of non-justiciability under the Act of State and political question doctrine of international comity.\footnote{Ibid.}

In July 2002, the District Court for the Central District of California decided the case.\footnote{Ibid.} On the one hand the court found that the plaintiffs sufficiently alleged a violation of international law and sufficiently pleaded that the mining group was a state actor. On the other hand the Court placed great emphasis to a Statement of Interest by the State Department to the effect that continuance of the lawsuit would negatively affect the foreign policy of the United States, because a peace treaty was negotiated. Therefore, the Court held that all claims were barred by the political question doctrine.\footnote{Id., at 1190.}
The United States Court of Appeal for the Ninth Circuit decided the appeal in August 2006. By a 2:1 majority, the Ninth Circuit ruled, among other things, that: (1) all of the plaintiffs’ claims, with the exception of the UNCLOS claim, assert jus cogens violations that are actionable under Sosa; (2) the UNCLOS claim, while not jus cogens, can provide the basis of an actionable ATCA claim given the widespread ratification of that treaty; (3) corporations can be vicariously liable for violations of jus cogens norms; (4) the State Department’s Statement of Interest did not expressly request dismissal therefore there was no basis to dismiss the lawsuit on political question grounds; (5) jus cogens violations cannot be ‘official acts’ under the Act of State doctrine; and (6) the ATCA does not require that claimants exhaust local remedies, the language regarding exhaustion in Sosa notwithstanding.

The US Court of Appeals, in August of 2007, granted Rio Tinto a rehearing en banc with a full panel of 11 judges. In December 2008, the Court of Appeals decided to remand the case back to the district court for the lower court to determine whether the plaintiffs were required to exhaust the remedies in their home country prior to filing the lawsuit in the US. After another rehearing en banc before the court of appeals, on 26 October 2010 the court referred the case to another judge to explore the possibility of mediation. One appeals court judge dissented from this order arguing that it was inappropriate to for the court to consider mediation before it determines whether it has jurisdiction over the case. On 25 October 2011, the Court of Appeals reversed the lower court’s dismissal of the case. The court upheld the dismissal of the claims regarding racial discrimination and crimes against humanity, but it reversed on the plaintiffs’ claims regarding genocide and war crimes. The case will return to the district court for further proceedings on the genocide and war crimes claims.

Doe v. Unocal

Plaintiffs in the case of Doe v. Unocal were villagers of the Tenasserim region of Myanmar, who alleged that the defendant Unocal, a Californian oil company, directly or indirectly subjected the villages to forced labor, murder, rape, and torture, when the defendant constructed an oil pipeline through Myanmar. Unocal held a 28% share in the Yadana Oil Pipeline project. The French company, Total S.A., held 31%; Thailand’s oil

141 Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir.2006).
142 Supra note 11, at 150.
company, PTT, held 25%; and Myanmar Oil and Gas Enterprise (MOGE) held 15%. It is undisputed that the Myanmar military provided security and other services for the project, and that Unocal knew about this. The Myanmar Military set up a force of four battalions of 600 men for the purpose of protecting the project. The Myanmar built helipads and cleared roads along the proposed pipeline route for the benefit of the project. The plaintiffs testified that they were forced to work as ‘porters’ to work on infrastructure projects for the pipeline project. One of the plaintiffs tried to escape and was shot at. In retaliation the Myanmar Military threw this man’s wife and child into a fire: the wife was badly burned and the child died. Several plaintiffs testified that rapes occurred as part of the forced labor program. Furthermore, there are reports that many villages were relocated without compensation to facilitate the construction of the pipeline.

The Myanmar government and military have a long and well-documented history of human rights abuses and Unocal was made aware of this before it entered the project. The US Department of State *Country Report on Human Rights Practices* for 1991 state that the ‘Burmese army has for decades conscripted civilian males to serve as porters.’ When Unocal was confronted with these allegations in January 1995, Unocal’s president, John Imle, said that he would continue the engagement in Myanmar with the military, even though Myanmaris were used as forced labor workers. “If forced labor goes hand and glove with the military yes there will be more forced labor.” He also said that he was well aware that these acts might breach human rights, but he refused to take responsibility for the behavior of the military. Imle admitted that their human rights behaviour is in a ‘grey zone’. As Paul Hoffman, one of the leading attorneys for the plaintiffs, put it, Unocal made a Faustian deal; a deal with the devil.

In September 1996, four villagers and the Federation of Trade Unions of Burma and the National Coalition Government of the Union of Burma, the government in exile,
brought an action against Unocal and the project, hereinafter called the Roe action. In October 1996, a second action was brought by fourteen villagers, who sought to represent a class of all residents of the Tenasserim region who have suffered similar injuries, hereinafter called the Doe action. The cases were decided by US District Judge Richard Paez, who was nominated by then President Bill Clinton.  

In Doe, at first instance, the District Court dismissed the claims against the Myanmar state-owned MOGE pursuant to the Foreign Sovereign Immunities Act (FSIA). The Court dismissed the claims against the French Company named ‘Total’, for lack of personal jurisdiction, which was later affirmed by the Court of Appeals. The Court at first instance determined that the subject matter jurisdiction was available under the ATCA and that the plaintiffs had placed sufficient facts.

In the Roe action the District Court found that the trade unions and the government in exile lacked standing. The other findings were identical to the Doe action. In August 2000, the District Court consolidated the Doe and Roe actions for summary judgement. The plaintiffs of both actions appealed the District Court’s decision. The Court of Appeals decided the appeals in September 2002. The principal legal issues in the Unocal Case on the appellate level were: the question of complicity; the necessity of state action; and the choice of law.

On the question of complicity, the Court of Appeals found that ‘the evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venture benefited from that practice.’ The Court stated that Unocal knew or should have known that its conduct, including the payments to build infrastructure, would assist or encourage the Myanmar military to subject the plaintiffs to forced labor.

In the issue of state action requirement, the Court noted that traditionally in international law only states were bound to human rights. But then the bench referred to decisions of international tribunals, such as the Nuremberg Tribunal, which stated that individuals and corporations can also be held responsible for human rights violations.

\[\^{153}\] Supra note 11, at 130.
\[\^{154}\] Ibid.
It held that the plaintiffs sufficiently alleged violations of the law of nations under the ATCA and that international law had been appropriately applied. Obviously, the defendants were waiting for the US Supreme Court’s decision in Sosa v. Alvarez. The US Supreme Court affirmed that ATCA as a basis for human rights claims.\footnote{<http://www.earthrights.org/sites/default/files/legal/doe-v-unocal-09-14-2004.pdf> Accessed on May 27, 2013.} In April 2005, Unocal agreed to settle and compensate the victims for an undisclosed, but assumedly, large amount.\footnote{<http://www.earthrights.org/legal/doe-v-unocal> Accessed on May 27, 2013.} The case was therefore jointly dismissed. It seems likely that the agreement in this case was also expedited by the fact that Chevron took over Unocal. Chevron might have had an interest in eliminating either the risk of high damages or the negative public opinion.\footnote{<http://www.totaldenialfilm.com/files/docs/Lawsuit_Doe_UNOCAL.pdf> Accessed on May 27, 2013.}

\textit{Holocaust Litigation against Swiss Bank}

The other successful ATCA litigation was the litigation concerning the Holocaust. The Holocaust is the name applied to the systematic state-sponsored persecution and genocide of various ethnic, religious and political groups during World War II by Nazi Germany and its collaborators. About 6 million Jews were killed and the total death toll of the Nazi government atrocities (including Slavic people, homosexuals, Sinti and Roma, political opposition) is estimated to be well at around 21 million.\footnote{Supra note 11, at 132.}

In the context of human rights litigation against TNCs only the three most prominent cases of Holocaust-related ATCA litigation are presented here: the Swiss banks litigation; the German industry litigation; and the Japanese forced labor camps litigation. The former two were successful, the latter was not. For the sake of completeness, the other Holocaust-related ATCA claims are also mentioned here. The claim against French banks was settled at approximately US$ 172.5 million. The claim against the Belgian banks was settled at US$ 55.5 million. Moreover, some of the cases concerning art that was looted during the Holocaust had impressive outcomes. The case of five masterpieces by Gustav Klimt, including the world-famous portrait of Adele Bloch-Baur, was litigated in various US courts. The US Supreme Court ruled that the heirs to the estate of which the picture was a part could sue a sovereign country, Austria. The final decision was
announced by an Austrian arbitration panel, which ruled that these works belonged to the heirs. The picture of Adele itself was sold for US$ 135, the highest sum ever paid.\textsuperscript{161}

The Swiss banks litigation began the Holocaust litigation and at the heart of its genesis was a coincidence. Ed Fagan, a controversial attorney in New York did some unrelated work for Gizella Weisshauss, an energetic Holocaust survivor. She told Fagan about her various attempts to collect the money deposited by her father in Switzerland before the war. She travelled to Switzerland various time. The Union Bank of Switzerland (UBS) as many other Swiss banking institutions have rejected claimants based on a variety of legalism. Methods to retain the funds of European Jews dormant bank accounts were not to answer letters of survivors or to ask for death certificates – not issued by Nazi officials – or to ask for tremendous search fees as high as 750 Swiss francs. Furthermore, it has been shown that the Swiss banks systematically destroyed evidence relating to their dealings in World War II.\textsuperscript{162}

In October 1996, Fagan filed the first class action lawsuit against the Swiss banks, seeking US$20 billion in damages. It marked the beginning of the Holocaust restitution movement in US courts, which led to one of the highest settlements in human rights cases. The case was joined by three other cases and then consolidated under the master docket, \textit{In re Holocaust victim assets litigation}.\textsuperscript{163} The Swiss banks were confronted with two main allegations: (1) they failed to return moneys deposited with them by Jews, (2) they traded in assets looted from the Jews by the Nazis and in assets that were the product of slave labor.\textsuperscript{164}

Plaintiffs alleged that the banks collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crime against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties, breached contracts, converted plaintiffs' property, enriched themselves unjustly, were negligent, violated customary international law and the ATCA, violated Swiss banking law and the Swiss commercial code of obligations, engaged in fraud and conspiracy, and

\textsuperscript{161} \textit{Ibid.}
\textsuperscript{162} \textit{Id.}, at 133.
\textsuperscript{164} \textit{Supra} note 11, at 133.
concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate the plaintiffs’ ability to pursue their claims.\textsuperscript{165}

The Swiss banks moved to dismiss on various grounds, including FNC, lack of personal and subject matter jurisdiction, and failure to join indispensable parties. While the motions to dismiss were pending, the parties engaged in a settlement agreement, which made it unnecessary to decide the motions. The Swiss banks settled at US$ 1.25 billion.\textsuperscript{166} They were pressured to settle the dispute by various different groups, including US state officials and various investigative reporting articles and books were published. The Special Representative of the President, the Senate and various state governments maintained pressure on the Swiss banks and threatened sanctions.\textsuperscript{167}

\textit{Iwanowa v. Ford Motor Company}

Since the 1950s, Germany has paid approximately US$ 60 billion to some Jewish victims of the Holocaust. Some Jewish Holocaust victims received small pensions. Germany never paid for victims of slave labor. Between eight and ten million people were forced to work as labourers in factories and camps in Germany, Austria and throughout occupied Europe during World War II. The conditions in these labor camps or concentration camps were horrific. People were essentially worked to death with inadequate rations and in terrible conditions. Many were killed if they were unable to work.\textsuperscript{168}

“There was hardly a German company that did not use slave and forced labor during World War II,” conceded Count Otto Lambsdorff, the chief German government negotiator in the forced labor settlement. About 1¼ million of these labourers were still alive in 2001. The German government claimed it was not obligated to pay compensation since the slave labor was carried out by private German industry. German industry claimed that the German government, as successor of the Third Reich, is liable, because industry was forced to use slave labor for the wartime economy.\textsuperscript{169}

\textsuperscript{165} \textit{In re Holocaust Victim Assets Litigation}, 105 FSupp 2d 139, D.C. E.D.N.Y. (2000) at 141.


\textsuperscript{168} Supra note 11, at 135.

In March 1998 the first slave labor case was filed against German industry, *Iwanowa v. Ford Motor Company*. In the ensuing months, close to 40 separate lawsuits were filed in various courts throughout the United States against numerous German companies that used slave labor during the war. The claims were based on: (1) the customary international law prohibition on the enslavement of conquered populations; and (2) the Nuremberg Principles that bar the commission of war crimes and crimes against humanity. Ed Fagan took American-style tactics to the heart of Germany in leading Holocaust survivors on a march through Frankfurt’s financial district.

The defendants argue that the claims founded on German law were barred by the two-year statute of limitations governing employment contracts and that the international law claims involved non-justiciable war reparations. In September 1999, the claimants suffered a serious setback in the litigation. Two federal judges dismissed five of the lawsuits. First, Judge Joseph Greenaway, Jr. dismissed the lawsuit against Ford Motor Company. In addition, Judge Dickinson R. Debevoise dismissed four separate lawsuits against German companies Degussa and Siemens. Both judges held that the suits were non-justiciable, specifically that they were precluded by the “Two-Plus-Four Treaty.” Judge Greenaway also found some claims against Ford to be time-barred. The plaintiffs appealed, arguing that the fact that the treaty was silent on this issue cannot be construed as an intention to destroy the plaintiffs’ claims.

Ultimately, the litigation became moot when the German government and German industry entered into a settlement in December 1999. The judicial persecution, the media attention and the settlement in the Swiss bank case, played a major role in persuading German industry to establish a German foundation to pay compensation to Holocaust victims. The name of the foundation was ‘Remembrance, Responsibility, and the Future Foundation.’ The dismissal of some of the case might have had the effect of reducing the final amount that was paid into the Foundation, but most of the other cases were still pending and the dismissals were appealed. Finally, the parties settled at 10 billion Deutsche Mark (approximately US$ 5 billion). Each individual survivor will receive a

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171 *Supra* note 169, at 21.
173 *Supra* note 11, at 136.
lump sum payment of between US$ 2,500 and $ 7,500.\textsuperscript{175} In June 2007 € 4.32 billion (approximately US$ 5.1 billion) has been paid out to 1.66 million survivors.\textsuperscript{176}

The German government and German industry only agreed to the settlement on the condition that it included “legal peace” that is, an indemnity from all current and future litigation.\textsuperscript{177} The indemnity from future litigation proved to be a difficult undertaking to enforce, as US judges are independent and do not take ‘marching orders’ even from their own government. The governments entered into an unprecedented executive agreement that compels the US government to issue statements of interest in cases relating to slave labor in Germany. The legal character and the obligation of courts pursuant to these agreements have not been definitively determined and remain controversial. It is not possible for the executive branch to prevent all future litigation. The agreement do not, however, purport to terminate the litigation of their own force, but instead obligate the State Department to file “Statements of Interest” requesting that courts dismiss the cases based on the foreign policy interests of the United States. Till date, the agreement has been successful in preventing further claims.\textsuperscript{178}

In this case the assistance from government, from both sides, was of great importance to the final settlement of this case. US President Bill Clinton and German Chancellor Gerhard Schroder personally intervened and accelerated the settlement various times. They nominated two powerful government negotiators, US Undersecretary of Treasury Stuart Eizenstat and the former Secretary of Commerce, Count Otto Lambsdorff. The cooperation between the two governments was harmonious and successful.\textsuperscript{179}

**Japanese Forced Labor Litigation**

Japan’s use of slave labor during World War II appears to have equalled or possibly exceeded that of Nazi Germany. It is estimated that around 15 million Chinese and between four and six million Koreans were slave labourers during the war.\textsuperscript{180} Among the Japanese companies that profited from slave labor are now some of the largest concerns in the world: Mitsubishi, Mitsui, Nippon Steel, Kawasaki Heavy Industries and others.

\textsuperscript{175} Supra note 169, at 23.
\textsuperscript{176} Supra note 11, at 137.
\textsuperscript{177} Supra note 167, at 83.
\textsuperscript{178} Supra note 11, at 137.
\textsuperscript{179} Supra note 167, at 71.
Japan’s government and Japanese corporations continue to resist legal and moral responsibility. Japanese courts have admitted that Korean and Chinese workers were forced to work without pay, but dismissed suits because the relevant statutes of limitation have expired.\footnote{Supra note 11, at 139.}

In California, one of Japan’s largest construction companies, Kajima, was the target of a tireless campaign for compensation and an apology. In November 2000, it agreed to pay US$ 4.6 million to the families of the 986 slave labourers. It was the first Japanese company to have ‘broken ranks’ and accepted responsibility for wartime injuries it caused to forced labourers.\footnote{Supra note 11, at 139.}

In July 1999, California enacted a law, the California Code of Civil Procedure (CalCCP), Section 354.6 of which enabled ‘prisoners-of-war of the Nazi regime, its allies or sympathizers’ to recover compensation for labor performed as a World War - II slave victim [...] from any entity or successor in interest thereof, for whom that labor was performed.’ In the ensuing months, more than 30 lawsuits were filed in California courts. Plaintiffs included civilian American, Chinese, Filipino and Korean forced labourers, former US and allied prisoner of war, and so-called ‘comfort women.’\footnote{Ibid.}

In June 2000, most of the California litigation was consolidated by transfer orders to the courtroom of federal judge Vaughn Walker of the Northern District of California. In September 2000, the Court dismissed all claims brought by US civilians and prisoners of war on the ground of the 1951 Peace Treaty.\footnote{In re World War II Era Japanese Forced Labor Litigation, 114 F Supp 2 d 939, D.C.N.D. Cal. (2001) at 942.} In the treaty, the United States waived all claims arising out of actions by the Japan government, Japanese nationals, or private Japanese corporations that were taken ‘in the course of the prosecution of the war;’ however, it is questionable if the use of slave labor can be seen as prosecution of the war. In September 2001, the Court also dismissed the claims brought by the Korean, Chinese, and Filipino plaintiffs. It stated that, as the Phillipines Government signed the treaty, the claims by Filipinos must also be dismissed. The claims by the Chinese and Korean victims could not be dismissed on the ground of the Peace Treaty since those countries never signed it. The Court instead dismissed those claims on other grounds. It held that the CalCCP was unconstitutional, since it infringes the exclusive foreign affairs power of
federal government. Moreover, it held that the claims based on the ATCA were statute-barred. The Court gave ‘significant weight’ to a Statement of Interest that was given by the US government. It asserted that the claims of the Allied prisoners of war were barred by the Peace Treaty and the California law CalCCP was an intrusion into the federal government’s exclusive responsibility for foreign relations.\(^{185}\)

_Kadic v. Karadzic_

Radovan Karadzic was President of the self-proclaimed Bosnian-Serb Republic of Srpska, which claimed to exercise lawful authority and controlled some territory. Muslim citizens of Bosnia-Herzegovina brought suit against him, alleging that he “personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats.”\(^{186}\) The court found a cause of action for genocide and war crimes in spite of the fact that Srpska was not an officially recognized state.\(^{187}\)

In addressing the state action requirement, the court liberally cited the Restatement (Third) of the Foreign Relations Law of the United States. Because the cause of action (whether there is a violation of the law of nations) in ATCA cases is conflated with the jurisdictional analysis, the Kadic court summoned both Sec 702 and Sec 404 of the Restatement to support the proposition that some of the offences of “universal concern” can be committed by non-state actors. Section 702 identifies actionable violations of the law of nations committed by a state. These include those violations listed in Sec 404 as of ‘universal concern’. Section 404, however, describes those offences for which a nation-state has universal jurisdiction, namely, ‘piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism’. The cross-over between these two provisions convinced the court that the offences listed in Sec 404 would not require state action.\(^{188}\)

The Kadic court conducted a nuanced analysis of the definition of ‘state’ under international law worth examining. The court recognized that a state under international law is “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal

\(^{185}\) _Supra_ note 11, at 140.


\(^{187}\) _Supra_ note 18, at 163-4.

\(^{188}\) _Ibid._ Also see: <http://www.lawofwar.org/kadic_v_karadzic.htm> Accessed on May 14, 2012.
relations with other such entities.”

Further, an entity can be a ‘state’ for purposes of international law whether or not formally recognized by other states. International law proscribes official torture, for example, whether a state is ‘recognized’ or ‘unrecognized’ by other states. Thus, whether or not the U.S. government officially recognizes a particular state, it may be considered a state under international law and for purposes of ATCA litigation. Otherwise, the court noted, “it would be anomalous indeed if non-recognition by the United States, which typically reflects disfavour with a foreign regime - sometimes due to human rights abuses - had the perverse effect of shielding official of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.”

In the final analysis, the court determined, the inquiry is “whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.” Notable in the corporate context, the Kadic court also asserted that the ‘color of law’ jurisprudence under 42 U.S.C. Sec. 1983 was a relevant guide as to whether a defendant has engaged in official action for purposes of ATCA jurisdiction.

Finally, the Kadic court addressed the political question concerns raised by the defendant. The court rejected the approach suggested by Judges Robb and Bork in Tel-Oren, and emphasized the fact-specific inquiry necessary to determine whether the political question doctrine applied in any given case. The court reiterated points made in the foundational political question cases, namely, that the mere fact these cases raise question involving foreign relations does not necessarily transform them into non-justiciable political questions. In essence, Kadic is “cited for the proposition that the ATCA covers violations of customary international law by private, non-state actors.”

Sosa v. Alvarez-Machain

Before discussing Sosa’s case the history of the case lies in the case of United States v Alvarez-Machain. In 1985, an agent of the Drug Enforcement Administration
(DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture.196

In 1990, a federal grand jury indicted Alvarez for the torture and murder of Camarena-Salazar, and the United States District Court for the Central District of California issued a warrant for his arrest. The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.197

Once in American custody, Alvarez moved to dismiss the indictment on the ground that his seizure was 'outrageous governmental conduct,' and violated the extradition treaty between the United States and Mexico. The District Court agreed, the Ninth Circuit affirmed, and we reversed, holding that the fact of Alvarez's forcible seizure did not affect the jurisdiction of a federal court. The case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal.198

Humberto Alvarez-Machain, the original plaintiff in the Sosa v. Alvarez-Machain litigation, was a Mexican national who was kidnapped in Mexico. After returning to his home country, he sued the Mexican citizens who kidnapped him, including Francisco Sosa, as well as individual DEA agents, the DEA, and the U.S. government for contracting for his abduction.199

196  Id., at 651.
197  Ibid.
198  Id., at 658.
After a long history of deliberation in and among the lower federal courts over the content and meaning of the ATCA, the Supreme Court issued its first elaboration on its interpretation of the ATCA in its June 2004 Sosa decision. While many supporters of the ATCA feared a decision that would eviscerate the ATCA, the Court’s opinion left the door ajar (subject to ‘vigilant doorkeeping’) to ‘independent judicial recognition of actionable international norms’ such that federal courts may continue to take cognizance of and interpret a ‘narrow class of international norms.’ Therefore, the ATCA may serve as a means of redress for those who have suffered violations of that narrow class of norms. In determining whether a particular norm is of the small set plaintiffs may employ under the ATCA, the Court required that any claim under the law of nation “(1) rest on norms of international character (2) accepted by the civilized world and (3) defined with a specificity comparable to the features of the 18th - century paradigms recognized by the Court. In other words, federal courts “should not recognize private claims under federal common law for violations of any international law norms with less definite content and acceptance among civilized nations than the historical paradigms familiar when Sec 1350 was enacted.” While the first two criteria will surely give rise to future ATCA debate and litigation, it is this third requirement, which is likely to give rise to the most active continued deliberation.200

In an effort to provide some guidance, the Court provided some limitations on the types of claims that can be entertained by ATCA litigation. Citing to Tel-Oren and In re Estate of Marcos Human Rights Litigation201, the Court outlines a set of standards for analyzing any given claim. A norm giving rise to liability under the ATCA must be (1) specific or definable (2) universal, and (3) obligatory. In addition, the Court sets out a number of other, case-contingent limitations, such as exhaustion of domestic remedies and case-specific deference to the political branches, especially in cases which may have an impact on U.S. foreign policy.202

Significantly, the Court accepted the argument that, as a general matter, the ATCA’s jurisdictional grant permits federal courts to recognize a limited set of human rights violations. However, in reviewing the particular facts of Mr. Alvarez-Machain’s detention and his assertions that the violations he suffered amounted to violations of customary

200 Ibid.
202 Supra note 199, at 639.
international law such that the ATCA should grant him relief, the Court applied the above parameters to determine that Mr. Alvarez-Machain’s ATCA claims were without merit. Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. . . . It is enough to hold that a single illegal detention of less than a day, followed by a transfer of custody to lawful authorities and a prompt arraignment, violates no norms of customary international law so well defined as to support the creation of a federal remedy.

However, commentator S Gul viewed the Sosa decision as a species of limited ‘jurisdiction plus’ analysis. According to the Sosa decision, actions can be brought directly under the ATCA for a ‘narrow set’ or ‘very limited set of claims’ of violations of customary international law. However, the court urged federal courts to use ‘great caution’ in creating such new causes of action. It has to satisfy the standard of the historical antecedents. The Supreme Court reveals five approach in how to exercise the ‘great caution’

i) The causes of action need to be sufficiently definite, as was the case for piracy in 1789.

ii) The practical consequences of the creation of a new cause of action have to be kept in mind. The floodgates to many different kinds of claims from other jurisdiction shall not be opened.

iii) The federal courts shall observe ‘legislative guidance’.

iv) The claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals.

v) Serious weight shall be given to the interference with the power of the executive branch concerning foreign affairs.

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205 Supra note 11, at 122.
**Thor Chemicals Holdings Ltd/Desmond Cowley**

During the 1980s, Thor manufactured mercury-based chemicals in Margate, South East England. Health and safety at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive (‘HSE’) due to elevated levels of mercury in the blood and urine of the workers. In about 1986, the company terminated mercury-based processes in Margate and shifted its Margate mercury operations (including key personnel and plant) to Cato Ridge, Natal, South Africa. At that factory, precisely the same deficiencies which had been identified by the HSE were replicated. In addition, the South African operation relied extensively on casual untrained labour. Workers with high level of mercury were laid off and replaced by new casual labourers who queued at the factory gate for work each day. This ‘recycling of workers’, rather than a proper health and safety system, appears to have been how Thor attempted to control mercury exposures of its workforce.\(^{206}\)

In February 1992, mercury poisoning of South African workers came to light. Three workers died and many others were poisoned to varying degrees. An inquiry and a criminal prosecution\(^{207}\) in the local (Pietermaritzburg) Magistrates’ Court led to the equivalent of a £ 3,000 fine. Compensation claims against the parent company and its Chairman, Desmond Cowley, were commenced in the English High Court on behalf of 20 workers. The Claims alleged that the English parent Holdings was liable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process. Thus the claim was based on negligent acts and omissions (failure to take steps to protect the South African workers against the foreseeable risk of mercury poisoning).\(^{208}\)

Thor applied to stay the action on *forum non conveniens* grounds. The application was dismissed by Deputy High Court Judge Mr. James Stewart QC, the judge, noting the connections of the claim with England and holding that English law would probably be applied to the case. The defendant’s appeal was struck out by the Court of Appeal on the grounds that Thor had acceded to the jurisdiction, *inter alia*, by serving a Defence. In 1997, Thor settled the claim for £ 1.3 million.\(^{209}\)

\(^{206}\) *Supra* note 75, at 255.


\(^{208}\) *Supra* note 79, at 165.

\(^{209}\) *Supra* note 75, at 256.
A further 21 claims were filed in appeal. In July 1998 Thor’s attempt to stay their further action on *forum non conveniens* grounds was rejected by Garland J. Leave to appeal was refused by the Court of Appeal. In 2000, the Appeal Court judges in London have ordered Thor to deposit £400,000 with the Court and produce documents regarding a demerger manoeuvre.

**Connelly v. RTZ**

A claim for compensation was brought in England by Edward Connelly, a laryngeal cancer victim employed at RTZ’s Rossing uranium mine in Namibia. Various allegations including the following were made: Key strategic technical and policy decisions relating to Rossing were taken by the English-based RTZ companies. For example, in order to meet contractual deadlines for the supply of uranium internationally by RTZ companies, directors of their English companies were directly responsible on the ground, for substantially increasing the output of uranium - and the consequent dust levels - without ensuring that effective precautions were taken to protect workers against the hazards dust exposure.

In March 1995, RTZ succeeded, initially, in persuading the Court that Namibia was the ‘natural forum’ for the case. Thereafter, the argument was limited to the relevance of Mr. Connelly’s inability, to obtain funding to bring a claim in Namibia (whereas funding was available here, in the forum of legal aid or lawyers willing to act on a ‘no win, no fee’ basis).

The case went to the Court of Appeal twice before reaching the House of Lords. On the first occasion, in August 1995, the Court of Appeal held that, in determining whether Namibia was an ‘available forum’, S 31 of the 1988 *Legal Aid Act* precluded the Court from having regard to the fact that the plaintiff was unable to obtain funding to litigate in Namibia, but had Legal Aid to litigate in England. The plaintiff applied to lift the stay on the grounds that the funding of his English action had switched to ‘no win, no fee’ conditional fee agreement (the UK variant of contingency fees) having been made lawful in August 1995. His application was rejected at first instance in October 1995. However,

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in May 1996 the Court of Appeal, referring specifically to Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, allowed the appeal. Bingham MR stated:\textsuperscript{214}

But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgement and interests of justice tend to weigh, and weigh strongly in favour of that forum in which the Plaintiff could assert his rights.

The Lords held, by a 4-1 majority, that Mr. Connelly's inability, in practice, to litigate in Namibia meant that the case should be allowed to proceed in England. In the lead judgment, Lord Goff stated:\textsuperscript{215}

The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.

A further claim was subsequently brought by the widow of another (oesophageal) cancer victim employed at Rossing, Peter Carlson. Mr. Carlson worked at Rossing during the same period, and for a substantial period in the same areas if the mine, as Mr. Connelly. Almost immediately after the House of Lords reversed the stay, RTZ applied to strike out the Connelly claim (including on limitation grounds) and to stay the Carlson action on the ground of FNC. In December 1998 the court struck out Mr. Connelly's claim on limitation grounds but dismissed RTZ's application to stay the Carlson action on the grounds that Mr. Carlson's widow could not obtain funding to achieve substantial justice in Namibia.\textsuperscript{216}

\textit{Cape PLC}

\textit{Lubbe v. Cape PLC}\textsuperscript{217} involved claims for personal injuries or death, brought originally by five claimants, caused by exposure to asbestos while working in South

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\textsuperscript{214} Supra note 75, at 257.
\textsuperscript{215} Supra note 75, at 257.
\textsuperscript{216} Carlson v. RTZ Corp. plc, Decision of Wright J (November 1998, unreported). As quoted in Supra note 75, at fn. 17.
\textsuperscript{217} Lubbe & Others v. Cape Plc (2000) 1 W.L.R. 1545 (HL).
\end{flushright}
Africa for Cape PLC’s South African subsidiaries.\textsuperscript{218} It was alleged that the defendant as a parent company had failed to discharge its duty to ensure the observance of proper standards of health and safety by its overseas subsidiaries.\textsuperscript{219} In all the material proceedings, the defendants relied on a plea of \textit{forum non conveniens}, though it was clear that Cape PLC, as an English company, was properly subject to suit in England.\textsuperscript{220}

At first instance, the proceedings were initially stayed on the ground that everything pointed to South Africa as the appropriate forum for the trial of the action and there was nothing which indicated that the interests of justice required trial in England. On appeal, the Court of Appeal removed the stay on the ground that the defendant had not shown that South Africa was clearly and distinctly the more appropriate forum. Thereafter, some 3,000 additional claimants issued writs against Cape PLC and hundreds more instructed solicitors to bring suit. One claimant (suing as personal representative of her deceased husband) was a British citizen residing in England. All the other claimants (most of modest means) were citizens and residents of South Africa.\textsuperscript{221}

The defendant then applied to stay these new proceedings (the claims had by then been consolidated into a group action) and succeeded in the application at first instance. Mr. Justice Buckley concluded that South Africa was clearly and distinctly the more appropriate forum for trial of the group action and that there were no sufficient reasons for refusing a stay. In particular, he held, in all the circumstances, that it could not be found that legal aid would not be granted to the claimants in South Africa. The claimants then appealed this decision to the Court of Appeal, which dismissed the appeal and continued the stay.\textsuperscript{222}

The claimants then appealed to the House of Lords who unanimously allowed the appeal and removed the stay. The House of Lords had no doubt at all that the defendants

\textsuperscript{218} The asbestos mining in South Africa has caused a chain of injuries worldwide – asbestos miners and millers, people involved in transportation of asbestos, stevedores loading/unloading ships, ship workers, workers at factories in South Africa, the UK and the USA as well as people living in the vicinity of these operations. Whereas victims in the US and the UK can and have been compensated, victims in South Africa have not been. For details see: \textit{Supra} note 75, at 257.

\textsuperscript{219} \textit{Lubbe}, [2000] 1 Lloyd’s Rep. at 143. In 1962, the Chief Medical Officer of Cape based in London visited South Africa and reported: “At Prieska the conditions around and about the mill are not good. The crusher is out of doors - it was obvious that quite a cloud of dust was being produced and blown away by a fairly strong wind towards the town.” For details see: \textit{Supra} note 75, at 258.

\textsuperscript{220} \textit{Id.}, at 139.

\textsuperscript{221} \textit{Lubbe & Others v. Cape Pic} (2000) 1 W.L.R. 1545 at 1550.

had discharged the burden of showing that South Africa was a clearly and distinctly more appropriate forum for the trial of these claims. But, at the second stage of the application of the *Spiliada* principles,\textsuperscript{223} there were convincing reasons to indicate that substantial justice would not be done if these claims were litigated in South Africa.\textsuperscript{224} First, there was no convincing evidence to suggest that legal aid might be available in South Africa as the Court of Appeal appears to have thought. Secondly, there was evidence to suggest that legal representation, on a conditional fee basis, would not be available for a variety of reasons in the case. As Lord Bingham put it:\textsuperscript{225}

If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion, provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here.

Lord Bingham felt reinforced in these views by the absence, at the time, of developed procedures for handling group actions in South Africa.\textsuperscript{226} While the litigation was pending, it was reported in *The Times of London* on January 15, 2002, that some 7,500 claimants had settled their claims against Cape PLC for £21 million.\textsuperscript{227}

**Eastman Kodak v. Kavlin**

This case is a somewhat unusual case.\textsuperscript{228} Susana Kavlin was the executive Vice President of the exclusive distributor for Eastman Kodak Company in Bolivia. Kodak cancelled the exclusive distributorship because it was dissatisfied with Kavlin’s distribution services and instead assigned exclusivity to Juan Carballo. Kavlin, having very close relations to the highest judicial institutions, filed a criminal complaint against Carballo alleging that he had not registered his company with appropriate Bolivian governmental authorities. Carballo was only dropped the suit on Kodak’s agreement to


\textsuperscript{224} *Lubbe*, [2000] 1 W.L.R. at 1557.

\textsuperscript{225} Supra note 222, at 549.

\textsuperscript{226} Ibid.


reinstate Kavlin as its distributor. Kodak brought an action in October 1996 pursuant to ATCA alleging that Kavlin violated international law, especially through arbitrary detention.  

The main legal issues of this case related to FNC and subject matter jurisdiction. The District Court for the Southern District of Florida held the chosen forum by the plaintiff, Kodak, could not be disturbed, because the defendant, Kavlin, had the ability to manipulate the Bolivian judicial system. On the question of subject matter, the Court decided with ‘deep reservations’ that the plaintiff’s complaint stated a cause of action pursuant to the ATCA. It held that the law of nations prohibits a state to misuse its coercive power to detain an individual for the purpose of extortion for the benefit for a private entity.  

On February 12, 1998, a Bolivian court entered a final judgment against Eastman Kodak and awarded damages to the plaintiff Casa Kavlin, S.A., the former defendant in the U.S. action. In March 1998, defendant moves for leave to amend their answer and affirmative defences, adding the affirmative defences of collateral estoppels. The court rejected this motion because of ‘the current state of the judicial system and Defendant’s alleged influence over litigation in Bolivia’.  

This case is interesting for three reasons. First, the ATCA can also be used by TNCs and not only against them. Second, it is surprising that the scope of the ATCA is understood to be so far-reaching. A detention of 10 days in inhumane conditions can be enough to state a cause of action pursuant to the ATCA. Third, the Court confirmed that US courts remain open forum for human rights claims. The case recently reached a successful settlement for plaintiffs; the terms of the settlement are undisclosed.  

Beanal v. Freeport-McMoran, Inc.  

Freeport operated mines in Tamika, Irian Jaya (Indonesia) and was accused by plaintiff Tom Beanal, a resident of Tamika, of having committed cultural genocide of his Amungme tribe, human rights abuses and environmental tort for open pit copper, gold

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229 Supra note 11, at 161.
230 Ibid.
232 Ibid.
233 The human rights abuses complained of are (a) arbitrary arrests and detention, (b) torture, (c) surveillance, (d) destruction of property, and (e) severe physical pain and suffering.
and silver mine at the Grasberg Mine in Indonesia. He filed a class action against Freeport-McMoran. On April 10, 1997, the court ruled that the plaintiff had standing to allege cultural genocide of the Amungme tribe, certain human rights violations and environmental torts, but stated that plaintiff should amend the complaint.

Defendants’ motion to strike the second amended complaint was granted on August 7, 1997 for failure to state a claim. On March 3, 1998, the court granted defendant’s motion to strike the third amended complaint and dismissed with prejudice plaintiffs’ claims. Plaintiffs appealed to the Fifth Circuit. Briefing was completed in January 1999. The Court of Appeal dealt with all the allegation separately which are mentioned in the following paragraphs.

As a basis for his environmental torts claims, plaintiff alleged that Freeport’s activities caused “destruction, pollution, alteration, and contamination of natural waterways, as well as surface and ground water sources; deforestation; destruction and alteration of physical surroundings.” Beanal invoked three international environmental law principles to support his ATCA claim: (1) the Polluter Pays Principle, (2) the Precautionary Principle, and (3) the Proximity Principle. Relying heavily on an international environmental law treatise the court rejects all three claims on the grounds that the “principles relied on by Plaintiff, standing alone, do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content.” Importantly, the court went on to find that the invoked principles apply to members of the international community rather than non-state

235 Id., at 370-381.
238 Supra note 231.
240 This principle states that the costs of pollution are to be borne by the polluter.
241 Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
242 The proximity principle suggests that hazardous waste should be disposed of in the state of its creation, to the extent that such disposal is reasonable.
corporations.... A non-state corporation could be bound by such principles by treaty, but not as a matter of international customary law.\textsuperscript{244}

Beanal also complained that the alleged human rights abuses and environmental violations had resulted in "the demise of the culture of the indigenous tribal people," which amounted to a "cultural genocide." Noting that genocide requires the "destruction of a group, not a culture," the court dismissed Beanal's claim for failure to make his allegation sufficiently specific.\textsuperscript{245}

The judgment was affirmed by the Fifth Circuit Court of Appeals\textsuperscript{246} which noted that the principles of international environmental law invoked by Beanal "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts."\textsuperscript{247} Beanal's reference to the Rio Declaration was found inappropriate in the sense that the Declaration seeks to prevent transboundary environmental harm; Beanal never made any claims of this nature. As a matter of policy the court advised that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."\textsuperscript{248} Though urged by plaintiff and various \textit{amic} briefs to recognize cultural genocide as a discrete violation of international law the court declined to merge the "amorphous right to 'enjoy culture', or a right to 'freely pursue culture', or a right to cultural development" with the concept of genocide, as it deemed it imprudent for a United States tribunal to declare an amorphous cause of action under international law that has failed to garner universal acceptance.\textsuperscript{250}

The \textit{Beanal} decisions emphasize courts' wariness of equating broad concepts of environmental law and human rights law responsibility with obligations under international customary law that could form a cognizable tort under the ATCA. Similarly,


\textsuperscript{245} Ibid.

\textsuperscript{246} \textit{Tom Beanal v. Freeport-McMoran, Inc.}, 197 F.3d 161 (5th Cir. 1999).

\textsuperscript{247} Id., at 167.

\textsuperscript{248} Ibid.

\textsuperscript{249} Many NGOs like Earth Justice and Earth Rights International, The Center for Constitutional Rights, Center for Justice and Accountability and Four Directions Council filed briefs.

\textsuperscript{250} \textit{Tom Beanal v. Freeport-McMoran, Inc.}, 197 F.3d 161 (5th Cir. 1999) at 167.
the courts stress that for ATCA purposes individuals and not (merely) states must be the
addressees of the allegedly violated obligations. The court of appeals reasoned that federal
courts should exercise “extreme caution” when deciding environmental ATCA cases as to
not interfere with environmental policies of other governments, a valid concern that is
frequently echoed in later decisions.251

Yosefa Alomang v. Freeport-McMoran, Inc.

Yosefa Alomang, a citizen of the Republic of Indonesia, filed this lawsuit on her
behalf and others similarly situated, alleging numerous acts and/or omissions by two
Louisiana corporations, Freeport-McMoRan, Inc. (FMI), and Freeport-McMoRan Copper
& Gold, Inc. (FMC & G).252 In their first petition,253 plaintiffs alleged foreign
environmental violations, international human rights violations and cultural genocide.
Plaintiffs thereafter amended their petition to add allegations that the claims raised in their
original petition were the result of decisions made by Freeport-McMoRan, Inc., and FMC
& G, in their corporate headquarters in New Orleans. The trial court granted defendants’
exception of lack of subject matter jurisdiction. The plaintiff approached the Court of
Appeal of Louisiana, 4th Circuit, appealing the judgment granting defendants’ exception of
no cause of action, dismissing plaintiffs’ claims, with prejudice.254

The Court of Appeal quoted it earlier decision regarding the function of an exception
of no cause of action and addressed the standards for evaluating the exception:255

The function of an exception of no cause of action is to test the legal
sufficiency of the petition by determining whether the law affords a
remedy on the facts alleged in the pleading. No evidence may be
introduced to support or controvert the objection that the petition fails to
state a cause of action. Therefore, the court reviews the petition and
accepts well pleaded allegations of fact as true, and the issue at the trial of
the exception is whether, on the face of the petition, the plaintiff is legally
entitled to the relief sought.

251 Supra note 244 at 529.
253 Alomang v. Freeport-McMoran, 97-1349 (La.App.4 Cir, 1998); 718 So. 2d 971.
The Court further quoted circumstances, which must be proven to support a finding that one corporation is the alter ego of another: 1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities required for incorporation and for the transaction of corporate affairs; 3) under capitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder or director meetings. The Court held that plaintiffs’ petition does not allege that any of the above-enumerated conditions exist, and, therefore, their petition is woefully deficient. An allegation that one corporation is a subsidiary of another is not sufficient to “pierce the corporate veil” of the parent corporation thereby making it liable for the actions of the subsidiary, in the absence of a showing that the two corporations are not separate entities or that there is fraud or illegal action.

On the other hand, plaintiffs argue that should the Court of Appeal decide that the trial court did not err in granting defendants’ exception of no cause of action then we should find that the trial court erred in not allowing plaintiffs to amend their petition. However, as the trial court noted in its reasons for judgment, the Supreme Court has ruled that no discovery would be allowed prior to a ruling on the exception. By plaintiffs’ own admission, they cannot ascertain the facts necessary to prove an alter ego theory of liability or fraud without discovery. Further, plaintiffs were ordered by the trial court to amend their petition to “plead facts, as necessary under Louisiana law, to assert claims for personal injury with sufficient detail to place defendants on notice of the facts sought to be proven.” They have again failed to do so. Therefore, it would be futile to allow plaintiffs to amend their original petition a fourth time in an attempt to cure the defects. Accordingly, we affirm the trial court’s judgment granting defendant’s exception of no cause of action, dismissing plaintiffs’ claims.

Jota v. Texaco, Inc.

In 1993, a group of Ecuadorian citizens of the Oriente region filed a class action lawsuit in US federal court against Texaco (Aguinda v. Texaco)\(^ {259} \), and in 1994 a group of Peruvian citizens living downstream from the Oriente region also filed a class action.

\(^{256}\) Rock v. ATPIC Trucking Co., Inc., 98-1420, p. 9 (La.App. 1 Cir. 6/25/99), 739 So.2d 874, 880.

\(^{257}\) Tom Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) at 167.


\(^{259}\) Aguinda v. Texaco, S.D.N.Y. Dkt. No. 93 Civ. 7527.
lawsuit against Texaco in US federal court (*Jota v. Texaco*)\(^{260}\). Both complaints alleged that between 1964 and 1992 Texaco’s oil operations polluted the rainforests and rivers in Ecuador and Peru, resulting in environmental damage and damage to the health of those who live in the region.\(^{261}\)

In *Aguinda v. Texaco Inc.* the District Court in a preliminary decision seemed rather responsive to claims based on Principle 2 of the Rio Declaration: Judge Broderick contemplated that the ‘Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence.’ Pointing to domestic and international commitments the United States has made to control hazardous wastes the court further suggested that plaintiffs could possibly have a valid claim under the ATS so long as there ‘were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law.’ The case was delayed and Judge Broderick died before he could decide on the merits. His successor Judge Rakoff dismissed the case.\(^{262}\)

After a period of discovery, Texaco renewed its motion to dismiss. Counsel for the Republic of Ecuador again supported the motion and submitted an affidavit by the Ecuadoran ambassador. The court granted Texaco’s motion to dismiss as to the Aguinda plaintiffs. *Aguinda I v. Texaco, Inc.*\(^{263}\), for FNC and comity and failure to join indispensable parties (Petroecuador and the Republic of Ecuador). Plaintiffs filed a motion for reconsideration and the Republic of Ecuador filed a motion to intervene, this time in favour of plaintiffs due to a change in government which resulted in the Ecuadoran government’s statement that the case should be heard in the U.S. court. The District Court (Judge Rakoff) denied both motions. The plaintiffs appealed.\(^{264}\)

On October 5, 1998, the Second Circuit ruled that dismissal on the ground of FNC was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador. The Second Circuit ordered the District Court to make an evaluation of whether a dismissal on the grounds of FNC ‘would frustrate Congress’s intent to provide a federal forum for aliens suing domestic entities for violations of the law of nations’. On the


\(^{261}\) *Supra* note 11, at 159.

\(^{262}\) *Supra* note 244, at 530.


\(^{264}\) *Supra* note 231, at 236.
question of the failure to include indispensable parties, the Court ruled that it was necessary on remand for the District Court to reconsider this issue in light of the government of Ecuador’s changed litigation position. The case was remanded and oral argument was heard in February 1999.\textsuperscript{265}

\textit{Aguinda} was consolidated with another case and its dismissal reversed and remanded by the Second Circuit in \textit{Jota v. Texaco, Inc.} After Texaco had agreed to accept Ecuador’s jurisdiction the district court in \textit{Aguinda III} dismissed the case applying the \textit{FNC} doctrine, as the cases had everything to do with Ecuador and nothing to do with the United States. As to the specific claims plaintiffs sought to bring under the ATS that the Consortium’s oil extraction activities violated evolving environmental norms of customary international law, the court found them to lack any meaningful precedential support and appeared extremely unlikely to survive a motion to dismiss. The Second Circuit later affirmed the dismissal on grounds of \textit{FNC}.\textsuperscript{266}

In 2003, a class action lawsuit was brought against Texaco (acquired by Chevron in 2001) in Ecuador alleging severe environmental contamination of the land where Texaco conducted its oil operation activities. The plaintiffs alleged that this contamination has led to increased rates of cancer as well as other serious health problems for the residents of the region. Judicial inspections of the allegedly contaminated sites commenced in August 2004. In early 2008, an independent expert recommended to the court that Chevron should pay $7-16 billion in compensation for the pollution. This expert increased his estimate of damages to $27 billion in November 2008. In 2008, Chevron reportedly lobbied the US Government to end trade preferences with Ecuador over this lawsuit. Following allegations of judicial misconduct, the original trial judge rescued himself from the case and a new judge was appointed. Following a successful petition in US court to receive unused footage from the documentary “Crude”, Chevron filed a petition with the court in August 2010 seeking to dismiss the lawsuit based on the company’s assertion that certain parts of this footage show alleged fraud on the part of the plaintiffs. In September 2010, the plaintiffs submitted a new assessment of damages for the claims stating that the cost would be between $90 and $113 billion. In the same month, the judge concluded the evidentiary phase of the lawsuit. On 14 February 2011, the Ecuadorian judge issued a ruling against Chevron in the lawsuit. Chevron was ordered to pay $8.6 billion in

\textsuperscript{265} \textit{Ibid.}
\textsuperscript{266} \textit{Supra} note 244, at 530.
damages and clean up costs, with the damages increasing to $18 billion if Chevron does not issue a public apology. Chevron indicated that it believes the ruling is “illegitimate” and “unenforceable”, and it filed an appeal. On 3 January 2012 a panel of three judges from the Provincial Court of Justice of Sucumbios upheld the February 2011 ruling against Chevron. On 20 January 2012, Chevron appealed the decision with Ecuador’s National Court of Justice. In March 2012, Chevron asked the Provincial Court of Justice for the fourth time to block the Ecuadorian Government from enforcing the $18 billion judgment against it. On 28 March 2012, the court ruled that Chevron was not entitled to use an order from the international arbitration tribunal, which asked Ecuador’s Government to suspend the litigation, to block the plaintiffs from enforcing the judgment.267

Coca-Cola lawsuit (re Colombia)

The United Steelworkers Union and the International Labor Rights Fund sued the Coca-Cola Company and two of its Latin American bottlers – Bebidas y Alimentos and Panamerican Beverages, Inc. (Panamco) – in July 2001 in US federal court. The lawsuit was brought by the Colombian trade union Sinaltrainal and five individuals and survivors who allege that the companies hired, contracted with or otherwise directed paramilitary security forces that murdered and tortured the leaders of Sinaltrainal (which represents workers at the bottlers’ facilities). The defendant companies argued that the plaintiffs failed to demonstrate complicity between the companies and the paramilitary security forces. In 2003, the court dismissed the case against Coca-Cola, but it allowed the case to proceed against the two bottlers. The following year the plaintiffs filed an amended complaint seeking to include Coca-Cola in the lawsuit due to its part ownership of Panamco through a 2003 acquisition. In September of 2006, the court dismissed the claims against the two Coca-Cola bottlers and rejected the plaintiffs’ attempt to bring Coca-Cola back into the lawsuit. The court held that the plaintiffs’ claims did not suffice to allege war crimes under international law, because the plaintiffs did not claim that the abuses occurred in the course of hostilities. It also held that plaintiffs’ claims did not suffice to allege violations of other international human rights because the plaintiffs did not claim a sufficiently close relationship between the Colombian Government and the


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companies’ alleged involvement in the abuses. In August 2009, the US Court of Appeals for the Eleventh Circuit affirmed the lower court’s dismissal of the lawsuit.\(^{268}\)

**Gurab v. Federal Laboratories, Inc., & Trans Technology Corp.**

In 1992 Center for Constitutional Rights (CCR) filed a claim in Pennsylvania state court on behalf of two of the plaintiffs in a related case in the Western District of Pennsylvania, *Abu-Zeineh et al. v. Federal Laboratories, Inc. and Trans Technology Corp.*\(^{269}\)

The suit was brought by families of Palestinians who were killed by exposure to CS gas, a lethal ‘riot control’ weapon manufactured and distributed by Federal Laboratories, Inc. and Trans Technology Corp. it alleged that the companies sold CS gas to the Israeli armed forces despite their knowledge that Israel’s use of CS gas had resulted in many civilian deaths.\(^{270}\)

The plaintiffs asserted that even though this gas was designed to be sprayed outdoors, Israeli forces fired it directly at people or in enclosed or confined residential spaces without giving any warning or allowing people any means of escape, thereby exposing peaceful civilians not involved in ‘rioting’ or other unlawful activity to the gas. International human rights group, including the UN Relief and Works Agency and Amnesty International, reported that at least 80 Palestinians have died since December 1987 as a result of exposure to CS gas.\(^{271}\)

While the federal claim was still active, CCR did not pursue the state action, but upon dismissal of the federal claim on jurisdictional grounds in December 1994, CCR reactivated this suit. Federal Labs and Trans Technology moved to dismiss the case, filing an almost identical motion to that filed in federal court (which the federal court denied). CCR opposed this motion. In fall 1996, the court rejected the defendants’ new attempts to end the case and ruled that plaintiffs would be permitted to go to trial. A second motion to dismiss was filed and rejected in 1998. The case was set for trial in 1999; however, a settlement has been reached, subject to court approval.\(^{272}\)

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\(^{271}\) Ibid.

\(^{272}\) Supra note 231 at 237-8.
Wiwa v. Royal Dutch Petroleum

Ogoni is a densely populated area in southern Nigeria with vast Oil resources. Shell began oil production in the Ogoni region in 1958. Shell appropriated land though coercion and misrepresentation without adequate compensation to the owners. Nigerian oil provided a considerable amount of Shell’s yearly revenue. Shell still pumps about 500,000 barrels a day from the eastern delta region and from several large offshore platforms.\(^{273}\)

The company has previously outlined plans to resume operations in the delta, but there is no guarantee that it will succeed this time. Shell’s profit in 2006 was US $ 22.4 billion, the third largest ever corporate profit in the world.\(^{274}\) Oil revenue provide 80% of Nigeria’s federal government budget. Shell’s oil exploration has contaminated the local water supply and agricultural land in Ogoni. The major part of the natural gas produced during the exploration has been flared, which causes persistent air and noise pollution.\(^{275}\)

Since 1990 the Ogoni people have engaged in peaceful protests against Shell’s operations. By 1993, more than half of the population of Ogoni supported the Movement for the Survival of Ogoni People (MOSOP), a Nigerian human rights organization designed to protect the rights of the Ogonis. In 1994, the Nigerian government instigated violent raids in at least 60 towns and villages in Ogoni to punish entire communities for their support of MOSOP. During these raids, several hundred Ogoni people were tortured, flogged, raped, detained and at least 50 were killed.\(^{276}\) Other sources speak of 2000 deaths.\(^{277}\) Shell and the Nigerian military allegedly worked together in suppressing the Ogoni people. Shell paid Nigerian military forces, supplied logistical support and provided surveillance and monitoring information.\(^{278}\) They transported troops via helicopter, boat and other means. According to sources from the New York Times, Shell frequently called for assistance from security forces, which led to numerous deaths. The security forces were locally known as the kill-and-go-mobs.\(^{279}\)

\(^{276}\) Id., No. 27 at 4.
\(^{278}\) Also see: A Rowell, “Sleeping With the Enemy”, Village Voice, World 23 (January 23, 1996).
\(^{279}\) Supra note 275, No. 20 at 5.
Ken Saro-Wiwa and John Kpuinen were the leaders of MOSOP. They were detained because of their non-violent opposition to the activities of Shell and the Nigerian government with fabricated murder charges. In November 1995, they were sentenced to hang by a special tribunal, the Civil Disturbances Special Tribunal, thereby violating numerous norms of customary international law. The death penalty was given retroactive effect, the judgement was not subject to review by a higher court and it violated other procedural guarantees of due process of law, including the right to counsel and the right to know the charges against one. Several others were also detained and charged in front of the Civil Disturbance Special Tribunal and one died in detention.280

Shell and the government worked closely together during the trial of Saro-Wiwa and Kpuinen. They allegedly held regularly meetings – for example, one was held on March 16, 1995 in London. On March 18, 1995 the Civil Disturbances Special Tribunal assumed jurisdiction. Shell allegedly promised bribes to at least two key witnesses to give false testimony against Saro-Wiwa. There was a huge public outcry during the trial of Saro-Wiwa and Kpuinen, but Shell and its chairmen refused to intervene, even though they know that an intervention could have prevented the death penalty, because of the strong interdependence of Shell and the Nigerian government.281

Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, and Wiwa v. Shell Petroleum Development Company are three lawsuits brought against the defendants. Defendants in this case are the Royal Dutch Petroleum Company of the Netherlands and the Shell Transport and Trading Company plc of the United Kingdom, who jointly operate a vast international integrated network of affiliated but formally independent oil and gas companies (this network will be referred to as ‘Shell’). Among these affiliated companies is Shell Petroleum Development Company of Nigeria Ltd, a wholly owned Nigerian subsidiary of the defendants. The plaintiffs, through their surviving next of kin, alleged that they were imprisoned, tortured and executed by the Nigerian government for their government for their peaceful opposition to the defendants’ oil exploration activities. The action commenced in November 1996.282

The plaintiffs based their claims on ATCA and RICO (the Racketeer Influenced and Corrupt Organizations Act). The defendants moved to dismiss on the grounds of lack of

280 Supra note 275, No. 20g at 4.
281 Supra note 11, at 142.
282 Id., at 143.
personal jurisdiction over Shell, FNC, and lack of subject matter jurisdiction. They argued that ATCA did not apply to a corporation and that the claim was precluded by the political question doctrine and the Act of State doctrine. In September 1998 the District Court for the Southern District of New York decided that the case should be dismissed on the grounds of FNC, ruling that England was a more convenient forum. Furthermore, the Court held it lacked personal jurisdiction, because the defendant lacked 'minimum contacts' with New York.283

In September 2000 the Court of Appeals for the Second Circuit overruled this decision and decided that the United States was a proper forum.284 The US had an interest in seeing that claims for violations of international law were litigated in a US forum. It said that greater weight should be given to the choice of forum by the plaintiffs, since some of the plaintiffs were US nationals. It stated that the defendant has sufficient contact with New York on account of its maintenance of an investor relations office. In February 2002 the District Court denied the motions to dismiss on virtually all of the plaintiff’s claims. Judge Wood found that the plaintiff’s allegations constituted participation in crimes against humanity, torture, summary execution, arbitrary detention, cruel, inhuman and degrading treatment and violations of international law,285 which made them entitled to bring their actions under the ATCA, TVPA and RICO. The Court also found that plaintiffs had adequately set forth their case that Royal Dutch knew what its Nigerian subsidiary was doing.286

In September 2003, the cases against Royal Dutch/Shell and Brian Anderson were amended to include additional plaintiffs. In April 2004, an additional case was brought against Shell Petroleum Development Company. On August 15, 2005, Magistrate Judge Pitman rejected defendant’s motion to dismiss a related case, *Kiobel v. Royal Dutch Petroleum*. In response, Royal Dutch/Shell filed a brief challenging the validity of the claims in Wiwa and claimed that the Supreme Court ruling in *Sosa v. Alvarez-Machain* excluded the human rights claims in Wiwa.287

287 Ibid.
On January 3, 2006, Judge Wood ruled that she would accept further briefing from any of the parties on the impact of Sosa so that the matter would be completely briefed. On January 20, 2006, the plaintiffs and defendants filed briefs on the impact of Sosa. In September 2006, Judge Wood dismissed plaintiffs’ summary execution, forced exile and right to life, liberty and personal assembly claims, but allowed plaintiffs’ claims for aiding and abetting liability in general, as well as the claims for crimes against humanity, torture and prolonged arbitrary detention. The court certified all issues for appeal to the Second Circuit Court of Appeals, and both plaintiffs and defendants petitioned to the Second Circuit for appeal.288

On March 4, 2008, Judge Wood denied plaintiffs additional jurisdictional discovery in Wiwa v. SPDC thereby dismissing the case. On April 15, 2008 CCR filed an appeal with the Second Circuit in Wiwa v. SPDC. On October 7, 2008, a hearing was held regarding discovery in Wiwa v RPDC and Wiwa v. Anderson. On March 16, 2009, CCR and ERI filed a Fifth Amended Complaint in Wiwa v Royal Dutch Petroleum Co. and a Third Amended Complaint in Wiwa v. Anderson. On June 8, 2009, on the eve of trial, the parties in Wiwa v. Shell agreed to a settlement for all three of the lawsuits.289

Kiobel v. Royal Dutch Petroleum Co.

This is the second case filed against Shell/Royal Dutch Co. by the wife of another victims of atrocities and execution. In 1994, Dr. Barinem Kiobel and other members of MOSOP were detained illegally based on spurious charges, held incommunicado in military custody, tortured, then tried by a special court established by the military government using procedures in violation of international fair trial standards. MOSOP campaigned against the environmental damage caused by oil extraction in the Ogoni region of Nigeria and for increased autonomy for the Ogoni ethnic group. Plaintiffs allege that Defendants participated in bribing witnesses to give false testimony before the Special Tribunal. Human Rights groups and political leaders around the world condemned the lack of due process that was accorded to the victims in connection with the so-called trial. In November 1995, Dr. Barinem Kiobel and the rest of the Ogoni were convicted of murder.

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288 Ibid.
289 Ibid.
and executed ten days later. The Ogoni also included Ken Saro-Wiwa, leader of MOSOP and an internationally renowned writer and activist.290

In September 2002, Royal Dutch/Shell was sued in US federal court by Esther Kiobel, the wife of Dr. Barinem Kiobel. The suit alleges that Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), provided transport to Nigerian troops, allowed company property to be used as staging areas for attacks against the Ogoni and provided food to the soldiers and paid them. The plaintiffs claimed the defendant companies were complicit in the commission of torture, extrajudicial killing and other violations pursuant to the ATCA.291

In March 2008, the district court granted the defendants’ motion to dismiss for lack of personal jurisdiction. On 16 November 2009, the plaintiffs’ motion for reconsideration was granted asking the court to re-examine the issue of jurisdiction. The court said in the motion that a direct business relationship between the USA and SPDC must be established in order for ATCA to apply. On 21 June 2010, the district court ruled that the plaintiffs had not shown that this direct business relationship had existed, and the judge dismissed the suit against SPDC. The plaintiffs appealed this ruling, and on 17 September 2010 the court of appeals issued a sweeping opinion addressing ATCA lawsuits involving corporate defendants. The majority opinion affirmed lower court’s dismissal of the lawsuit, and it also stated that ATCA could not be used to sue corporations for violations of international law. A separate opinion was written by the third judge from the appeals court panel, who concurred with the majority in judgment only. This judge vigorously disagreed with the majority’s reasoning; he wrote that the majority’s opinion dealt a “substantial blow to international law and its undertaking to protect fundamental human rights.” On 14 October 2010, the plaintiffs filed a petition for rehearing and rehearing en banc with the court. The court of appeals, on 4 February 2011, refused to rehear the case. The plaintiffs petitioned the Supreme Court in June 2011 asking it to hear an appeal of the lower court’s ruling. On 17 October 2011 the Supreme Court announced that it would hear the plaintiffs' appeal in this case. Oral arguments were held on 28 February 2012.292

291 Ibid.
On 5 March 2012 the Supreme Court announced that the ATCA does not apply to human rights offences committed in other nations. In a surprise procedural order on March 5, the court ordered the parties to brief the second issue, and reargue the case in October term. It has asked the parties to submit supplemental briefs and will rehear the case in the next term. The Court asked the parties to submit briefs on whether the ATCA allows federal courts to hear lawsuits alleging violations of international law which occur outside the United State.293

The second round of arguments was heard on October 1, 2012. The second round of arguments took new position to even further extremes at oral argument, arguing that the ATS never governs conduct outside of the United States – not even with respect to piracy on the high seas.294 On April 17, 2013, the Supreme Court dismissed the case against Shell, holding that the company could not be liable in U.S. courts under the ATS for acts committed overseas. The decision was devastating for Esther Kiobel and the other plaintiffs who have fought so long for justice.295

Larry Bowoto et al. v. Chevron Texaco Corp. et al.

Chevron was the first oil corporation that came to Nigeria in 1956, it found oil in 1963. It has explored oil in vast amounts from the Niger Delta for many decades. Because of their exploitive policies, environmental pollution and brutal military interventions they faced increasing resistance, beginning in the late 1990s. In 1998 the Ijaw Youth Council (IYC) stated in a ten point declaration, the Kaiama declaration, that, among other things, all natural resources in the Ijaw land belong to the Ijaw people and is the basis of their survival. They argued further that they would cease to recognize all undemocratic decrees, which rob them of the right to ownership and control of their resources and demanded the withdrawal of military forces of occupation from Ijaw land. The Kaiama declaration also demanded that all oil companies cease their operations in Ijaw land. Initially, the IYC protested peacefully for their cause.296

295 Id., at 20
The subsequent military development after the Kaiama declaration and peaceful demonstrations was massive. Tanks, armoured personnel carriers, artillery pieces, amphibious and fast attack crafts, warships and hundreds of combat ready soldiers were deployed. Many military checkpoints were installed. The creeks were patrolled by naval ships. Soldiers were posted to oil installations. The police stations were closed down. On January 4, 1999, in the Ikenyan incidents, a helicopter flown by Chevron pilots and transporting Nigerian military opened fire on artless Nigerian villagers. Chevron acknowledged that it paid the soldiers, but considered it a regulatory payment for the guarding of its facilities. Since the incidents the situation in the Niger Delta region has increasingly deteriorated and militarized. A human rights commission, installed by the Nigerian government, gives some insights on the responsibilities of the Nigerian military and the private corporations.297

The plaintiffs, five Nigerian, filed an action in May 27, 1999 alleging that Chevron violated human rights, including the rights to life and freedom of movement under the Alien Tort Statute (‘ATS’) or ATCA, Nigerian law, and California law. The District Court for the Northern District of California held that (1) defendants could not be held directly liable for the alleged abuses; (2) genuine issues of material fact existed as to the extent to which defendants were integrally involved in the actions and structure of the company; and (3) defendants were not alter egos of the company.298 In August 2007 the District Court granted Chevron’s motion for summary judgement. On March 21, 2008, the Court heard argument on defendants’ motion for summary judgment on plaintiffs’ remaining federal law claims under the ATCA. The Court granted in Part and Denied in part the defendants’ motion.299 Finally, in November 2008, the jury rendered a verdict in favor of Chevron on all admitted claims. In June 2010, the Plaintiffs filed an appeal before the Court of Appeal, Ninth Circuit.300

This appeal raises challenges principally to the jury instructions and the district court’s evidentiary rulings. The Court of Appeal found no abuse of discretion in the district court’s decisions admitting the pieces of challenged evidence. The Court further

297 Id., at 145.
held that there are only two legal issues in this appeal, both relating to statutes Congress adopted to incorporate principles of international law. The first issue is whether the Federal Death on the High Seas Act (‘DOHSA’) pre-empts wrongful death and survival claims brought under the ATS. The other legal issue is whether corporations can be found liable under the Torture Victim Protection Act (TVPA). The Court affirm the dismissal of the ATS wrongful death and survival claims and agree with the district court that Congress did not intend the TVPA to apply to corporations. Finally the Court of Appeal affirmed the district court’s judgment.301 On April 23, 2012 the US Supreme Court has denied another petition for a writ of certiorari.302

**Ibrahim v. Titan**

This was the first ATCA decision in US law that dealt with the US led invasion into Iraq in 2003. It was a case concerning torture by private contractors in Abu Ghraib and was decided by the District Court for the District of Columbia. Also it was the first decision to deny human rights responsibilities to corporations. It held that “alleged acts of torture inflicted upon Iraqi national detainees by private government contractors that provided interpreters and interrogators to US military in Iraq were not actionable under the ATCA as violations of the law of nations, although numerous treaties and other sources of international law condemned torture; the law of nations did not apply to the contractors, as they were private, rather than official, actors.”303

The Titan Court relied on the Sanchez-Espinoza v. Reagon decision and the Judge Edwards opinion in Tel-Oren, stating that the law of nations does not reach private, non-state conduct like execution, murder, abduction, torture, rape.304 However, in Sanchez-Espinoza Case has been misread by the Titan Court. The Edwards Opinion found that ATCA covers individual responsibility under color of law, but did not completely deny individual responsibility.305

Furthermore, the Edwards Opinion also stated that international law is developing towards allocating duties to private actors absent color of law authority; he only refrained

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305 Supra note 11, at 199.
from imposing such duties on individuals without guidance by the US Supreme Court. Exactly the same imposition of such international duties was found in the Kadic decision for individuals and affirmed by the Ford decision for corporate actors. These US decisions have not been mentioned or were incorrectly represented. The Titan Court completely refrained from citing sources of international law. Therefore, it is fair to say that the Titan decision lacks any analysis of either US law or international law on the subject of human rights responsibilities of TNCs. The Titan decision stands in stark contrast to the scope of liability established by the preceding ATCA litigation.306

**Doe v. Exxon**

In the decision *Doe v. Exxon*307 in October 2005 and for a second time following the Titan decision a US court in ATCA litigation found against human rights responsibilities of TNCs. Again this was decided by the District Court for the District of Columbia. It interpreted the Supreme Court’s decision in *Sosa* to mean that a decision has to involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts. Therefore, the Exxon Court held that cause available to litigants in the federal courts. Therefore, the Exxon Court held that it would be ‘highly unfair’ to impose liability on corporate actors that do business in countries with problematic human rights records.308

It is correct that a corporation cannot be held liable for human rights violations carried out by the state in which it is doing business. However, where a corporation directed, controlled, conspired or aided and abetted gross human rights violations, such as genocide or torture, it seems fair to make the corporation liable for these violations. It is necessary to differentiate and look closely at the case. This liability standard for aiding and abetting in gross violations of human rights is also imposed on individuals by international law (as in the ICC and the complementary national jurisdiction), as well as in US law. This liability standard was also established by the preceding US judgements in *Kadic, Wiwa, Talisman* and others.309

306 Supra note 11, at 199.
308 Supra note 11, at 199.
309 Id., at 199-200.

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Moreover, the Court in Exxon stated that the Sosa decision suggested that only states, and not individuals or corporations could be held liable. This is wrong. The Supreme Court briefly and neutrally describes the current scope of liability of individuals and corporations. It mentioned the Kadic decision, where there was sufficient consensus to hold non-state actors liable for grave breaches of international law. Many decisions have read the Kadic decision to include the liability of TNCs and not only private individuals. The Exxon decision therefore does not produce any significant argument to deny human rights responsibilities of TNCs. This also clearly needs to be differentiated from imposing duties, such as human rights obligations, on TNCs.  

**ExxonMobil Lawsuit (re Aceh)**

In 2001, eleven Indonesian villagers filed suit against ExxonMobil in US federal court alleging that the company was complicit in human rights abuses committed by Indonesian security forces in the province of Aceh. The plaintiffs maintain that ExxonMobil hired the security forces, who were members of the Indonesian military, to protect the natural gas extraction facility and pipeline which ExxonMobil was operating. The plaintiffs further claim that ExxonMobil knew or should have known about the Indonesian military’s human rights violations against the people of Aceh. The plaintiffs allege that they suffered human rights violations, such as murder, torture and rape, at the hands of these security forces.

On October 14, 2005, a US federal judge ruled that the plaintiffs’ case may proceed on District of Columbia (DC) state law claims (which include wrongful death, theft by coercion and assault and battery), but he dismissed the plaintiffs’ federal claims under the Alien Tort Claims Act and the Torture Victim Protection Act. On March 2, 2006, a US federal judge denied a motion to dismiss filed by ExxonMobil, and ordered the parties to proceed toward discovery in this case. In January of 2007, the US Court of Appeals for the DC Circuit denied ExxonMobil’s appeal of the lower court’s denial of its motion to dismiss.

Additionally, the court of appeals denied ExxonMobil’s petition for a writ of mandamus to compel the lower court to dismiss the claims against the company. In July of

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310 *Supra* note 11, at 200.

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2007, ExxonMobil appealed to the US Supreme Court (petitioned for a writ of certiorari). On 13 November 2007, the US Supreme Court invited the US Solicitor General to file a brief expressing the views of the executive branch on this petition. On 16 June 2008, the US Supreme Court declined to hear this case. On 27 August 2008, the US District Court for the District of Columbia ruled on a motion for summary judgment filed by ExxonMobil; the judge declined to grant the defendants’ motion. The judge found that the plaintiffs had presented sufficient preliminary evidence to support their allegations of abuse and therefore the case should be submitted to a jury for trial. On 30 September 2009, the US District Court ruled on another motion to dismiss from the defendants. The judge granted ExxonMobil’s motion to dismiss the case finding that the plaintiffs did not have standing to bring the case in a US court. On 8 July 2011, the Court of Appeals reversed the district court’s dismissal of the case, finding that a corporation should not be immune from liability under the Alien Tort Claims Act. The court remanded the lawsuit to the lower court. ExxonMobil filed a motion with the Court of Appeals on 8 August 2011 asking the court to rehear the case en banc. 313

*Presbyterian Church of Sudan, et al., v. Talisman Energy, Inc.*

In 2001, the Presbyterian Church of Sudan, as well as a number of Sudanese individuals, filed suit in US federal court against Talisman Energy. They alleged the company’s complicity in the Sudanese Government’s human rights abuses against non-Muslim Sudanese living in the area of Talisman’s oil concession in southern Sudan and that these abuses amounted to genocide. The plaintiffs allege that the Sudanese Government was engaged in an armed campaign of ethnic cleansing against the non-Muslim Sudanese which included massive civilian displacement, extrajudicial killing of civilians, torture, rape and the burning of villages, churches and crops. The court granted Talisman’s motion to dismiss on 12 September 2006 finding that the plaintiffs had failed to supply sufficient admissible evidence to permit the lawsuit to go to trial on the plaintiffs’ claims. In February, 2007 plaintiffs appealed against the dismissal to the US Court of Appeals for the Second Circuit. On 2 October 2009, the Court of Appeals ruled on this case, and it affirmed the lower court’s dismissal of the lawsuit. The Court of Appeals also found that to determine liability under the ATCA the plaintiffs must show that the defendant “purposefully” aided and abetted a violation of international law. On 15 April 2010, the plaintiffs filed a petition for certiorari with the Supreme Court asking the

court to hear an appeal of the lower court’s dismissal of the case. On 20 May 2010, EarthRights International filed an amicus brief with the Supreme Court urging it to hear the appeal and overturn the dismissal of the case. In October 2010 the Supreme Court announced that it would not hear the appeal in this case.314

*Kasky v. Nike*

This suit charges Nike Inc., with violating California Business and Professions Code 17200. The suit alleges that workers who make Nike products in China, Indonesia and Vietnam are not paid living wages and must work long hours in dangerous working conditions for little pay, and the company violated 17200 because Nike mislead the public about the working conditions of labourers, claiming that its contracts with suppliers forbid slave labour, corporal punishment and other abusive practices.315

Defence counsel moved to dismiss the case based on a First Amendment defence, saying that Nike can’t be sued for speech made in ‘self-defense’ after its labour practices were subject to public criticism. On February 8, 1999, Judge David Garcia dismissed the case without written opinion. While, in Appeal, the Supreme Court did not issue a substantive ruling on Nike’s constitutional claims, it rejected Nike’s pre-emptive appeal and remanded the case of a trial court on the merits of Kasky’s complaint - that Nike lied to the public about its ‘sweatshop’ practices in the course of a major PR campaign. However, before the decision of the court, on September 12, 2003, Marc Kasky and Nike Inc. announced a settlement stipulating that Nike will pay $1.5 million (about half of one day’s advertising budget) to the Washington, D.C. – based Fair Labor Association for “program operations and worker development programs focused on education and economic opportunity.”316

### 6.4 A Critique to the Judicial Response

TNCs are subject to dual legal system, one is the home country and another is the host country. The claimant can seek action against the TNCs in both jurisdictions. The important cases mentioned in the preceding part of the chapter discuss the judicial approach of home countries towards the protection of the human rights. Under the ATCA

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the first case of Filgarta v Pena-Irala\(^{317}\) was a crucial development which laid down two principles that the ATCA should be based not on understanding of the law in 1789, but on contemporary principles. The second Circuit clarified that international law is an evolving body of law recognized by the international community. However, in Tel-Oren\(^{318}\) case the statist approach was applied inquiring into the intent of framers of the ATCA to determine the original scope of the statute.

Again in Kardic v. Karadzic\(^{319}\) in 1995 expanded Filartiga and extended ATCA liability to private actors. The court interpreted the law of nations, in a modern context, to encompass “certain forms of conduct [that] violate the law of nations whether undertaken by those acting under the auspices of states or only as private individuals.” The court also found aiding and abetting liability to be sufficiently “well-established [and] universally recognized” under international law to fall within the scope of ATCA liability.\(^{320}\)

In 2004, the Supreme Court considered the ATCA for the first time in Sosa v. Alvarez and found the ATCA to provide subject matter jurisdiction and announced a standard for determining what causes of action may fall within the “law of nations” statutory text. First, the claim must meet a threshold level of acceptance in the international community. Second, the claim must have specificity comparable to the original set of violations. Under this reasoning, “the ATCA will recognize a cause of action beyond the list of violations of safe conducts, piracy, and ambassador law, so long as it is accepted by the international community and defined with the same degree of specificity that those violations had been.”\(^{321}\)

Finally, in Doe v. Unocal Corp.\(^{322}\) for the first time the court confirmed that plaintiff may bring a case alleging violation of international human rights law against Private Corporation even if the element of state action is absent.\(^{323}\) Unfortunately, in Kiobel v. Royal Dutch Petroleum, the US Supreme Court dismissed the case against Shell and holding that the company could not be liable in US Courts under for the ATS for acts

\(^{317}\) Dolly M.E. Filartiga and Joel Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
\(^{318}\) Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
\(^{319}\) Kadic v. Karadzic, 70 F3d 232 at 242 (2d Cir. 1995).
\(^{321}\) Ibid.
committed overseas. In this case, the majority decision ruled that customary international law only confers jurisdiction over natural persons, therefore ATCA cannot be used as a basis to sue corporations. In terms of the future of ATS cases, however, the Court’s decision raised more questions than it answered. Although all nine justices believed the case should be dismissed, they had different reasons. There were a number of separate and fractured concurring opinions that leave open the possibility that victims of human rights abuses may still hold companies and individuals accountable in cases with a stronger connection to the United States than *Kiobel* had.

The above examples demonstrate that bringing a case against TNCs under the ATCA has never been a simple process for plaintiffs. Judges have taken different views regarding the applicability of ATCA to hold TNCs liable for violating human rights, and there has been no consistency on this particular issue. Rather than discussing all possible substantive and procedural obstacles.

It has been further found by that the scope and jurisdiction of courts under ATCA too narrow; it only covers violations of civil and political rights and of international humanitarian law. Whereas, majority of corporate human rights abuses concern environmental, labour, and health issues, which fall under economic, social, and cultural rights. US courts have been reluctant to recognize environmental abuses as violations of the law of nations in *Beanal v. Freeport-McMoran, Inc.; Sarei v. Rio Tinto, PLC*. The courts seem to divide ATCA cases into two categories: whether they involve a ‘marginal’ or ‘core’ violation of human rights. Despite the decision of the US Supreme Court in *Sosa v. Alvarez-Machain*, which for the first time, set the standard on what type of claims are actionable under ATCA in the future, no uniformity exists among courts in applying these categories.

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325 Supra note 20.
326 Ibid.
329 Supra note 324.
Another dilemma under the ATCA, some human rights violations by private actors require governmental action. This requirement is considered as another essential burden for victims when they seek redress under US jurisdiction. Because international human rights rules are binding only to governments—not to private actors—courts must first examine whether a private defendant was acting under the 'color of law'.

Courts have been used four separate tests to examine the existence of governmental action or aid. These tests are public function, nexus, symbiotic relationship, or joint action. In a recent case, the court also employed the ‘proximate’ test.

Another significant barrier in human rights litigation under the ATCA mechanism is when the defendant raises a motion that another forum is more appropriate and convenient for settling the case. Based on the forum non conveniens (FNC) doctrine, a court may dismiss a case after examining whether a defendant’s motion to dismiss satisfies two conditions. First, an adequate alternate forum, where the case could be brought, must exist. An independent and functioning judicial system would sufficiently constitute an adequate forum. However, the mere availability of judiciary mechanism at the alternate forum is insufficient to grant a dismissal; the court will consider whether that forum is able to adjudicate the subject matter of the case. Second, public and private interests must seriously be considered.

The court will first examine US foreign policy interest in relation with the case. Similarly, it will also consider the convenience of the parties in dispute, including the availability of witnesses and evidence. However, the US courts have been applying various standards in granting or declining motion to dismiss on the ground of the FNC doctrine. The Government of India v Union Carbide Corp. was dismissed on this ground only that Indian Courts has capacity to deal with this complex litigation.

335 Supra note 323.
336 Supra note 334.
337 Supra note 323.
Another limitation which emerges for the claiming a claim under ATCA is the political question doctrine which restricts the justifiability of questions which are political in nature, and therefore deemed more properly dealt with by the executive and legislative branches of government. The criteria for applying the doctrine remain vague, and it appears to arise whenever a case raises matters that are simply “too political.....to handle”. The question mainly arises in cases where government foreign policy is there. *Iwanowa v. Ford Motor Company* is an example of the same.

While deciding the case against transnational corporation in UK the foreign plaintiffs may face at least two potential hurdles. First, courts will consider a plaintiff’s cause of action as legitimate only if the alleged conduct is able to be pursued under the law of tort as applicable in the foreign state where the damage arose. A provision in the Private International Law (Miscellaneous Provisions) Act clearly states that in a case where the injury or damage is sustained in a foreign jurisdiction, the law of that country must be applied in adjudicating the case. Second, plaintiffs’ efforts to seek justice in UK courts may potentially be prevented by the statutes of limitation. The Limitation Act 1980 provides for a three-year limitation period for claims on personal injury or death. In Connolly v. RTZ, for instance, the judge found that the plaintiff’s claim was clearly time-barred, primarily because the proceeding were issued and served outside the limitation period, as stated under both English limitation statutes and Namibian law.

The cases discussed above in this chapter highlights two main issues one is the procedural obstacles faced by foreign claimant in establishing jurisdiction and then claiming the compensation for violation of human rights so most of claims are unsuccessful. Secondly where there is a little hope for successful claims the parties went for settlement before the compensation is awarded.

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341 *Supra* note 330.
342 *Supra* note 323.