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PEOPLE BEFORE PROFITS: PURSUING CORPORATE ACCOUNTABILITY FOR LABOR RIGHTS VIOLATIONS ABROAD THROUGH THE ALIEN TORT CLAIMS ACT

DOUGLAS S. MORRIN*


In their book, Corporate Predators: The Hunt For Mega-Profits and The Attack on Democracy, Russell Mokhiber and Robert Weissman expose the pervasiveness of rights violations committed by corporations both domestically and abroad. However, while the authors alert their readers to and educate them about the dangers of globalization, they fail to provide many clear solutions. Fortunately, evidence suggests that the United States judicial system is already being used to pursue corporate accountability in the global marketplace. The Alien Tort Claims Act (ATCA), adopted by the first Congress in the Judiciary Act of 1789, provides foreigners who suffer human rights injuries outside the United States a federal forum through which to pursue their claim. Recently, decisions have extended the ATCA's jurisdiction into the realm of labor rights as well. Through an analysis of the ATCA's case law, the current lawsuit filed against eighteen United States clothing designers and manufacturers for labor violations in Saipan factories can be better examined. In turn, this analysis will show how the ATCA, while not yet a panacea for the ills of the global economy, has become an increasingly powerful tool in promoting corporate accountability abroad.

Transnational corporations (TNCs) wield extraordinary power and influence in today's global economy.\(^1\) In fact, approximately half of the top 100 economies in the world now belong to corporations, not countries.\(^2\) The ability to export substantial capital has provided these corporations with major leverage against local, state, and federal officials, both domestically and abroad.\(^3\) Many national and state politicians, unwilling to risk further factory relocation overseas, offer sub-

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3 See generally MOKHIBER & WEISSMAN, supra note 1.
stantial tax incentives to TNCs to remain in the United States. Similarly, many of these same politicians are also fearful of inhibiting corporate profitability and, in turn, hurting the national economy through greater regulation of TNCs abroad. Thus, political attempts for corporate accountability have largely failed due to the dominant bargaining position of TNCs.

As a result of increased economic globalization, transnational corporations are largely able to avoid accountability abroad as well. Developing governments have persuaded TNCs to relocate factories into their countries by offering lower environmental and labor standards. Transnational corporations have enjoyed greater profitability through the decreased production costs that exist in such countries. However, this private profitability has come at great societal cost. Transnational corporations often possess tremendous economic values that rival those of the developing countries in which they establish their factories. In turn, these governments are willing to ignore violations of human rights, labor rights, and environmental rights as a means of attracting needed jobs and improving economic conditions in their developing countries. For example, though reports of sweat-

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5 See Sarah Anderson et al., Ten Myths About Globalization, Nation, Dec. 6, 1999, at 26-27; see generally David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 YALE J. INT'LS. L. 129 (1999). An example of the U.S. government's reluctance to inhibit corporate freedom is its recent ratification of the International Covenant on Civil and Political Rights (ICCPR). See id. at 166-68. While the United States government ratified the ICCPR, which prohibited slavery, indentured servitude, and forced labor, it declared that the covenant's terms were not "self-executing." See id. at 166; Sarah H. Cleveland, Global Labor Rights and the Alien Tort Claims Act, 76 TEX. L. REV. 1533, 1573 n.200 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996)). In so doing, the United States has exempted itself and is not bound by the terms of the treaty. See Sloss, supra, at 166-68.
6 See Mokhiber & Weissman, supra note 1, at 68-70.
7 See id. at 69.
9 See Mokhiber & Weissman, supra note 1, at 68-70.
Shop conditions in garment factories are commonplace, the number of prosecutions of such abuses by developing governments is negligible. In fact, developing governments themselves frequently have been accused of committing violations for the benefit of TNCs.

Transnational corporations have denied responsibility for such abuses, claiming they are simply providing needed jobs to developing regions. Many TNCs, especially ones that rely on consumer name recognition, have established "codes of conduct" for their foreign factories in response to growing media reports of systematic rights violations. However, while these codes of conduct may seem impressive, they have been largely ineffective at realizing the goals they purport to pursue. When one considers the U.S. government's reluctance to regulate TNCs coupled with developing nations' perpetuation of rights violations, it is apparent that transnational corporations have enjoyed their increased profitability at the expense of workers and have done so with relative impunity.

In their book, Corporate Predators: The Hunt For Mega-Profits and The Attack on Democracy, Russell Mokhiber and Robert Weissman expose the pervasiveness of rights violations committed by corporations both domestically and abroad. Alternating between depictions of corporate support of rights violations abroad and government appeasement of TNCs, Mokhiber and Weissman show how democracy

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10 See Global Survival Network, Trapped: Human Trafficking for Forced Labor in the Commonwealth of the Northern Mariana Islands (a U.S. Territory) (visited May 15, 2000) <http://www.globalsurvival.net/projects/cnmi/9905cnmi.html> [hereinafter Trapped Report]. Many garment factories in Saipan block walkways and emergency exits to restrict the movement of workers, in complete disregard of federal safety codes. See id. Similarly, in NIKE's Vietnam factories, workers are reportedly required to work overtime, each in excess of 500 hours per year. See Lena Ayoub, Nike Just Does It—and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad, 11 DePaul Bus. L.J. 395, 409 (1999). This requirement is in direct violation of Vietnamese labor law, which sets maximum overtime at 200 hours per year. See id. In both cases, these violations have been consistently ignored by the foreign governments. See id.


12 See Anderson et al., supra note 5, at 26-27.
13 See Mokhiber & Weissman, supra note 1, at 171-72.
14 See id. at 84; Ayoub, supra note 10, at 411.
15 See generally Mokhiber & Weissman, supra note 1.
has been threatened by greater corporate profitability.\textsuperscript{16} Through their reports, the authors attempt to compel citizen activism against corporate misconduct.\textsuperscript{17}

However, while Mokhiber and Weissman alert their readers to and educate them about the dangers of globalization, they fail to provide many clear solutions.\textsuperscript{18} Readers are left to question how "this march toward Corporate Feudalism can be legally stopped."\textsuperscript{19} Fortunately, evidence suggests that the United States judicial system is already being used to pursue corporate accountability in the global marketplace.\textsuperscript{20} The Alien Tort Claims Act (ATCA), adopted by the first Congress in the Judiciary Act of 1789, provides foreigners who suffer human rights injuries outside the United States a federal forum through which to pursue their claim.\textsuperscript{21} Recently, cases have been brought against American corporations in an effort to extend the ATCA's jurisdiction to labor rights as well.\textsuperscript{22}

Part I of this Book Review provides an overview of the Alien Tort Claims Act as a basis for litigating human rights violations and the formidable hurdles that plaintiffs face before they can successfully invoke the statute. Part II examines the recent extension of the ATCA to international labor violations, focusing on the two suits that established this trend, \textit{National Coalition Government of the Union of Burma v. Unocal, Inc.} and \textit{Doe v. Unocal Corp.} Finally, Part III highlights a recent lawsuit filed in federal court against eighteen garment manufacturers for labor violations in Saipan factories and posits the lawsuit's likelihood of successfully surviving dismissal. This Book Review concludes that the ATCA, while not yet a panacea for the ills of the global economy, has become an increasingly powerful tool in promoting corporate accountability abroad.

\textsuperscript{16} See generally id.

\textsuperscript{17} See Ralph Nader, \textit{Introduction to Mokhiber & Weissman, supra} note 1.

\textsuperscript{18} See generally Mokhiber & Weissman, \textit{supra} note 1.

\textsuperscript{19} Charles Reid, \textit{Reviews of Corporate Predators} (visited May 15, 2000) \texttt{<http://www.corporatepredators.org/reviews.html>}.  


I. OVERVIEW OF THE ALIEN TORT CLAIMS ACT AS A BASIS FOR CORPORATE ACCOUNTABILITY

The Alien Tort Claims Act grants federal courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Thus, federal jurisdiction is seemingly established for claims brought (1) by an alien, (2) alleging a tort, (3) in violation of a United States treaty or the law of nations. However, plaintiffs face numerous and significant hurdles in successfully obtaining jurisdiction through the ATCA.

As the statute implies, not all torts are within the jurisdictional grant of the ATCA. Rather, only torts in violation of a United States treaty or the law of nations can be successfully brought under the ATCA. The federal courts apply a stringent threshold standard in determining whether the conduct alleged satisfies this requirement. To determine whether a particular tort is a violation of the law of nations, courts examine contemporary international law. The norms of contemporary international law are determined by “consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” In addition, such rules must command the “general assent of civilized nations” to become binding as contemporary international law and, thus, as the law of nations. This requirement of international consensus has established a high threshold by which causes of action are judged. The federal courts established such a high threshold to prevent nations from imposing their own ideological standards upon other countries, in the guise of applying

24 See id.
27 See id.
28 See Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980); Beanal, 969 F. Supp. at 370.
29 See Filartiga, 630 F.2d at 881. The court reasoned that international law is not static and, thus, must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.” See id.
30 Karadzic, 70 F.3d at 238; Filartiga, 630 F.2d at 880; see Beanal, 969 F. Supp. at 370.
31 See Filartiga, 630 F.2d at 881.
32 See id. at 888.
international law. Due to this stringent standard, a violation of the law of nations occurs only when the defendant's alleged conduct violates "well-established, universally recognized norms of international law," as opposed to merely the "idiosyncratic legal rules" of certain nations.

As a result of the requirement for international consensus, only a limited number of claims have been held by courts to constitute a violation of the law of nations. The Restatement (Third) of the Foreign Relations Law of the United States provides a list of claims that, at a minimum, constitute such violations. According to Section 702 of the Restatement, a state violates international law if it practices, encourages, or condones genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights. Conversely, numerous other claims, while certainly compelling, have failed to meet the strict standards of international consensus. Courts have been unwilling to extend ATCA jurisdiction to claims of fraud, conversion, negligence, wrongful death, child custody, and libel based on the idiosyncratic nature of the claims. Many environmental claims have

33 See id. at 881; see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-30 (1964) (declining to adjudge the validity of the Cuban government's expropriation of a foreign-owned corporation's assets, the Supreme Court noted sharply conflicting views on the issue propounded by communist and capitalist nations).
35 See Karadzic, 70 F.3d at 240; Restatement (Third) of Foreign Relations Law § 702 (1986) [hereinafter Restatement].
37 See Hamid, 51 F.3d at 1418; Huynh Thi Anh, 586 F.2d at 629; Benjamins, 572 F.2d at 916; Vencap, 519 F.2d at 1015; Akbar, 490 F. Supp. at 63.
also faced intense scrutiny by the courts due to their similar lack of international consensus.\footnote{See Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 382 (E.D. La. 1997), aff'd, 197 F.3d 161 (5th Cir. 1999); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991).}

However, although the text of the ATCA merely requires that an alien allege a tort in violation of the law of nations, not all of these violations can actually be brought under the statute.\footnote{See Beanal, 969 F. Supp. at 370; Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988).} Courts have additionally required that such violations be "definable" and contain "obligatory, rather than hortatory" language.\footnote{See Beanal, 969 F. Supp. at 370; Xuncax, 886 F. Supp. at 184; Forti, 694 F. Supp. at 709.} Thus, not only must there be international consensus that a particular claim is a violation of the law of nations, but there must also be global assent as to the elements of that claim.\footnote{See generally Forti, 694 F. Supp. 707. In Forti, the court noted that "disappearance" was a universally recognized violation of the law of nations. See id. at 710. In addition, there was a universal and obligatory international proscription of the elements of the tort. See id. at 711. Thus, the plaintiff's claim of disappearance established jurisdiction under the ATCA. Conversely, the court did not find any universal assent to the terms of "cruel, inhuman or degrading treatment," and dismissed this latter claim. See id. at 712.} Unfortunately for plaintiffs, proving international consensus as to a definable tort may still not be enough to obtain jurisdiction under the ATCA.

In addition to demonstrating a definable violation of the law of nations, most plaintiffs are also required to prove the existence of state action.\footnote{See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 (D.C. Cir. 1984); National Coalition Gov't v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997); Beanal, 969 F. Supp. at 373; Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997).} Although this state action requirement is absent from the text of the ATCA, most courts have held that customary international law itself imposes such a requirement.\footnote{See Tel-Oren, 726 F.2d at 792.} In \textit{Tel-Oren v. Libyan Arab Republic}, Judge Harry Edwards noted that the law of nations traditionally has been defined as "the body of rules and principles of action which are binding upon civilized states in their relations with one another."\footnote{Id. at 792 n.22. (citing J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 1 (6th ed. 1963)).} The inherent state action requirement of the ATCA has led most courts to refuse jurisdiction in cases absent such action, even where a clear violation of the law of nations has been alleged.\footnote{See, e.g., \textit{Tel-Oren}, 726 F.2d at 792 (finding that, while torture is a violation of the law of nations, no jurisdiction exists under the ATCA due to lack of state action); \textit{Beanal}, 969 F. Supp. at 371 (holding claims of murder and torture not actionable under ATCA due to lack of state action); \textit{see also National Coalition Gov't}, 176 F.R.D. at 348 (finding jurisdiction}
sequently, this requirement has greatly limited the feasibility of the
ATCA for claims against private individuals.\textsuperscript{48}

Nonetheless, private individuals are not completely immune from
the jurisdiction of the ATCA.\textsuperscript{49} The state action requirement can be
satisfied where a private individual acts under the color of law.\textsuperscript{50} To
determine whether this standard is satisfied, courts use the jurispru-
dence developed under 42 U.S.C. § 1983 as a relevant guide.\textsuperscript{51} Under
the ATCA, four approaches have been used in determining the color
of law question: public function, symbiotic relationship, nexus, and
joint action.\textsuperscript{52} To date, only the joint action test has successfully found
state action by a private defendant.\textsuperscript{53} Under the joint action test, state
action will exist "where there is a 'substantial degree of cooperative

\textsuperscript{48} See Tel-Oren, 726 F.2d at 792; Beanan, 969 F.Supp. at 371.

\textsuperscript{49} See Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995); National Coalition Gov't, 176
F.R.D. at 348; Beanan, 969 F. Supp. at 374; Doe, 963 F. Supp. at 891–92.

\textsuperscript{50} See Karadzic, 70 F.3d at 245; National Coalition Gov't, 176 F.R.D. at 348; Beanan, 969 F.
Supp. at 374; Doe, 963 F. Supp. at 891–92.

\textsuperscript{51} See Karadzic, 70 F.3d at 245; National Coalition Gov't, 176 F.R.D. at 344; Beanan, 969 F.
Supp. at 374; Doe, 963 F. Supp. at 890.

\textsuperscript{52} Under the public function approach, state action can exist where a private entity
performs a function traditionally the exclusive prerogative of the State. See Beanan, 969 F.
Supp. at 379 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

Under the symbiotic relationship approach, state action can be established where the
state "has so far insinuated itself into a position of interdependence" with a private party
that "it must be recognized as a joint participant in the challenged activity." See Beanan, 969
F. Supp. at 378 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). To
establish a symbiotic relationship, the state and the private entity must be "physically and
financially integral." See id.

Under the nexus test, a plaintiff must demonstrate that there is a sufficiently close
nexus between the government and the challenged conduct such that the conduct may
fairly be treated as that of the state itself. See Beanan, 969 F. Supp. at 377 (citing Gallagher v.
Neil Young Freedom Concert, 49 F.3d 1442, 1448 (10th Cir. 1995)). To satisfy this test, the
state must be significantly involved in or actually participate in the alleged conduct. See id.

"Under the joint action approach, private actors can be state actors if they are 'willful
participant[s] in joint action with the state or its agents.'" Doe, 963 F. Supp. at 890 (citing
Dennis v. Sparks, 449 U.S. 24, 27 (1980)).

\textsuperscript{53} See National Coalition Gov't v. Unocal, Inc., 176 F.R.D. 329, 348 (C.D. Cal. 1997) (al-
leging defendant corporation to be joint venturers with state officials in forced labor and
other human rights violations in furtherance of joint gas pipeline project); Doe, 963 F.
Supp. at 891 (alleging defendant corporation to be joint venturers with state officials in
forced labor and other human rights violations in furtherance of joint gas pipeline proj-
ext).
action' between the private and state actors in effecting the deprivation of rights . . . ."54

In limited circumstances, courts have held that private individuals may be liable for violations of the law of nations even absent state action.55 An exception to the state action requirement is provided for those violations that rise to the level of "universal concern."56 As a result, certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.57 However, courts have been unwilling to read this exception expansively absent guidance from the Supreme Court.58 To date, only piracy, slave trade, genocide, war crimes, and attacks on or hijacking of aircraft have been considered undisputed violations of universal concern.59

In addition, private individuals need not be directly engaged in such violations to be exposed to liability.60 Rather, private individuals may be held liable merely where they knowingly benefit from a violation of universal concern by a third party.61 Thus, the ATCA, notwithstanding its substantive hurdles, can still provide a powerful weapon against private misconduct abroad.

Even after successfully establishing jurisdiction under the ATCA, many plaintiffs face a formidable procedural hurdle in surviving dismissal.62 Defendants routinely move to dismiss an ATCA claim

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54 Doe, 963 F. Supp. at 891 (citing Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995)).
55 See Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995), Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984); National Coalition Gov't, 176 F.R.D. at 348; Doe, 963 F. Supp. at 891.
56 See Karadzic, 70 F.3d at 240; Tel-Oren, 726 F.2d at 795; Beanal, 969 F. Supp. at 371. In his concurring opinion, Judge Harry Edwards noted that the requirement of state action did not always exist. See Tel-Oren, 726 F.2d at 794 (Edwards, J., concurring). Rather, in the eighteenth and early nineteenth centuries, writers and jurists believed that rules of international law implicitly bound individuals as well as states. See id. In the nineteenth century, the view that states alone were subjects of international law became firmly entrenched in doctrine and practice. See id.
57 See Karadzic, 70 F.3d at 239; Tel-Oren, 726 F.2d at 795; National Coalition Gov't, 176 F.R.D. at 349; Beanal, 969 F. Supp. at 371; Doe, 963 F. Supp. at 892.
58 See Tel-Oren, 726 F.2d at 795.
59 See RESTATEMENT, supra note 36, at § 404.
60 See National Coalition Gov't, 176 F.R.D. at 349; Doe, 963 F. Supp. at 892.
61 See National Coalition Gov't, 176 F.R.D. at 349; Doe, 963 F. Supp. at 892.
through the common law doctrine of *forum non conveniens*. In this doctrine, the court determines the location for trial that would be most convenient and best able to serve the ends of justice.

In making this determination, the court first must ascertain whether an adequate alternative forum exists. In many cases, defendants prefer a foreign forum due to the probability of a more favorable outcome. Many foreign courts, especially in developing countries, are ill-equipped to handle such cumbersome cases, and some have a reputation for corruption. Accordingly, the court’s initial determination will largely depend upon the stability of the foreign nation’s judiciary.

If the court finds that an adequate alternative forum exists, it will then balance a number of public and private interests to determine whether the convenience to the parties and the ends of justice would be served by dismissing the action. The public interest factors to be considered include “administrative difficulties stemming from court congestion; the interest in having ‘localized controversies decided at home;’ and the interest in having issues of foreign law decided by a foreign tribunal.”

In most cases, these factors should weigh in favor of the plaintiff. Congress enacted the ATCA specifically to “provide a federal forum

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63 See *Jota*, 157 F.3d at 158–59; *Karadzic*, 70 F.3d at 250; *Eastman Kodak*, 978 F. Supp. at 1087; *Cabiri*, 921 F. Supp. at 1198–99.
64 See *Jota*, 157 F.3d at 159; *Karadzic*, 70 F.3d at 250; *Cabiri*, 921 F. Supp. at 1198.
65 See *Jota*, 157 F.3d at 158–59; *Eastman Kodak*, 978 F. Supp. at 1083; *Cabiri*, 921 F. Supp. at 1199.
66 For example, discovery rules are much weaker in many foreign courts. See generally Eyal Press, *Texaco on Trial*, NATION, May 31, 1999, at 11. In Ecuador, judges almost never compel witnesses to testify and require all questions to be submitted in writing. See id. at 15. Moreover, if a party wishes to withhold any subpoenaed documents from the court, it can do so and simply pay a $180 fine. See id.
67 If the district court accepts the *forum non conveniens* argument on remand from *Jota*, the case would be dismissed from the Southern District of New York. See Press, *supra* note 66, at 13, 15. The alternative forum in Ecuador is a “small office on the third floor of a brown cinderblock building . . . that . . . has one computer, no fax machine, no Internet connection and no law clerks to assist with paperwork.” See id. at 13. Moreover, in a recent poll conducted by George Washington University, only 16% of Ecuadorians expressed confidence in their judiciary. See id. at 12.
68 See *Karadzic*, 70 F.3d at 250 (finding that courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are unavailable to entertain plaintiff’s claims); *Eastman Kodak*, 978 F. Supp. at 1085–86 (finding that proof of corruption in Bolivian justice system precluded dismissal of action on grounds of *forum non conveniens*).
69 See *Jota*, 157 F.3d at 159; *Eastman Kodak*, 978 F. Supp. at 1083; *Cabiri*, 921 F. Supp. at 1199.
70 See *Cabiri*, 921 F. Supp. at 1199.
for aliens suing domestic entities for violation of the law of nations."71 Since an ATCA claim is brought pursuant to United States case law and statutes, federal courts are interested in having the issues of law decided by a U.S. court.72 Moreover, the judiciaries of developing countries, where many ATCA violations originate, would be substantially overburdened by the additional caseload.73

The private interests to be weighed by the court require factspecific determinations. These interests include "the ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive."74 As a result, determinations will be based primarily on the location of necessary documents and witnesses, the possible costs of translation, and safety considerations of the parties.75

However, while the court balances the public and private interests of the litigants, the plaintiff's choice of forum is entitled to a strong presumption of suitability.76 Unless this balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.77

Due to the pervasiveness of rights violations committed by TNCs, the ATCA is increasingly being used by plaintiffs as a tool for corporate accountability. The Alien Tort Claims Act provides foreign plaintiffs with a federal forum to bring claims against private individuals, such as U.S. corporations. As the international norms of the law of nations continue to evolve and expand outside of traditional human rights, this tool should become even more helpful.

II. THE EXTENSION OF JURISDICTION UNDER THE ATCA TO INTERNATIONAL LABOR VIOLATIONS

Until the Second Circuit's decision in Filartiga v. Pena-Irala, the ATCA had rarely been used as a basis for jurisdiction in federal

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71 See Jota, 157 F.3d at 159; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 790 (D.C. Cir. 1984); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Cabiri, 921 F. Supp. at 1199.
72 See Cabiri, 921 F. Supp. at 1199.
73 See Press, supra note 66, at 13.
74 Cabiri, 921 F. Supp. at 1199 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
76 See Eastman Kodak, 978 F. Supp. at 1083; Cabiri, 921 F. Supp. at 1199.
77 See Eastman Kodak, 978 F. Supp. at 1083; Cabiri, 921 F. Supp. at 1199.
By validating a Paraguayan citizen’s claim of torture under the ATCA, the Second Circuit established the modern framework for determining jurisdiction under the statute. Since Filartiga, courts have been reluctant to extend this framework beyond a limited number of human rights violations. However, this trend may be changing; a number of decisions have recently extended jurisdiction under the ATCA to international labor violations by a private defendant.

In National Coalition Government of the Union of Burma v. Unocal, Inc. and Doe v. Unocal Corp., Burmese citizens, the Federation of Trade Unions of Burma, and the exiled National Coalition Government of the Union of Burma brought actions against Unocal Corporation for human rights and labor violations committed by the reigning government of Myanmar (formerly Burma) in the construction of the Yadana natural gas pipeline. This pipeline was a joint venture between Unocal and the current Myanmar government, better known as the State Law and Order Restoration Council (SLORC).

According to the plaintiffs, SLORC destroyed numerous villages in the pipeline region, burning homes and forcing people to flee; at the same time, it also engaged in the assault, rape, and torture of villagers. Moreover, SLORC used threats of death to compel thousands of villagers to travel to forced labor camps, carry food and tools for railroad construction, and serve as porters for the military in the pipeline region. Likewise, SLORC used forced labor to move military battalions into the pipeline region, clear forests, construct a road alongside the route of the pipeline, and build other infrastructure.

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78 See 630 F.2d 876, 887 (2d Cir. 1980).
79 See generally id.
80 See supra note 35 and accompanying text.
82 See National Coalition Gov’t, 176 F.R.D. at 334; Doe, 963 F. Supp. at 883. The two cases are separate, but related, actions against Unocal. In Doe, the plaintiffs are farmers from the Tenasserim region in Burma who were abused and forced into labor by the government. See Doe, 963 F. Supp. at 883. In National Coalition Gov’t, the plaintiffs are the exiled government, a Burmese labor organization, and four Burmese citizens alleging torture, expropriation of property, and forced labor. See National Coalition Gov’t, 176 F.R.D. at 335. Both cases involve similar allegations by the individual plaintiffs and both were decided by the same judge. See National Coalition Gov’t, 176 F.R.D. at 334–35; Doe, 963 F. Supp. at 883–84. Although the decisions are nearly identical, the two cases were not consolidated and, thus, were decided separately. See National Coalition Gov’t, 176 F.R.D. at 334–35; Doe, 963 F. Supp. at 883–84.
83 See National Coalition Gov’t, 176 F.R.D. at 335–36; Doe, 963 F. Supp. at 885.
84 See National Coalition Gov’t, 176 F.R.D. at 336; Doe, 963 F. Supp. at 885.
85 See National Coalition Gov’t, 176 F.R.D. at 336; Doe, 963 F. Supp. at 885.
related to the pipeline. The plaintiffs alleged that Unocal was aware of and benefited from the use of this forced labor to support the Yadana gas pipeline project.

The district court rejected Unocal's motions to dismiss for lack of subject matter jurisdiction, finding that jurisdiction existed under the ATCA for the plaintiffs' claims of torture and forced labor against the oil company. In applying the framework provided by Filartiga and its progeny, the court determined that federal jurisdiction was appropriate since the claims were brought by aliens alleging a tort in violation of the law of nations. First, the individual plaintiffs, Burmese citizens, were clearly aliens for purposes of the statute. Moreover, the court, while handling the claims of torture and forced labor differently, held both to be definable violations of the law of nations. In so deciding, the court established a foothold for the ATCA in the realm of international labor violations.

Torture had already been firmly established as a violation of the law of nations through significant case law. However, since torture did not rise to the level of "universal concern," a finding of state action was needed in order for the claim to be actionable under the ATCA. The court determined that state action existed, as Unocal was "a willful participant in joint action" with SLORC or its agents. Comments reportedly made by the president of Unocal, John Imle, limited any possibility for a different determination.

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86 See National Coalition Gov't, 176 F.R.D. at 336; Doe, 963 F. Supp. at 885.
87 See National Coalition Gov't, 176 F.R.D. at 336; Doe, 963 F. Supp. at 885.
88 See National Coalition Gov't, 176 F.R.D. at 345; Doe, 963 F. Supp. at 883–84. The district court, while holding that jurisdiction was available under the ATCA, found that the exiled government and the labor organization lacked standing to bring a claim under the ATCA. See National Coalition Gov't, 176 F.R.D. at 360. Thus, only the individual John Doe plaintiffs remained after the decision. See id. at 360–61; Doe, 963 F. Supp. at 897–98.
89 See National Coalition Gov't, 176 F.R.D. at 349; Doe, 963 F. Supp. at 892; see generally Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
90 See National Coalition Gov't, 176 F.R.D. at 344; Doe, 963 F. Supp. at 890.
91 See National Coalition Gov't, 176 F.R.D. at 345, 348; Doe, 963 F. Supp. at 890. In National Coalition Gov't, some individual plaintiffs also brought claims alleging expropriation of property. See National Coalition Gov't, 176 F.R.D. at 345. The court noted that this claim was not recognized as a violation of the law of nations due to a lack of international consensus. See id. Thus, the claim was not actionable under the ATCA. See id.
92 See National Coalition Gov't, 176 F.R.D. at 345; see also Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984); Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980).
94 See National Coalition Gov't, 176 F.R.D. at 348; Doe, 963 F. Supp. at 891.
95 See National Coalition Gov't, 176 F.R.D. at 348. Imle was quoted as stating to pipeline opponents: "What I'm saying is that if you threaten the pipeline, there's gonna be more
In examining the plaintiffs’ forced labor claims, the court noted that Unocal would be held liable for violations of the law of nations even absent state action. The court equated forced labor to slave trading and held that, as such, the claim was “included in that ‘handful of crimes’ to which the law of nations attributes individual responsibility . . .” The court likened Unocal to a slave owner because the corporation paid the Myanmar government to provide labor and security for the pipeline and “essentially treat[ed] SLORC as an overseer [that] accept[ed] the benefit of and approv[ed] the use of forced labor.” Moreover, since Unocal knowingly benefited from the forced labor, no showing of direct engagement in slave trading was needed by the plaintiffs.

While the plaintiffs faced the various substantive hurdles in establishing jurisdiction under the ATCA, a forum non conveniens argument was noticeably absent from the defendant’s procedural arsenal. However, this argument would have been highly unpersuasive if brought in the Unocal case. As an American corporation chartered in California, Unocal would have had great difficulty in claiming it was inconvenienced by the choice of forum in U.S. District Court-Central District of California. Also, more importantly, it is unlikely that a federal court would have found an adequate alternative forum to exist in Myanmar. There was no functioning judiciary in Myanmar; thus, the ends of justice would not have been served by dismissing the action under the doctrine of forum non conveniens.

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96 See id.; Doe, 963 F. Supp. at 891.
97 See National Coalition Gov’t, 176 F.R.D. at 348; Doe, 963 F. Supp. at 891. It is interesting to note a slight change in wording between the two cases. In Doe, Judge Paez commented that the “allegations of forced labor in this case are sufficient to constitute an allegation of participation in slave trading.” Doe, 963 F. Supp. at 892 (emphasis added). However, approximately eight months later, Judge Paez wrote in National Coalition Gov’t that the “allegations of forced labor in this case may be sufficient to state a claim for participation in the slave trade.” National Coalition Gov’t, 176 F.R.D. at 349 (emphasis added). He noted in the latter case that “what constitutes ‘slave trade,’ however, has not been thoroughly delineated either by the courts listing it as a peremptory norm or by the parties in this action.” Id.
98 See National Coalition Gov’t, 176 F.R.D. at 349; Doe, 963 F. Supp. at 892.
100 See MOKHIBER & WEISSMAN, supra note 1, at 198–200.
101 See Doe, 963 F. Supp. at 884.
102 See id. The court provides a vivid example of Myanmar’s inadequacy to serve the ends of justice. On May 27, 1990, SLORC held multi-party elections in which the opposition party, the National League for Democracy, captured 82% of the parliamentary seats.
The two cases brought against Unocal, National Coalition Government of the Union of Burma v. Unocal, Inc. and Doe v. Unocal Corp., provided a more expansive reading of the ATCA than previous cases.\textsuperscript{104} In establishing jurisdiction under the statute, the court characterized forced labor as a modern form of slavery and the slave trade and, thus, a violation of universal concern.\textsuperscript{105} Recently, another district court has supported this characterization of forced labor.\textsuperscript{106} In Iwanowa v. Ford Motor Company, the court found that the use of forced labor in the manufacturer's German factories during World War II violated established norms of customary international law.\textsuperscript{107} Through these decisions, the courts have helped to further restrict the boundaries by which corporations can lawfully place profits before people.

### III. The Saipan Case and Its Likelihood of Success

In the apparel industry, major clothing retailers clamor to obtain their garments from a small island in the South Pacific Ocean.\textsuperscript{108} Saipan, the main island within the Commonwealth of Northern Mariana Islands (CNMI), is home to numerous garment manufacturers and produces apparel for many top U.S. brands.\textsuperscript{109} In fact, the island exports roughly one billion dollars worth of merchandise annually to the United States.\textsuperscript{110} The island's substantial economic success is due mainly to the CNMI's unique relation to the United States.\textsuperscript{111} The Commonwealth enjoys United States territorial status, similar to Puerto Rico, and the indigenous people of the CNMI enjoy U.S. citizenship.\textsuperscript{112} Thus, as a territory, the CNMI can sell merchandise produced in the Common-

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\textsuperscript{104} See National Coalition Gov't, 176 F.R.D. at 360; Doe, 963 F. Supp. at 884.
\textsuperscript{105} See National Coalition Gov't, 176 F.R.D. at 348–49; Doe, 963 F. Supp. at 891–92.
\textsuperscript{107} See id. Although the court in Iwanowa held forced labor to be a violation of the law of nations, they ultimately dismissed the case on statute of limitations grounds. See id. at 491.
\textsuperscript{108} See Trapped Report, supra note 10.
\textsuperscript{109} See id.
\textsuperscript{111} See Trapped Report, supra note 10.
\textsuperscript{112} See id. In addition to U.S. citizenship, CNMI residents enjoy all other accompanying benefits such as Social Security, unemployment benefits, workers' compensation, welfare, etc. See id. However, the right to vote in federal elections is excepted from this grant. See id.
wealth duty-free in the United States.\textsuperscript{113} The United States government neither taxes nor imposes quotas on the merchandise exported annually from the CNMI to the fifty states.\textsuperscript{114}

However, unlike other U.S. territories, the CNMI has retained control over immigration and naturalization policies and its minimum wage.\textsuperscript{115} Currently, the Commonwealth’s minimum wage is approximately $3.05 per hour, more than $2.00 less than the federal rate.\textsuperscript{116} Because of its low minimum wage and its exemption from U.S. import tariffs or quota restrictions, Saipan has attracted numerous garment manufacturers who, in turn, produce clothes for some of the biggest U.S. labels.\textsuperscript{117} Similarly, major clothing retailers have been attracted to the Saipan manufacturers by the substantial savings the manufacturers offer due to their low production costs.\textsuperscript{118}

While both U.S. retailers and Saipan garment manufacturers have profited from this arrangement, the garment workers themselves largely have been exploited.\textsuperscript{119} Amazingly, over ninety percent of garment industry jobs in the CNMI are held by foreign “guest workers,” predominately young women from China, the Philippines, Bangladesh, and Thailand.\textsuperscript{120} The vast majority of these workers are recruited by private agencies advertising well-paying jobs in the United States.\textsuperscript{121} With promises of high pay and quality work in the United States, workers agree to repay recruitment fees ranging from $2,000 to $7,000 and thus become trapped in a state of indentured servitude.\textsuperscript{122} Since workers often cannot pay the recruitment cost up front, they agree to work off the debt through labor.\textsuperscript{123} As a result, the workers end up in a form of bondage from which most of them cannot

\textsuperscript{113} See id.
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} See Trapped Report, supra note 10.
\textsuperscript{117} See Stop Saipan Sweatshops, supra note 110.
\textsuperscript{118} See Trapped Report, supra note 10.
\textsuperscript{119} See id.
\textsuperscript{120} See Stop Saipan Sweatshops, supra note 110.
\textsuperscript{121} See Sweatshop Watch: Saipan Sweatshop Litigation (visited May 15, 2000) <http:www.sweatshopwatch.org/swatch/marianas/complaint.htm> [hereinafter State Complaint]. These recruiters advertise well-paying jobs in the U.S. by using such misrepresentations as Saipan only being “a short train ride” from Los Angeles to lure impoverished men and women living in severely underdeveloped nations. See id.
\textsuperscript{122} See Stop Saipan Sweatshops, supra note 110.
\textsuperscript{123} See Trapped Report, supra note 10.
escape. 124 In addition, the working and living conditions imposed on garment workers are deplorable. 125

On January 13, 1999, a federal class action lawsuit was filed in Los Angeles on behalf of more than 50,000 workers from China, the Philippines, Bangladesh, and Thailand against eighteen high-profile U.S. clothing retailers, including The Gap, Tommy Hilfiger, Sears, Wal-Mart, and J.Crew. 126 The plaintiffs brought this action under the Alien Torts Claim Act, alleging human rights and international labor violations committed by garment manufacturers in Saipan factories. 127 The plaintiffs claim that these companies have conspired to place thou-

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124 See id. Among workers, "payless paydays" is a familiar phrase as debt repayments, coupled with other essential expenses, leave them with nothing. See id. Many workers complain of not getting paid at all. See id.

125 See Steven Greenhouse, Suit Says 18 Companies Conspired to Violate Sweatshop Workers' Civil Rights, N.Y. TIMES, Jan. 14, 1999, at A9; William Carlsen, Sweatshop Conditions Alleged on U.S. Island, S.F. CHRON., Jan. 14, 1999, at A1; William Branigin, Top Clothing Retailers Labeled Labor Abusers; Sweatshops Allegedly Run on U.S. Territory, WASH. POST, Jan. 14, 1999, at A14; Lorrie Grant, "Sweatshop" Lawsuit Seeks $1B From Retailers, USA TODAY, Jan. 14, 1999, at 3B. The lawsuit paints a grim picture of the sweatshops in Saipan. The complaint states that workers, predominately female, often must work 12 hours a day, seven days a week, and sometimes for free if they fall behind on their quotas. See Carlsen, supra, at A1. These workers live seven to a room in barracks that are surrounded by inward-facing barbed wire. See id. in order to remain productive, the complaint asserts, some companies force pregnant women to have abortions. See id.


127 See Greenhouse, supra note 125, at A9; Carlsen, supra note 125, at A1; Branigin, supra note 125, at A14; Grant, supra note 125, at 3B. The plaintiffs also brought claims under the federal RICO statute. See Greenhouse, supra note 125, at A9. In addition, two companion cases in federal and state court alleged unfair business practices in violation of the Fair Labor Standards Act and California law. See id. However, for purposes of this book review, the analysis will only focus on the ATCA claim.
sands of workers in involuntary servitude and knowingly benefit from this form of forced labor.\(^{128}\)

In order to establish jurisdiction under the ATCA, the plaintiffs must show that the claim has been brought by an alien and alleges a tort in violation of a United States treaty or the law of nations.\(^{129}\) Clearly, the first requirement has been satisfied; the plaintiffs represent a class of more than 50,000 workers from China, the Philippines, Bangladesh, and Thailand.\(^{130}\) Moreover, the court, in determining whether a violation of the law of nations exists, should afford the plaintiffs’ claim of debt bondage the same status as the forced labor claims in the Unocal cases.\(^{131}\) As a result, debt bondage would constitute a violation of universal concern, eliminating any requirement for state action.\(^{132}\) In addition, U.S. retailers would be liable for these violations as long as they knowingly benefited from the debt bondage that existed in the factories and regardless of whether they directly engaged in the violation.\(^{133}\)

However, distinctions can be drawn between forced labor and debt bondage. For example, by definition, forced labor requires that the person has entered into work against her will.\(^{134}\) Conversely, debt bondage implies some degree of voluntary action by the person in initially accepting the work.\(^{135}\) Nonetheless, this distinction should not preclude jurisdiction under the ATCA.\(^{136}\) The prohibitions of forced labor and slave-like practices such as debt bondage are now widely recognized in conjunction with slavery as customary international norms.\(^{137}\) In fact, most international instruments address the prohibitions against these practices coterminously.\(^{138}\) Thus, such practices are

\(^{128}\) See Greenhouse, *supra* note 125, at A9; Carlsen, *supra* note 125, at A1; Branigin, *supra* note 125, at A14; Grant, *supra* note 125, at 3B.


\(^{130}\) See Greenhouse, *supra* note 125, at A9; Carlsen, *supra* note 125, at A1; Branigin, *supra* note 125, at A14; Grant, *supra* note 125, at 3B.


\(^{133}\) See National Coalition Gov’t, 176 F.R.D. at 349; Doe, 963 F. Supp. at 892.

\(^{134}\) See Cleveland, *supra* note 5, at 1570.

\(^{135}\) See *id.* at 1567–68.

\(^{136}\) See *id.* at 1570.

\(^{137}\) See *id.*

\(^{138}\) See *id.*
prohibited regardless of whether the person voluntarily entered into the bonded condition or was forced into it.\textsuperscript{139}

While the plaintiffs' ability to establish jurisdiction under the ATCA is only speculative, their fate under a \textit{forum non conveniens} argument has already been decided.\textsuperscript{140} The defendant retailers and manufacturers claimed that an adequate alternative forum existed in Saipan.\textsuperscript{141} As a U.S. territory, the Commonwealth is also part of the U.S. federal court system.\textsuperscript{142} Consequently, United States law would continue to be applied to the case if it were removed to Saipan.\textsuperscript{143} Moreover, the defendants argued that most of the witnesses and evidence were located on the island.\textsuperscript{144} However, the district judge, while ultimately transferring venue to federal court in Honolulu, Hawaii, rejected the defendants' argument.\textsuperscript{145} The judge cited the potential difficulty in obtaining a fair and unbiased jury pool in Saipan, given the relatively small number of potential jurors and the extensive pretrial publicity in the pro-garment local press, as a basis for her decision.\textsuperscript{146} On January 24, 2000, the Court of Appeals for the Ninth Circuit denied the defendants' request without comment.\textsuperscript{147} Thus, the case will now proceed in Honolulu to determine jurisdiction under the ATCA.\textsuperscript{148}

\textbf{CONCLUSION}

In their book, \textit{Corporate Predators: The Hunt For Mega-Profits and The Attack on Democracy}, Russell Mokhiber and Robert Weissman recount numerous instances of corporations placing concern for profits before people.\textsuperscript{149} In so doing, these corporations have committed egregious violations of human rights, labor rights, and environmental

\textsuperscript{139} See Cleveland, supra note 5, at 1569–70.
\textsuperscript{141} See Court Refuses to Move Suit from Honolulu to Saipan, ASSOCIATED PRESS NEWSWIRES, Jan. 26, 2000, available in Westlaw, 1/26/00 APWIRES 21:23:00 [hereinafter Court Refuses to Move Suit].
\textsuperscript{142} See Trapped Report, supra note 10.
\textsuperscript{143} See id.
\textsuperscript{144} See Court Refuses to Move Suit, supra note 141.
\textsuperscript{145} See Forum Non Conveniens Summary, supra note 140.
\textsuperscript{146} See id.
\textsuperscript{147} See Court Refuses to Move Suit, supra note 141.
\textsuperscript{148} See id.
\textsuperscript{149} See generally MOKHIBER & WEISSMAN, supra note 1.
rights in developing countries. Due to the economic girth of transnational corporations, foreign and domestic governments have been unsuccessful or unwilling to require greater corporate accountability. Thus, corporations have enjoyed a virtual freedom from liability for their abuses abroad. While Mokhiber and Weissman have educated their readers to these atrocities, they have failed to provide clear solutions for stopping the ill effects of globalization. However, evidence suggests that activists need not solely rely on political leaders to affect change; rather, relief may be granted in the federal courts. The Alien Tort Claims Act has increasingly been able to provide a forum for human rights claims and, more recently, for international labor violations. As international norms continue to evolve, the ATCA should become an even more powerful weapon in compelling greater corporate accountability.

150 See generally id.
151 See generally id.
152 See generally id.
153 See generally id.
155 See National Coalition Gov’t, 176 F.R.D. at 349; Doe, 963 F. Supp. at 892.