Florida State University Journal of Transnational Law & Policy

Volume 10 | Issue 1 Article 4

2000

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Cover Page Footnote

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AT THE CROSSROADS OF ENVIRONMENTAL AND HUMAN RIGHTS STANDARDS:

AGUINDA V. TEXACO, INC.

USING THE ALIEN TORT CLAIMS ACT TO HOLD MULTINATIONAL CORPORATE VIOLATORS OF INTERNATIONAL LAWS ACCOUNTABLE IN U.S. COURTS

LISA LAMBERT*

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I. INTRODUCTION

In December of 1999, the World Trade Organization ("WTO") Summit in Seattle, Washington, was met with several thousand unexpected attendees. Labor, environmental, and human rights activists took to the streets of Seattle to protest the WTO's exclusion of the their interests from the bargaining table.[1] Multinational corporations ("MNC")[2] have grown and prospered, but often at the

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1. *See* Jonathan Peterson, *Bottom Line on WTO Still Shaky for U.S.*, L.A. TIMES, Nov. 29, 1999, at A1.

2. *See* BLACK'S LAW DICTIONARY 1015-16 (6th ed. 1990) (defining a MNC as a company "which has centers of operation in many countries," versus an international corporation which

expense of basic international human rights and the natural environment. Many MNC's have annual profits exceeding the Gross Domestic Product ("GDP") of smaller nations, yet they are not bound to the same laws as these nations.[3] Industrial globalization will not end, but the activists want to ensure that the environmental and human rights protections are included within the international trade accords proposed by organizations such as the WTO.[4]

The protestors' shutdown of the WTO summit announced to the world the realization that MNC's can impact everything from environmental issues to basic human rights.[5] In three short days, the meetings were adjourned.[6] The protests of Seattle were formed by a coalition of advocates spanning from across the non-profit sector.[7] Human rights leaders were hand-in-hand with sheet metal workers; representatives of various religious organizations marched with Earth First! members.[8] Though each group and individual may have had its own priority, they found a common ground in protesting the actions of the MNC's.

The implementation of worker and environmental protections into both newly created and existing trade agreements is imperative. International accords and conventions addressing these issues are binding only upon the ratifying states; therefore, the private MNC may escape international scrutiny. However, until that time, the United States ("U.S.") federal courts may provide an outlet for redress.

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generally has one central nucleus of operation with activities crossing borders; however, the terms are used interchangeably).

3. *See* Sherrie E. Zhan, *World Trade 100*, WORLD TRADE, Nov. 1999, at 46 (listing the top 100 international businesses based in the United States).

4. *See* Peterson, *supra* note 1, at A1. Note, however, that some of the activists do want to stop globalization; in fact, the movement is referred to by some as an anti-globalization movement. *See* Jane Spencer, *Raising a Ruckus: Students Take the Bus to DC*, THE NATION, Apr. 24, 2000, at 23.

5. *See* John Burgess, *Protesters at WTO Plan D.C. Follow-Up*, WASH. POST, Jan. 26, 2000, at E1.

6. *See id.*

7. *See* John Nichols, *The Beat*, THE NATION, Apr. 24, 2000, at 9. Seattle is just the beginning of a coalition of activists protesting unchecked global corporate activity; on April 16-17, 2000, over 400 organizations, including the AFL-CIO, Direct Action Network, Rainforest Action Network, and Global Exchange, protested the World Bank/International Monetary Fund meetings in Washington, D.C. (simply named, 'A16' – as the WTO protests which began on November 30, 1999, were termed 'N30'). *See id.*

8. *See* Nov. 30 Nonviolent Direct Action (last visited Mar. 20, 2000) <http://www.agitprop.org/artandrevolution/wto/n30.html> (stating co-sponsors include, among others, Direct Action Network, Global Exchange, Rainforest Action Network, Ruckus Society, National Lawyers Guild, 50 Years is Enough, and Earth First! and the Green Party of Seattle).

The Alien Torts Claims Act ("ATCA") allows foreign plaintiffs to sue defendants of any nationality in a U.S. federal court for a tort constituting a violation of international law.[9] Therefore, a U.S.-owned MNC may face a lawsuit in its own courts if it operates abroad in contravention to international standards. Indeed, Texaco, Inc. ("Texaco") is the named defendant in a class action lawsuit under the ATCA in the Second Circuit, the site of its headquarters.[10]

Seven years ago, a class-action lawsuit, *Aguinda v. Texaco, Inc.*, was filed by citizens of the Republic of Ecuador ("Ecuador") alleging environmental and personal harms caused by Texaco.[11] The citizens of the "Oriente,"[12] or rainforest, region of Ecuador claimed Texaco's operation of an oil pipeline resulted in environmental degradation causing illness and destroying their livelihood in the forest.[13] After a myriad of litigation involving motions to dismiss for *forum non conveniens*, international comity, and joinder of necessary parties, the plaintiffs may well have their day in court.[14] On January 31, 2000, presiding Judge Rakoff issued an order to submit briefings on whether the issue can be fairly adjudicated in Ecuador.[15] Presumably, if the court finds that the plaintiffs will not receive justice in their home courts, the lawsuit will continue here in the United States.

Aguinda v. Texaco, Inc. stands to be an important case in international litigation for several reasons. First and foremost, the plaintiffs initiated a lawsuit against a U.S.-owned MNC in U.S. federal court for alleged harms committed in another country in violation of international laws. Second, the case may stand as an

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9. *See* 28 U.S.C. § 1350 (1999).

10. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), *adhered to by*, 850 F. Supp. 282 (S.D.N.Y. 1994), *dismissed by*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998), *on remand*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000).

11. *See Aguinda*, 1994 WL 142006. However, the defendants reference Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994), as the first case in this litigation—most likely because the court dismissed *Sequihua* on grounds of *forum non conveniens*, a friendly holding for Texaco. In reality, the causes of action are similar, but the *Sequihua* case is "arguably distinguishable." *Aguinda*, 1994 WL 142006, at *3 (finding the district court's reliance on *Sequihua* for dismissal erroneous). The most notable difference is that the *Aguinda* plaintiffs pointed to their belief that decisions made by the defendant in New York led to the actions of their subsidiary in Ecuador, thus leading to the harms suffered. *See id.*

12. "Oriente" literally means "east" — the Amazon of Ecuador is located in the eastern portion of the country, hence the term. *See* BANTAM NEW COLLEGE SPANISH & ENGLISH DICTIONARY 250 (1991).

13. *See Aguinda*, 1994 WL 142006, at *1.

14. *See id.* For a detailed description of the procedural history, see *infra*, notes 38-71 and accompanying text.

15. *See Aguinda*, 2000 U.S. Dist. LEXIS 745.

expansion of the ATCA, making environmental torts a part of the *jus cogens*[16] of international law, and hence, our federal common law. Third, the case, if litigated and won, may provide a collectible judgment in ATCA litigation rather than judgments yet to be recovered by victorious ATCA plaintiffs.[17] Finally, the case may serve as a warning to first-world MNC's that they will be held responsible for the harms they cause in less-developed states.

This note will explore the possibilities of suing MNC's in U.S. federal courts, using the *Aguinda* claims as a basis, and thus further expanding international norms. Part II traces the history of Texaco's involvement in Ecuador, together with the procedural history of the case. Part III examines the ATCA and its application to private, corporate defendants. Lastly, Part IV explores some of the barriers facing ATCA plaintiffs pursuing litigation against MNC's.

II. AGUINDA V. TEXACO, INC.

A. Background

The saga of Texaco's connection with Ecuador began over thirty years ago. In 1964, the Ecuadorian government, a U.S.-endorsed military-junta regime,[18] invited Texaco and Gulf Oil Corporation ("Gulf Oil") to explore for oil in the Amazon region,[19] the Oriente. Texaco and Gulf Oil formed a consortium with equal interests, signed a twenty-eight year agreement, and began drilling for oil in the rainforest.[20] By 1972, the TransEcuadorian pipeline was completed and major amounts of oil were being extracted from the Oriente.[21] In 1974, Petroecuador, the state-owned oil company,

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16. *Jus cogens* are the peremptory norms of customary international law, such as "genocide, slavery . . . the 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." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987). However, the list is an evolving standard, not a fixed one. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

17. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 218 (1996) (noting only $400 was recovered against the judgment in Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988), and all other multi-million dollar judgments are as yet uncollected).

18. *See* John D. Martz, *Ecuador: The Fragility of Dependent Democracy*, *in* LATIN AMERICAN POLITICS AND DEVELOPMENT 378, 389 (Howard J. Wiarda & Harvey F. Kline eds., 3d ed. 1990).

19. *See* TEXACO, TEXACO AND ECUADOR: HISTORY OF OPERATIONS (last modified Sept. 22, 1999) <http://www.texaco.com/shared/position/docs/history.html>.

20. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 626-27 n.1 (S.D.N.Y. 1996).

21. *See* TEXACO, TEXACO AND ECUADOR: CHRONOLOGICAL OVERVIEW (last modified Feb. 1, 1999) <http://www.texaco.com/shared/position/docs/chron_overview.html>.

acquired a twenty-five percent interest in the consortium,[22] beginning Ecuador's long dependence on petroleum.[23]

The leadership of Ecuador's military dictatorship during the 1970s led the country into prosperity based on the oil industry.[24] Government agencies and employees tripled in three years time.[25] In 1976, Gulf Oil stepped out of the picture, and Petroecuador acquired its shares, giving the nation a 62.5 percent interest in the consortium.[26] Ecuador joined the Oil Producing and Exporting Countries ("OPEC") and became an active participant.[27] Petroleum soon became the baseline of the Ecuadorian economy, and by 1987, oil accounted for two-thirds of export revenue and sixty percent of government earnings.[28]

However, the bounties of the oil industry were not destined to last. The reserves gradually dwindled and production declined.[29] Ecuador began ignoring the OPEC quotas to offset the losses.[30] Then a catastrophic earthquake hit in 1987 and severely damaged the TransEcuadorian pipeline,[31] which by then was completely controlled by Petroecuador.[32]

The boom of the petroleum industry was also not without environmental and human costs, which have led to the instant lawsuit. Estimates place pipeline spills at 16.8 million gallons of crude oil emptying into the Amazon River Basin.[33] Additionally, almost 30 billion gallons of toxic by-products of the petroleum extraction were released into the environment.[34]

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22. *See Aguinda*, 945 F. Supp. at 626-27 n.1.
23. *See* Martz, *supra* note 18, at 380.
24. *See id.* at 386.
25. *See id.*
26. *See Aguinda*, 945 F. Supp. at 626-27 n.1.
27. *See* Martz, *supra* note 18, at 390.
28. *See id.* at 380.
29. *See id.*
30. *See id.* at 388.
31. *See id.* at 380. After the earthquake, the United States sent 6,000 troops to assist reconstruction efforts in the Amazon region. *See id.* at 389. The action fueled many underlying anti-U.S. sentiments; however, by July 1987, the U.S. Congress resolved to withdraw the troops. The troops did not leave until October, with little rebuilding completed. *See id.* at 390.
32. *See* TEXACO AND ECUADOR, *supra* note 21. In 1986, Petro-ecuador acquired 100% ownership of the pipeline, while Texaco maintained its 37.5% share of the consortium.
33. *See* Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE IN AMERICAS 293, 315 n.77 (1995). By comparison, the Exxon-Valdez spill sent 10.8 million gallons of crude oil into the Alaskan bay. *See id.*
34. *See* THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS, RIGHTS VIOLATIONS IN THE ECUADORIAN AMAZON: THE HUMAN CONSEQUENCES OF OIL DEVELOPMENT 23 (Mar. 1994), <http://www.cesr.org>.

A study in 1993 found that Oriente residents were being exposed to levels of oil-related contaminants surpassing international standards.[35] The study also revealed they were suffering from a high rate of skin-related diseases.[36] Lastly, the study showed that such findings pointed to an increased risk of more serious diseases such as reproductive and neurological problems, as well as cancers.[37] In fact, an unpublished study's preliminary findings state the overall rate of cancer in the Oriente is 2.3 times higher than residents of Ecuador's capital, Quito.[38]

B. Procedural History

Aguinda v. Texaco, Inc. is a class-action lawsuit filed by citizens of Ecuador in November of 1993 in the Southern District of New York alleging large-scale environmental abuse in the Oriente.[39] The *Aguinda* plaintiffs have been through pre-trial litigation spanning seven years and have yet to get past an order allowing for limited discovery.[40] Instead, the years have been spent fending off Texaco's motions to dismiss based on three premises: *forum non conveniens*, international comity, and failure to join an indispensable party.

The initial presiding judge, Vincent L. Broderick, denied Texaco's motions to dismiss and permitted limited discovery to proceed.[41] Judge Broderick reasoned that discovery was necessary to determine the validity of plaintiffs' claim that Texaco's headquarters maintained final authority over all decision-making in the Ecuadorian project.[42] Further, the Judge's memorandum stated that absent a binding agreement by Texaco accepting jurisdiction in

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35. *See id.* at 20.

36. *See id.*

37. *See id.*

38. *See* Eyal Press, *Texaco on Trial*, THE NATION, May 31, 1999, ¶ 6 <http://www.thenation.com/issue/990531/0531press.shtml> (interviewing Dr. Miguel San Sebastian, who is analyzing the health patterns in areas of the Oriente affected by oil production). The preliminary results also point to Oriente men suffering from larynx cancer thirty times more, and stomach cancer rates five times higher, than men of comparable age in Quito, Ecuador. *See id.*

39. No. 93 Civ. 7527, 1994 WL 142006, at *1-2 (S.D.N.Y. Apr. 11, 1994) *adhered to by*, 850 F. Supp. 282 (S.D.N.Y. 1994), *dismissed by*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998), *on remand*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000). The initiating attorney, Cristobal Bonifaz, is a native of Ecuador, grandson of a former Ecuadorian president and former chemical engineer; he enlisted the assistance of Kohn, Swift & Graf, a Philadelphia firm specializing in class action lawsuits on behalf of plaintiffs. *See* Press, *supra* note 38, at 8-9, 11. *See also* Kohn, Swift & Graf, P.C., Texaco, Inc. (visited Apr. 3, 2001) <http://www.kohnswift.com>.

40. 1994 WL 142006. The first unreported memorandum allowed for limited discovery. *See id.* at *1.

41. *Id.*

42. *See id.* at *4.

Ecuador, no final determination concerning dismissal would be made.[43]

Regarding the issue of international comity, the court stated that Texaco's motion sounded more like a choice of law argument and found no apparent conflict with Ecuadorian laws.[44] Ecuador filed a brief in support of the motion to dismiss; however, the basis of its argument was neither international comity nor national sovereignty. Ecuador's brief argued that retention of jurisdiction by a U.S. court would be a disincentive to U.S. investors.[45] The court agreed that countries like Ecuador rely upon foreign investment, however, the court noted the real disincentive would be "to conduct likely to violate applicable legal norms regardless of the site of the property affected."[46]

Interestingly, Judge Broderick noted the plaintiffs' failure to plead a particular treaty for their ATCA claims, then proceeded to point to the Universal Declaration of Human Rights[47] and the Rio Declaration on Environment and Development[48] as being the most relevant.[49] As luck would have it for the plaintiffs, Judge Broderick died a year after affirming his order.[50]

Under the new judge, Jed Rakoff,[51] Texaco again raised its motion to dismiss – this time with a more favorable outcome for the defendants. In November of 1996, Judge Rakoff granted the defendants' motion to dismiss.[52] For the grounds of *forum non conveniens* and international comity, the court relied upon a similar, yet distinguishable case from Texas, *Sequihua v. Texaco, Inc.*,[53]

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43. *See id.* at *2.

44. *See id.* at *8.

45. *See id.* at *9.

46. *Id.*

47. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, Article 3 (1948) [hereinafter UDHR].

48. Rio Declaration on Environment and Development, *adopted by*, United Nations Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vol.1) (1992), 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

49. *See Aguinda*, 1994 WL 142006, at *6-7.

50. *See* Press, *supra* note 38, ¶ 18. Before his death, Judge Broderick dismissed the plaintiffs' motion requesting to structure a settlement agreement. *See Aguinda*, 1994 WL 142006, at *1. He based his denial on the fact that the plaintiffs had not completed the allowed discovery and the issue of forum was not completely resolved; therefore, any issues of settlement procedures were premature. *See id.* at *3-4.

51. Judge Rakoff is a former partner in a large firm that represented Texaco's patent interests (although he never personally handled any of the cases). He also authored a journal article defending the officers of corporations committing environmental harms. *See* Press, *supra* note 38, ¶ 18.

52. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1996).

53. 847 F. Supp. 61 (S.D. Tex. 1994).

without meaningful discussion.[54] The court did, however, analyze an independent ground for dismissal, the failure to join Ecuador and Petroecuador as indispensable parties.[55] These parties were necessary to provide full relief to the plaintiffs,[56] yet they are subject to the Foreign Sovereign Immunities Act ("FSIA")[57] and cannot be sued in the U.S. courts.[58] Because of their immunity, the court held dismissal of the entire action proper.[59]

After the dismissal, Ecuador and Petroecuador submitted motions to intervene in the action, stating support of the plaintiffs' litigation in the U.S.[60] This move was odd because from the beginning of the litigation, Ecuador had "repeatedly lodg[ed] formal and unequivocal demands that the Court dismiss the action in the interests of international comity."[61] The change of heart was attributed to a change of political leadership.[62] The court was not persuaded and denied the motion as untimely and lacking an unequivocal waiver of immunity.[63] Further, the court found Ecuador to have no legal interest warranting intervention because it had executed a formal settlement with Texaco, releasing the corporation from future liability.[64]

Starting their fifth year of litigation, the dismissal was vacated and remanded on appeal.[65] The court held that the finding in favor of the *forum non conveniens* doctrine was erroneous because Texaco was not required to submit to the jurisdiction of the Ecuadorian

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54. *See Aguinda*, 945 F. Supp. at 626-27.
55. *See id.*
56. *See id.* at 627 (citing FED. R. CIV. P. 19(a)).
57. *See* 28 U.S.C. §§ 1603(b), 1604 (1994).
58. *See Aguinda*, 945 F. Supp. at 628.
59. *See id.*
60. *See* Aguinda v. Texaco, Inc., 175 F.R.D. 50, 51 (S.D.N.Y. 1997).
61. *Id.* at 51.
62. *See id.*
63. *See id.* at 51-52.
64. *See id.* at 53. A copy of the agreement and release between Ecuador and Texaco is available at TEXACO AND ECUADOR, LEGAL ARCHIVES (last modified Sept. 22, 1999) <http://www.texaco.com/shared/position/docs/legal.html>.
65. *See* Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998), *vacating*, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996). In 1994, a companion case, Jota v. Texaco, Inc., No. 94 Civ. 9266 (JSR), was filed. The plaintiffs in *Jota* are a class of Peruvian indigenous tribes who reside in the rainforest, alleging similar environmental and health harms as a result of the toxins flowing into Peru via the Amazonian waterways. The *Jota* and *Aguinda* plaintiffs appealed to the Second Circuit together, as their claims were dismissed on the same grounds. This paper focuses solely on the *Aguinda* litigation, as the *Jota* plaintiffs raise even more issues outside the scope of this research. The *Jota* plaintiffs possess similar, yet distinct, claims in that their harms occurred in Peru, but Texaco did not operate directly in Peru, and they are a class comprised solely of indigenous tribes.

courts.[66] Regarding the issue of international comity, deference was given to the position of the interested state, and due to Ecuador's oscillating position on the litigation, the appellate court suggested further inquiry upon remand.[67] The final issue of joinder was held neither to require nor authorize dismissal "simply because [the] party cannot be joined."[68] Rather, the test is whether the litigation can proceed "in equity and good conscience" without the unnamed party.[69] The court held Ecuador was not an indispensable party for all claims of relief; therefore, litigation could continue without joinder of the state.[70] However, an opportunity for Ecuador to amend its motion to intervene with a full waiver of immunity was reserved for remand.[71]

The *Aguinda* plaintiffs sustained victory on appeal. Now, back in the trial court, Texaco consented to jurisdiction in Ecuador,[72] and renewed the motions to dismiss regarding forum and comity.[73] The court stated Ecuador was probably the proper forum, but it reserved decision on the dismissal issues.[74] Instead, the court issued an order for all parties to brief whether Ecuador could provide a sufficient forum, with at least a "modicum of fundamental fairness to litigants,"[75] in light of the recent *coup d'etat*.[76] Although by a political turn of events, the plaintiffs may well have their day in U.S. court.

III. ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act ("ATCA") may be the vehicle to get extra-territorial victims of toxic torts into U.S. courts and vindicate their rights against the degradation of their homelands by U.S. MNC's. The ATCA is simplistic yet forceful. It states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a

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66. *See Jota*, 157 F.3d at 159.
67. *See id.* at 160.
68. *Id.* at 162.
69. *Id.* (citing FED. R. CIV. P. 19(b)).
70. *See id.*
71. *See id.*
72. Texaco also consented to jurisdiction in Peru. *See* Aguinda v. Texaco, Inc., 2000 U.S. Dist. LEXIS 745, at *4 (S.D.N.Y. Jan. 31, 2000).
73. *See id.*
74. *See id.* at *5.
75. *Id.* at *8 (relying on Brideway Corp. v. Citibank, No. 99 Civ. 7504, 2000 WL 1673 (2d Cir. Jan. 3, 2000)).
76. *See id.* at *7 (citing *Ecuador Coup Shifts Control to No. 2 Man*, N.Y. TIMES, Jan. 23, 2000, at 1, that on January 21, 2000, a military coup deposed President Jamil Mahuad). Judge Rakoff, *sua sponte*, researched the judiciary of Ecuador through the State Department's Country Reports. *See id.* at *8-9.

treaty of the United States."[77] The seeming simplicity may be where the problems in application enter. The statute was enacted in 1789; however, until recently, attorneys rarely utilized the ATCA.[78]

Before World War II, internationally accepted laws were scant.[79] The horrors brought to the surface from this conflict promulgated the United Nations ("U.N.") conventions on human rights that exist today, thus enabling a more definitive approach to using the ATCA.[80]

A. Jurisdiction

The ATCA confers "original jurisdiction" to the federal courts of the United States.[81] It is well accepted that ATCA's express grant of access to the courts serves as a waiver to the requirement of monetary minimums for damages for diversity jurisdiction.[82] Moreover, jurisdiction is granted on grounds of international law; hence, the federal question requirement need not be addressed.[83]

The plaintiff in an ATCA action must be an alien.[84] The courts accept that the defendant does not have to be a resident of the United States.[85] The defendant, however, must be subject to service in the U.S. court system.[86] In order to maintain jurisdiction after service of process, the foreign defendant must have a sufficient nexus with the forum state.[87] No hard and fast set of rules exists to determine whether the court may exercise jurisdiction over a foreign defendant;

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77. 28 U.S.C. § 1350 (1999).

78. *See* Derek P. Jinks, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights Norms*, 4 ILSA J. INT'L & COMP. L. 465, 465-66 (1998). *See also* Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 890-93 (1999) (recounting the theories underlying the ATCA as a statute to enabling federal, rather than state, control of suits brought by foreign diplomats and an altruistic congressional move to allow any alien wronged by a U.S. citizen to have a forum for justice in U.S. courts).

79. *See* Jinks, *supra* note 78, at 466.

80. *See id; see also* BLACK'S LAW DICTIONARY 1533 (6th ed. 1990). The United Nations was formed during World War II for the "purposes of preventing war, providing justice and promoting welfare and human rights of peoples."

81. *See* 28 U.S.C. § 1350 (1999).

82. *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996); *see also* Jama v. United States Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 363 (D.N.J. 1998).

83. *See Kadic*, 70 F.3d at 246; *see also* Lynch v. Household Fin. Corp., 405 U.S. 538, 546-47 (1972), *reh'g denied* 406 U.S. 911 (1972).

84. *See* 28 U.S.C. § 1350 (1999) (stating the action must be commenced "by an alien").

85. *See id.* (containing no language delineating the nationality of the defendant, and the courts have not construed it as such).

86. *See generally* FED. R. CIV. P. 4.

87. *See id.* at 12(b)(2). This refers to whether the court can exercise personal jurisdiction over the defendant. *See generally* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

the court exercises discretion on a case-by-case basis.[88] However, some general guidelines include whether the defendant does business in the forum state, has otherwise consented to jurisdiction, or has visited the state.[89]

An example of an ATCA claim dismissed on jurisdictional grounds is *International Labor Rights Education & Research Fund v. Bush*.[90] The plaintiffs sought an injunction against [then] President Bush to enforce the labor provisions of the Generalized System of Preferences ("GSP").[91] This case was dismissed on jurisdictional grounds, as well as issues of standing and political question doctrine.[92] The court denied jurisdiction, holding that the subject matter should be addressed in the Court of International Trade.[93]

In the example of *Aguinda v. Texaco, Inc.*, the initial requirements of jurisdiction were easily satisfied. The plaintiffs were aliens, suing for damages resulting from a toxic tort. Unlike the union in the *International Labor Rights* case, the foreign plaintiffs in *Aguinda* did have standing. The defendant, Texaco, was a corporate citizen of New York, the location of the court filing, and was obviously subject to service in the lawsuit.

B. Passing Jurisdiction . . . The Next Step

After the jurisdictional requirements are met, a two-prong analysis is applied. "First, the court must determine if the plaintiffs have a claim under international law."[94] If the first prong is met, the court must decide if the action may proceed against the named defendants.[95] Only after this analysis will an ATCA claim defeat a motion to dismiss.[96] Grounds of *forum non conveniens* and international comity, however, will likely be addressed as grounds for dismissal as well.

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88. *See* ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 153 (3d ed. 1994).

89. *See id.*

90. 954 F.2d 745 (D.C. Cir. 1992).

91. *See id.* at 746.

92. *See id.* at 748-52.

93. *See id.* at 747-48. *But see id.* at 752-59 (Mikva, C.J., dissenting) (offering a vigorous dissent against the conclusion that the Court of International Trade held exclusive jurisdiction, that the unions had no grounds for standing, and that the political question doctrine barred the case).

94. Jama v. United States Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 361 (D.N.J. 1998).

95. *See id.*

96. *See* FED. R. CIV. P. 12(b)(6); *see, e.g.*, Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (stating that a complaint must be dismissed if the court finds "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

1. *Prong One: Claims Arising Under International Law*

a. *Defining the "Law of Nations"*

The "law of nations" means international law.[97] International law is defined not only as "[t]hose laws governing the legal relations between nations," but also as the "relations with persons, whether natural or juridical."[98] International customs and treaties detail the universally accepted standards.[99] However, our judiciary has accepted U.S. federal common law as embodying the law of nations as well.[100]

In the context of ATCA litigation, the courts have delineated the law of nations to encompass only those standards that are universal, obligatory, and definable.[101] These are known as the *jus cogens* or compelling law normatives.[102] The majority of ATCA cases rose in situations of torture at the hands of foreign government officials.[103] In fact, Congress expanded the Act in 1991 to allow U.S. citizen plaintiffs redress under the statute in cases of torture or extra-judicial killings.[104]

Nothing in the Act, however, designates its status as solely within the realm of torture. In addition to torture, the courts have recognized ATCA claims involving summary execution,[105] genocide,[106] war crimes,[107] disappearance,[108] arbitrary detention,[109]

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97. BLACK'S LAW DICTIONARY 886 (6th ed. 1990).

98. *Id.* at 816.

99. *See id.*

100. *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stating it is a "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S.Ct. 2524 (1996); *see also In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) (stating "it is . . . well settled that the law of nations is part of federal common law").

101. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980).

102. *See* Jinks, *supra* note 78, at 469-70.

103. *See Filartiga*, 630 F.2d at 878 (involving wrongful kidnapping and torture by a former Paraguayan official); *Kadic*, 70 F.3d at 236 (utilizing the ATCA to bring claims of war crimes and genocide by Bosnian Serb leader); *In re* Estate of Ferdinand Marcos, Human Rights Litig. 25 F.3d 1467, 1472-76 (9th Cir. 1994) (allowing class action certification under ATCA for claims of torture and disappearances by the Marcos regime); Abebe-Jira v. Negewo, 72 F.3d 844, 845-46 (11th Cir. 1996) (upholding damages against a former Ethiopian official for torture). For a more exhaustive listing, see Kieserman, *supra* note 78, at 899 n.106.

104. The revisions effectuated no substantive change in the wording of the statute but reflect Congress's ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and subsequent obligation under UN protocols to incorporate "measures to ensure that torturers within their territories are held accountable for their acts." 138 CONG. REC. S2667-04, S2668 (daily ed. Mar. 3, 1992) (statement of Mr. Specter). *See also* STEPHENS & RATNER, *supra* note 17, at 25-29.

105. *See In re Estate of Ferdinand Marcos*, 25 F.3d at 1475.

106. *See Kadic*, 70 F.3d at 241-42.

107. *See id.* at 242-43.

slave labor[110] and cruel, inhuman or degrading punishment.[111] The courts have refused to entertain allegations of property expropriation,[112] support of armed forces,[113] or labor rights of picketing.[114]

Internationally accepted standards are not applied equally in ATCA litigation. The judiciary has reserved this statute as a vehicle for vindicating only those wrongs that are universally accepted as reprehensible. However, these "norms" are fluid; as societies develop, so does the accepted level of human rights.[115] A human right can become cognizable under the ATCA when it surpasses the level of a goal, and becomes accepted as a right throughout the world.[116] In other words, the right to have a freedom or to be free from a particular injustice must be ripe.

I argue that a right to be free from environmental degradation, as described by the *Aguinda* plaintiffs, has risen to the level of universal acceptance, giving this right a place in the *jus cogens* of international laws.

b. Law of Nations Addressing Environmental Standards

The duty of one nation to compensate another for its environmental misdeeds that cross international borders and result in serious harm is time-honored in international law.[117] This concept of remuneration rests on the principle of *sic utere*; in other words, do not use your property in a manner that will harm others.[118] In the *Aguinda* scenario, the tort committed is environmental harm resulting in human rights violations. It may be a variation of the *sic utere* principle in that the alleged acts were perpetrated directly on the plaintiffs' property. The petroleum extraction, ensuing oil spills, and toxic waste release occurred directly on the lands upon which

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108. *See* Forti v. Suarez-Mason, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988).

109. *See* Xuncax v. Gramajo, 886 F. Supp. 162, 184-85 (D. Mass. 1995).

110. *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997).

111. *See Xuncax*, 886 F. Supp. at 187-89.

112. *See Unocal Corp.*, 963 F. Supp at 899 (clarifying an earlier order dismissing plaintiffs' expropriation of property claim).

113. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (dismissing Nicaraguan plaintiffs' allegations of a U.S. federal government conspiracy to support the *contras* in order to overthrow the Nicaraguan government).

114. *See* Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 51-52 (2d Cir. 1960).

115. *See* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989).

116. *See id.*

117. *See* STEPHENS & RATNER, *supra* note 17, at 89-90.

118. *See id.*

the plaintiffs live, as opposed to drifting to the plaintiffs homestead from Texaco's own property. Moreover, the lawsuit involves private parties, not states. A direct act of environmental harm may be seen as even more egregious than secondary pollution; and therefore, it contravenes the *jus cogens* law of nations.

The *sic utere* principle has been reaffirmed by various international documents.[119] The problem with reliance upon accepted international agreements in U.S. courts is that the United States, leader of the free world, has yet to secure Congressional ratification of most international conventions. Moreover, when ratification occurs, it is usually with reservations attached.[120] The good news is that we have existing case law and federal statutes that support the principles of these declarations, and may assist the federal judiciary in overseeing these types of claims.[121]

Curiously, the court in *Aguinda* noted a pleading of violations of international law without reference to a specific international document.[122] The court did not seem to find this problematic at the early stage of litigation, stating, "[n]o single document can create [non-treaty customary international law], but the unanimity of view as well as consistency with domestic law and its objectives are highly relevant."[123] However, specific international declarations address the types of harms alleged in *Aguinda*.

The triggering events in *Aguinda* consisted of environmental abuses, but the consequences of these actions have affected the basic human rights of the Ecuadorian plaintiffs. In a broad sense, the harms have affected the individual plaintiffs' fundamental "right to life, liberty and the security of the person."[124] The destruction of the environment in which a person lives can have a profound, if not deadly, impact upon basic human rights, thus, potentially violating the Universal Declaration of Human Rights.[125]

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119. *See infra*, notes 122-30 and accompanying text.

120. *See, e.g.*, LOUIS HENKIN ET AL., HUMAN RIGHTS 334 (1999).

121. Note the landmark case *Filartiga* was decided in 1980; the United States did not ratify the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment until 1991. Thus, there are universally accepted norms that can be adjudicated in U.S. Federal Courts utilizing the ATCA before our Congress moves to ratify existing conventions. *See also*, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *6 (S.D.N.Y. Apr. 11, 1994) (citing to various U.S. federal environmental statutes as "bespeak[ing] an overall commitment to responsible stewardship toward the environment").

122. *See Aguinda*, 1994 WL 142006, at *6.

123. *Id.* (citing to the UDHR, *supra* note 47, as an example).

124. UDHR, *supra* note 47, art. 3.

125. *See* STEPHENS & RATNER, *supra* note 17, at 92 n.74 (citing Case 7615, Inter-Am. C.H.R. 24, 28, 33 OEA/ser.L./V.11.66doc. 10 rev. 1 (1985)). The author points out the Brazilian government was held liable by the Inter-American Commission on Human Rights for not

Indeed, the international documents address the interrelatedness of environmental and human rights.[126] For instance, The Stockholm Declaration,[127] the premier international agreement on the environment, proclaims, "both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself."[128] This enunciation is then safeguarded as a "fundamental right to . . . an environment of a quality that permits a life of dignity, and well-being . . . " in the Declaration's first principle.[129] This theme has been repeated throughout U.N. documents,[130] with the Rio Declaration reaffirming the international standards put forth twenty years earlier in Stockholm.[131] While these documents affirm an individual right to a healthy environment, they also put forth an affirmative obligation to maintain and care for the environment.[132]

The international environmental principles receive strong criticism for their anthropocentric viewpoints.[133] In a very general sense, the philosophers divide into two camps: deep ecologists, who believe the natural world has an inherent value, and anthropocentrists, who view the worth of the environment according

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preventing the environmental harms leading to the decline in the Yanomami tribe of the Amazon. *See id.*

126. It is beyond the scope of this paper to address all existing international environmental agreements, declarations, or treaties; but for a comprehensive volume addressing international environmental law, see INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY (Anthony D'Amato & Kirsten Engel eds., 1996).

127. Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14Rev.1 (1973), 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

128. *Id.* at Proclamation 1.

129. *Id.* at § 2, Principle 1.

130. *See, e.g.*, Rio Declaration, *supra* note 48, at Principle 1 (declaring that "[h]uman beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."); *Experts Group on Environmental Law of the World Commission on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development*, adopted by, WCED Experts Group on Environmental Law, Article 1, U.N. Doc. WCED/86/23/Add. 1 (1986)(stating that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.") [hereinafter *Experts Group*].

131. *See* Rio Declaration, *supra* note 48, at Preamble, ("[r]eaffirming the Declaration of the United Nations Conference on the Human Environment . . . and seeking to build upon it.").

132. *See, e.g.*, Stockholm Declaration, *supra* note 127, at Principle 2 (declaring "natural resources . . . must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate"); *Experts Group*, *supra* note 130, art. 2 (reporting that "[s]tates shall ensure that the environment and the natural resources are conserved and used for the benefit of present and future generations."); Rio Declaration, *supra* note 48, at Principle 7 (declaring "[s]tates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.").

133. *See, e.g.*, ALEXANDER GILLESPIE, INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS 15-18 (1997).

to its utility and value to humans.[134] The deep ecology theory would certainly bring interesting litigation in the ATCA context, along with its own peculiar problems.[135] Realistically, however, the beliefs of protecting the environment, whether for the benefit of the people or for its own sake, support a common goal. If some of the international declarations appear to say the natural world deserves protection from a human utility point of view, at least one, the World Charter for Nature, explicitly lays out our interdependence with the environment.[136]

The *Aguinda* plaintiffs seek monetary damages to compensate the human victims, but the complaint also requests "equitable relief to remedy the contamination and spoliation of their properties, water supplies *and environment*." [137] The lawsuit itself recognizes the tie between the plaintiffs and the natural world. A big monetary judgment is meaningless if they can no longer survive in their environment. Accordingly, the equitable relief includes specific requests, such as the cleanup of the affected area, access to drinking water, and the establishment of a trust fund to finance environmental monitoring of the forest.[138]

Approximately thirty years ago, world leaders convened in Sweden to announce an international concern and recognition that protection of the environment protects human rights. Although not all environmental mishaps may constitute a violation of the law of nations,[139] the release of petroleum and hazardous wastes on such a large scale as in *Aguinda,* merit appropriate sanctions and penalties. The international documents, such as the Stockholm and Rio Declarations, collectively and individually, demonstrate the world's commitment to preserving and maintaining the global natural

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134. *See id.* at 4-15, 127-36. *See generally,* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? 7-33 (1996).

135. Assuming a foreign non-governmental organization (NGO) brought suit, the initial hurdle would be the standing doctrine. The exploration of this topic is outside the bounds of this paper. However, in the only ATCA claim brought by an organization I have uncovered, International Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992), the concurring opinion makes a strong argument against the NGOs and labor unions' standing to bring suit. *See International Labor Rights,* 954 F.2d at 748 (Sentelle, J., concurring).

136. *See* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 126, at 64 (citing to the World Charter for Nature, Preamble, (1982), 22 I.L.M. 455 (1983) (declaring awareness that "(a) Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrient . . . .")).

137. Aguinda v. Texaco, Inc., 157 F.3d 153, 156 (2d Cir. 1998) (emphasis added).

138. *See id.* at 156 n.2.

139. *See* Aguinda v. Texaco Inc., No. 93 Civ. 7527, 1994 WL 142006, at *7 (S.D.N.Y. Apr. 11, 1994) (citing Amlon Metals v. FMC, 775 F. Supp. 668 (S.D.N.Y. 1991). *Amlon Metals* concerned a single shipment of hazardous waste, versus the wide scale environmental harms conducted over an extensive period of time involved here. *See id.*

environment. The time is ripe for the *jus cogens* school of laws to encompass major environmental torts as violations of human rights.

2. *Prong Two: Defining the Defendant*

By definition, the ATCA would appear to provide a remedy against only official actions of states. International laws are accords between the states, and as such, may not always apply to private individuals. Indeed, the majority of the cases brought forth under the ATCA alleged wrongs by government officials.[140]

The ATCA has been likened to Section 1983 actions;[141] wherein, but for the person's stature as a state actor would the violation have been committed.[142] However, reading the statute, it can be utilized for "any civil action" for "a tort only, committed in violation of the law of nations or a treaty of the United States."[143] Historically, tort claims defined the civil cause of action between private individuals.[144] It appears the verbiage of the statute does not preclude suits against private defendants. The courts have noted that particular situations allow for suits against "private individuals as well as state actors."[145] The *Unocal* case,[146] like *Aguinda*,[147] named a private corporate defendant. However, it may be argued the private actors allegedly received a benefit at the expense of the plaintiffs because of the state's complicity in the actions.

Unocal is another situation involving the petroleum industry pleading ATCA claims; however, the torts were committed in a labor setting.[148] Unocal Corp. ("Unocal"), a U.S.-owned oil company, built

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140. *See* Kieserman, *supra* note 78, at 908-11. Kieserman notes that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-11 (1994), precludes jurisdiction over foreign countries with few exceptions. *See id.* This would account for the naming of individuals versus states.

141. *See* 42 U.S.C. § 1983 (1994). Section 1983 allows private citizens to sue for redress of Constitutional rights violations at the hands of state actors; Congress enacted the statute to enforce the provisions of the Fourteenth Amendment. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961).

142. *See* Kieserman, *supra* note 78, at 905-11.

143. 28 U.S.C. § 1350 (1993).

144. *See* BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

145. Jama v. United States Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (relying upon Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)). *See also* STEPHENS & RATNER, *supra* note 17, at 95. For an in-depth treatment of private plaintiffs and defendants in ATCA cases, see David P. Kunstle, Note, Kadic v. Karadzic: *Do Private Individuals have Enforceable Rights and Obligations Under the Alien Tort Claims Act?*, 6 DUKE J. COMP. & INT'L L. 319 (1996).

146. John Doe I v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

147. Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998).

148. *See* Unocal Corp., 963 F. Supp. at 880 (sustaining jurisdiction); *cf.* International Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992) (dismissing on jurisdictional grounds).

a gas pipeline in Myanmar (formerly Burma) as a joint project with the state government.[149] The plaintiffs claimed suffering torture and being forced into labor by Unocal and the military government.[150] The court found the foreign government defendants immune from suit as the commercial activity did not fall into the exceptions listed in the Foreign Sovereign Immunities Act ("FSIA").[151] But, the ATCA claims survived the motion to dismiss by the private defendant, Unocal.[152] This case is still pending.

In *Jota v. Texaco, Inc*, like *Unocal*, the harms alleged would not have been possible without the joint cooperation of the state of Ecuador.[153] But like Myanmar, Ecuador enjoys sovereign immunity under the FSIA.[154] However, arguing to let the private corporate offenders off the hook from a state action requirement perspective would defeat the purpose of the ATCA.

In these cases, it may be argued "but for" the state's willingness to comply with the desires of the private corporation, the violation of international law would not have occurred.[155] Countries such as Myanmar and Ecuador sustain a much-needed economic benefit from foreign investment, and will thus do whatever it takes to attract MNC's. Regulations may be overlooked regarding MNC's or fines suspended for violations, in order to acquire and keep the foreign investment coming in. Now, these types of actions do not relieve the host countries of liability; in fact, they make them more culpable. But, MNC's should not escape liability for engaging in tortious conduct—albeit with a national seal of approval.

International laws govern "international organizations" as well as states.[156] If MNC's intend to operate on a global scale, they must be held to the same international norms as the states and be held accountable for violations of international standards. However, until courts recognize MNC's as capable of violating (and complying with) international laws without the direction and assistance of

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149. *See Unocal Corp.*, 963 F. Supp. at 883-86.

150. *See id.*

151. *See id.* at 885-88.

152. *See id.* at 889-92.

153. 157 F.3d 153 (2d Cir. 1998).

154. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1994) (allowing for waivers in limited circumstances, such as when a nation state is an actual market participant).

155. *See* Kieserman, *supra* note 78, at 908-11. Kieserman points out the conundrum for MNC's engaging in acts that violate international laws in that they may be "left holding the bag" for their collusion with the foreign government. *See id.*

156. *See* BLACK'S LAW DICTIONARY 816 (6th ed. 1990).

states, the potential ATCA plaintiff must assert a concerted state effort.

IV. VARIOUS HURDLES IN ACTA LITIGATION

A. Forum Non Conveniens

The first line of defense in an ATCA suit is the federal common law doctrine of *forum non conveniens*.[157] The doctrine allows dismissal of a case, without prejudice, but only if the court otherwise has proper jurisdiction and venue.[158] Additionally, a case may not be dismissed on grounds of *forum non conveniens* absent a showing by the movant that an alternative forum exists to adjudicate the claims.[159] *Forum non conveniens* has diminished in U.S. federal courts since the passage of a federal statute allowing transfer of venue.[160] However, it continues to have great importance in cases where the alternate forum would be a foreign jurisdiction.[161]

The *forum non conveniens* doctrine is facially attractive to both the defendants and the courts in ATCA litigation. The events alleged in an ATCA claim will have taken place outside the borders of the United States. The discovery period will necessarily entail depositions of foreign nationals requiring translators and travel. Moreover, documents and other pertinent information will lie in the other country. Also, courts will be concerned about the necessity of applying either foreign law, choice of law, or both.[162]

In the *Aguinda* litigation, the plaintiffs have spent seven years fighting the defense of *forum non conveniens*. The peculiar nature of environmental claims makes this defense hard to overcome. The damages alleged in *Aguinda* took place and continue to harm an area of the world a continent away from the Second Circuit. The court has shown reservation to adjudicate these claims because of the

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157. For an excellent comment critiquing the use of the *forum non conveniens* doctrine to dismiss foreign plaintiff's lawsuits as discrimination see Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L. J. 513 (1996). For a strong article promoting the elimination of the doctrine in human rights litigation altogether, see Kathryn Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998).

158. *See* HAYDOCK, *supra* note 88, at 167. If jurisdiction or venue were improper, the case must be dismissed or transferred on those grounds, not *forum non conveniens*. *See id.*

159. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

160. *See* 28 U.S.C. § 1404 (1994). This statute, entitled "Change of venue," allows transfer for the "convenience of parties and witnesses, in the interest of justice," see § 1404(a), at the court's discretion, see § 1404(b). *See also* HAYDOCK, *supra* note 88, at 167.

161. *See* HAYDOCK, *supra* note 88, at 167.

162. *See id.*

inherent difficulties of determining the actual physical damage from the petroleum production.[163]

However, the plaintiffs allege Texaco headquarters spearheaded the policies and procedures leading to the damages in Ecuador.[164] Texaco's headquarters, along with all pertinent documents, are in New York. Additionally, if certified as a class, the named members would reasonably be able to travel to the United States to testify without an undue hardship.

Barriers such as language and choice of law should not bar the claims from adjudication in the United States either. Spanish is the second most common language in the United States and translation of witnesses or documents would be easily obtained. Also, the law pled is international, and these documents can readily be interpreted by our sophisticated federal judiciary.

The doctrine of *forum non conveniens* developed not as a punishment, but to eliminate burdens on the judiciary if the plaintiff chose an inconvenient location for trial.[165] But the doctrine results in dismissal, not solely a venue change, and therefore is regarded as a severe remedy that should not be taken lightly.[166] This accounts for the necessity of ensuring an alternate, adequate court exists where "justice would be better served."[167]

Ecuadorian courts jump out as the obvious alternative; the events, after all, occurred in that country. Texaco has maintained its agreement to suit in Ecuador.[168] However, the possibility of a fair trial in Ecuador has been questioned for some time,[169] and following the *coup d'etat* in January 1999, the possibility of justice there seems unlikely. In fact, on remand, the trial court has *sua sponte* researched the political situation in Ecuador and has ordered the parties to brief the issue of adjudication abroad in light of the recent

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163. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *2 (S.D.N.Y. Apr. 11, 1994).

164. *See id.* at *3.

165. *See* HAYDOCK, *supra* note 88, at 167.

166. *See id.*

167. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

168. Texaco has, according to the record, maintained an oral agreement to suit in Ecuador; however, by the January, 2000 order, Texaco had formally agreed to suit in Ecuador. *See* Aguinda v. Texaco, Inc., 2000 U.S. Dist. LEXIS 745, at *4 (Jan. 31, 2000).

169. *See* U.S. DEP'T OF STATE, ECUADOR COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1999 § 1(e) (Feb. 25, 2000) (noting "the judiciary is susceptible to outside pressure. . . . Judges reportedly rendered decisions more quickly or more slowly depending on political pressure or the payment of bribes."); *see also Aguinda*, 2000 U.S. Dist. LEXIS 745, at *5-6 (citing Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978) (finding Ecuador's military control of the courts to provide an unacceptable alternative forum)).

developments.[170] The court now appears willing to retain venue over the plaintiffs' claims. However, a final order on the issue is pending.

In the end, *forum non conveniens* relies upon the discretion of the court.[171] The court need not entertain a suit, regardless of proper jurisdiction and venue, if a more appropriate forum exists. However, given the chronic and current political unrest in Ecuador, and the claims of corporate parent responsibility, the *Aguinda* plaintiffs' choice of forum should not be disrupted.

B. International Comity

International comity is the practice of deference to the acts, laws, and jurisdictions of foreign countries.[172] Essentially, it is respect for another's sovereignty.[173] But international comity, as a judicial doctrine, is not easily reduced nor defined. The historical position relates to keeping the judiciary out of foreign relations; however, the modern view puts forth an expanded role of the judiciary in these matters.[174] The modern analysis is a balancing test, comparing "the foreign sovereign's interest in not having a U.S. court rule on the validity of its public actions with the interests of the coordinate branches of the U.S. government."[175]

The issue of deference to Ecuador has been frustrated by the state's changing opinions on the pending litigation. Initially, the lawsuit was thought to be a grave violation of its sovereignty. Ecuador filed motions with the court demanding dismissal so adjudication could be rightly pursued in its court system. Then, after dismissal of the plaintiffs' claims, Ecuador completely changed its position and backed the lawsuit! The appellate court reasoned two competing considerations have erupted as a result of the changed stance: orderly adjudication and deference to the wishes of the state where the events occurred.[176] Without resolving the comity issue,

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170. *See Aguinda*, 2000 U.S. Dist. *Lexis* 745, at *10.

171. *See id.*

172. *See* Jota v. Texaco, Inc., 157 F.3d 153, 159-60 (2d Cir. 1998) (citing Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997) (internal quotes omitted)).

173. *See id.*

174. *See* Curtis A. Bradley & Jack L. Goldsmith, *Commentary: Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2273 (1998).

175. Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J. L. & SOC. PROBS. 35, 60 (1998) (citing to W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990)).

176. *See Jota*, 157 F.3d at 160.

the court stated the parties' reliance upon Ecuador's position should be considered upon remand.[177]

While the sovereignty of states should be given due respect, the claims in an ATCA suit involve violations of international law. More precisely, they involve the *jus cogens* of international law, which, in theory, are held to be applicable to all states. For this reason, adjudicating these claims in U.S. courts should pose no threat to another state's sovereignty, and the doctrine of international comity is inapplicable.

C. The Corporate Veil

Peculiar to ATCA litigation initiated against a private MNC, the plaintiff will likely have to "pierce the corporate veil" of the subsidiary corporation operating in the foreign country. Piercing the corporate veil refers to looking beyond the usual limited liability of a corporation to remedy a fraud, wrong or injustice.[178] It can be imposed to find shareholder liability, or, in the case of *Aguinda*, parent company liability for the actions of its subsidiaries.[179] The phrase has a dangerous connotation; however, in practice from the plaintiff's perspective, the danger lies in instituting a suit without uncovering sufficient documentation to hold the real decision-maker, and money-holder, liable for its actions.

Prior to the institution of any litigation proceedings against the MNC-parent company in an ATCA suit, research must be done on the home base of the offending company. Knowledge of the name of the subsidiary's parent is not enough. The parent must have exerted a sufficient amount of control over the subsidiary to be held liable for its actions.[180] Corporations can run the lines of defense through various offspring to avoid just this type of liability. Of particular concern to ATCA plaintiffs is whether they can find evidence of a disregard of legal formalities or a failure to maintain "arm's length relationships" between the parent and subsidiary corporations.[181]

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177. *See id.*

178. *See* BLACK'S LAW DICTIONARY 1147-48 (6th ed. 1990).

179. *See* David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT'L & COMP. L. REV. 323, 324 (1996) (noting courts will pierce the corporate veil and find shareholder liability as a matter of public policy to right the wrongs of the corporation; citing United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (7th Cir. 1905)). Parent company liability for the actions of its subsidiaries is a prime issue in domestic environmental lawsuits. *See id.*

180. *See id.* at 333-34.

181. LARRY D. SODERQUIST ET AL., CORPORATE LAW & PRACTICE § 7:1 (2d ed. 1999).

The *Aguinda* litigation is against the U.S. headquarters of a MNC. Whether Texaco, Inc. of New York exerted substantial control over Texaco de Petroleos del Ecuador, S.A., remains an issue. In order for the plaintiffs to be successful, they must pierce the corporate veil between Texaco's operations in Ecuador and the home base in New York.

Texaco has questioned the validity of the forum based on the notion that its U.S. base of operations is distinct from the subsidiary corporation. By contrast, the plaintiffs assert that New York "micro-managed its Ecuadorian operations."[182] Former employees have stated that contracts were routinely sent to New York for approval and signatures; direct phone lines existed between Ecuador and New York for close communications; and reports and updates were photocopied and mailed to the United States on a daily basis.[183] Yet, the plaintiffs allege Texaco failed to support its Ecuadorian project with the necessary information to prevent or minimize environmental harms.[184]

Judge Broderick granted the initial period of limited discovery to determine the validity of potential liability for the U.S. office of Texaco.[185] Assuming the plaintiffs uncovered no evidence of substantial control and authority exercised by the New York office over the Ecuador operations, the suit would not go forward. However, if the evidence demonstrates Texaco's headquarters truly served as the base of operations, the court may find liability for the parent corporation.

V. CONCLUSION

Seattle promulgated the beginning of a new era of activism, one of coalition-protests, whose members span ideological, socio-economic, and cultural backgrounds. The activist's agendas overlap with human rights, labor rights, and environmental rights at the crossroads. MNC's are a reasonable target because the majority are based in developed countries with high levels of regulation and protections for both the worker and the environment; yet, it appears

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182. Kimerling, *supra* note 33, at 319.

183. *See id.* (citing to amicus briefs in support of the plaintiffs containing a former employee's affidavit).

184. *See id.*

185. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994) (stating "discovery is limited to . . . events relating to the harm alleged by plaintiffs occurring in the United States, including specific or generalized directions initiating events to be implemented elsewhere, communications to and from the United States and discussions in the United States concerning, or assistance to or guidance for events occurring elsewhere . . . .").

in some instances that the MNC's standards are altered according to where they are working—in the name of profits.

The harms alleged in *Aguinda v. Texaco, Inc.* exemplify the convergence of environmental and human rights. While the input of the grassroots organizers and non-governmental organizations cannot be overlooked, the *Aguinda* plaintiffs may provide meaningful legal precedent that will further awareness of the interconnectedness of human and environmental rights. The rapid globalization of industry and business, calls for a quicker development of international norms for human, labor, and environmental rights. MNC's should be held accountable for their misdeeds and negligence. The time has come for the expansion of the *jus cogens* of international law to include large-scale environmental harms that infringe upon people's basic human rights.

VI. POSTSCRIPT

While this article was prepared to ship to the printer, Judge Jed Rakoff entered an Order granting Texaco's Motion to Dismiss the plaintiffs' claims.[186] Judge Rakoff put off this long awaited decision pending the outcome of Plaintiffs' mandamus petition to the Second Circuit seeking recusal of Judge Rakoff.[187] The Second Circuit denied Plaintiff's petition.[188] The appellate court also denied Plaintiffs' motion for rehearing *en banc* on May 29, 2001.[189] One day later, Judge Rakoff proceeded to issue his order granting Texaco's Motion to Dismiss, on May 30, 2001.[190] The trial court's order reasoned the doctrine of *forum non conveniens*, coupled with Texaco's explicit assent to suit in Ecuador, deemed dismissal appropriate.[191] Presumably, the plaintiffs are mounting an appeal. While this order comes as a disappointment to the author, and surely to the plaintiffs, it by no means delineates a bar to toxic tort actions against MNC's in U.S. Federal Courts under the ATCA. The analysis of this most recent opinion will be left to another day, another note.

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186. *See* Aguinda v. Texaco, Inc., No. 93CIV7527, 2000 WL 579776 (S.D.N.Y. May 30, 2001).
187. *See id.* at *3.
188. *See In re* Aguinda, 2000 WL 33182244 (2d Cir. Feb. 23, 2001).
189. *See Aguinda*, 2000 WL 579776, at *3.
190. *See id.*
191. *See id.*