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CORPORATE ACCOUNTABILITY FOR ENVIRONMENTAL HUMAN RIGHTS ABUSE IN DEVELOPING NATIONS: MAKING THE CASE FOR PUNITIVE DAMAGES UNDER THE ALIEN TORT CLAIMS ACT

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I. INTRODUCTION

Professors Marc Galanter and David Luban argue that punitive damages constitute "the best available means for social control . . . of economically formidable wrongdoers."[1] However, many of the most "economically formidable" corporations conduct operations outside the borders of the United States, where punitive damages are generally not available or are available in very limited circumstances.[2] Multinational corporations (MNCs) possess the "size, technology, and economic reach necessary to influence human affairs on a global basis" and often amass more wealth than the nation-states that supposedly regulate them.[3] Given the massive power and influence of MNCs and the general unavailability of punitive damages abroad, it is logical to consider whether U.S. corporations could be subject to liability in the United States for their operations abroad.

While punitive damages may be assessed against U.S. corporations for human rights violations committed outside the U.S. pursuant to the Alien Tort Claims Act (ATCA),[4] current judicial interpretation of the Act does not allow for a cause of action for environmental harms. In *Beanal v. Freeport-McMoran, Inc.*, the Fifth Circuit Court of Appeals held that an Indonesian citizen's environmental human rights action against a New Orleans-based mining corporation failed to state a claim upon which relief could be granted in part because the claims for severe environmental destruction and cultural genocide were not shown to violate a *universally accepted standard* or *norm of customary international law* as required by the ATCA.[5] The plaintiff in *Beanal*, who sued on behalf of his native tribe, alleged that Freeport-McMoran, Inc. (Freeport) dumped one hundred thousand tons of toxic acid mine tailings per day into three different rivers, amounting to cultural genocide.[6] People living near Freeport's mine reported increased health prob-

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1. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1396 (1993).

2. Barbara J. Houser, *Classification and Treatment of Foreign Claims in U.S. Bankruptcy Proceedings*, 36 TEX. INT'L L.J. 475, 491 (2001) (quoting *In re* Dow Corning Corp., 244 B.R. 634, 660 (Bankr. E.D. Mich. 1999)).

3. Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 882 (1999) (quoting THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 31 (1989)).

4. *See* Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379 (2007).

5. 197 F.3d 161, 167 (5th Cir. 1999).

6. Randi Alarcon, *Beanal v. Freeport-McMoran, Inc.*, 13 N.Y. INT'L L. REV. 141(2000).

lems and destruction of fish and vegetation which they relied on for sustenance.[7] The complaint also alleged that Freeport's security force acted in concert with the Republic of Indonesia to violate international human rights.[8]

The harms alleged in the *Beanal* case, and the inability of the law to prevent or repair such harms, are part of a large pattern of problems the author will address in this paper. This paper suggests that Congress amend the ATCA to create a private right of action for a narrow category of environmental claims against United States corporations, in order to provide redress to victims and impose civil liability in the form of punitive damages against defendant corporations. Specifically, severe environmental harm that has a direct, substantial, and widespread effect on human health and well-being should be actionable under the statute.

In order to familiarize the reader with the ATCA, the author will first provide a background of the development of cases under the ATCA with respect to corporate liability and the assessment of punitive damages. Second, the author will argue that amending the Act is necessary to ensure the availability of punitive damages in order to achieve three distinct goals: (1) to incentivize lawsuits and provide greater accountability with regard to corporations' destructive environmental practices in developing countries; (2) to provide a forum to victims of environmental human rights violations; and (3) to provide compensation beyond actual damages in accordance with the goals of environmental and transnational public litigation. Third, the author will examine the link between severe environmental degradation and human health and well-being and propose that Congress amend the ATCA to create an express right of action for environmental human rights claims under narrowly defined circumstances. Fourth, the author will contemplate objections to, and the relative costs of, the proposed amendment.

II. CORPORATE LIABILITY UNDER THE ATCA

The ATCA, originally part of the Judiciary Act of 1789,[9] provides simply that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or a treaty of the United States."[10]

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7. Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 339 (1997).

8. Alarcon, *supra* note 6, at 141.

9. Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1071 (2005).

10. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

Courts have interpreted the statute as creating a limited cause of action in addition to conferring jurisdiction upon U.S. courts.[11] According to the plain language of the statute, a plaintiff bringing a claim under the ATCA must establish three elements: (1) a civil suit for a tort; (2) brought by an alien plaintiff; and (3) committed in violation of the Law of Nations or a treaty of the United States.[12]

Punitive damages are allowed under the Act when the trier of fact finds the defendant's conduct to be especially reprehensible, malicious or reckless.[13] However, scholars note that as a practical matter, punitive damages are generally warranted in any ATCA claim in which the plaintiff prevails on the merits.[14] This is because an essential element of an ATCA claim is proof that the defendant violated the Law of Nations, which by definition requires evidence of an "egregious violation of a well-established, universal norm of international law."[15] Because the standards for asserting a claim for which relief can be granted under the ATCA and for awarding punitive damages overlap, the potential for punitive damage awards in cases presenting triable issues is "enormous," with punitive damage awards often exceeding $500,000.[16] Punitive damage awards are also expansive because ATCA claims are often brought as class actions on behalf of entire tribes or communities.[17]

U.S.-based corporations have only recently become amenable to suits under the ATCA as the result of three landmark decisions: *Filártiga v. Peña-Irala, Kadic v. Karadzic,* and *Doe I v. Unocal Corp.*[18] The 1980 *Filártiga* decision, considered by some scholars to be the "*Brown v. Board of Education* of transnational public litiga-

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11. Gul, *supra* note 4, at 399.

12. *Id.* at 394; 28 U.S.C. § 1350 (2000); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

13. Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law, in* 21 CAUSES OF ACTION 2D 327, § 51 (2007).

14. *Id. See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 202 (D. Mass. 1995) (awarding compensatory damages of $14.75 million and punitive damages of $27.75 million to Guatemalan nationals in wrongful death action against former Guatemalan government official); Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996) (affirming jury award of $766 million in compensatory damages and $1.2 billion in punitive damages); Paul v. Avril, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (awarding $24 million in punitive damages to Haitian citizens for injuries resulting from torture and false imprisonment by former Haitian military leader).

15. Holton, *supra* note 13, § 51.

16. *Id.* §§ 50-51.

17. For example, in Doe I v. Unocal Corp., 395 F.3d 932, 943 (9th Cir. 2002), *reh'g en banc granted,* 395 F.3d 978 (2003), *vacated, appeal dismissed per stipulation,* 403 F.3d 708 (2005), residents of Myanmar alleged human rights atrocities committed by Unocal Corporation in connection with Myanmar military.

18. Gul, *supra* note 4, at 395.

tion," brought the previously obscure statute into the spotlight.[19] In *Filártiga v. Peña-Irala*, the Second Circuit Court of Appeals held that torture perpetrated by a Paraguayan official violated the Law of Nations and created a cause of action under the Act.[20] The court found that a determination of a violation of the Law of Nations depends on the current international consensus on the violation's illegality.[21] The current international consensus may be 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."[22] Thus, new torts may become actionable under the ATCA as international law evolves.

In the second landmark ATCA decision, *Kadic v. Karadzic*, the Second Circuit determined that certain forms of conduct violate the Law of Nations regardless of whether the actions are undertaken by state officials or private individuals.[23] In *Karadzic*, victims of brutal human rights violations committed in Bosnia brought suit against the leader of the insurgent Bosnian-Serb forces.[24] The *Karadzic* court rejected the district court's finding that application of the Law of Nations is confined to state action, stating that "[t]he [trial court] Judge appears to have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture . . . without consideration of the substantial body of law . . . that renders private individuals liable for some international law violations."[25] Under *Karadzic*, private actors may be held independently responsible for tortious violations of customary international law.[26]

Finally, the Ninth Circuit's decision *Doe I v. Unocal Corp.* explicitly recognized for the first time that corporations may be held civilly liable under the ATCA for violations of international law in conjunction with state authorities.[27] In *Unocal*, residents of Myanmar alleged that the Myanmar military committed human rights violations in furtherance of Unocal's oil pipeline project.[28] The *Unocal* decision is especially pertinent to this discussion, because the most significant violations of environmental human

19. *Id.* at 395 (citing Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991)).
20. 630 F.2d 876, 878 (2d Cir. 1980).
21. *See id.* at 880.
22. *Id.* (quoting U.S. v. Smith, 18 U.S. 153, 160-61 (1820)).
23. 70 F.3d 232, 239 (2d Cir. 1995).
24. *Id.* at 236.
25. *Id.* at 239.
26. *See id.*
27. Doe I, 395 F.3d at 962.
28. *Id.* at 936.

rights arise out of the operations of "hybrid state-corporate enterprise[s]."[29]

Together, *Filártiga*, *Karadzic*, and *Unocal* provide the "general contours" for corporate liability under the ATCA.[30] These decisions demonstrate that international legal norms may apply to private actors, and that private corporations may be held liable "both when they act in complicity with state actors and when they commit violations that do not require state action, such as crimes against humanity . . . ."[31]

III. NECESSITY OF PUNITIVE DAMAGES UNDER THE ATCA FOR ENVIRONMENTAL HUMAN RIGHTS CLAIMS AGAINST U.S. CORPORATIONS

The availability of punitive damages under the ATCA for international environmental human rights claims serves three distinct purposes: (1) to provide greater accountability with regard to corporations' destructive environmental practices; (2) to provide a forum and a voice to victims of environmental human rights violations with otherwise limited prospects of redress; and (3) to fully compensate plaintiffs for claims in which monetization is difficult.

A. Lack of Domestic and International Environmental Standards Necessitates the Need for an Alternative Regulatory Device

While corporations operating within U.S. borders face civil liability, including punitive damage fines, and even criminal sanctions for environmentally destructive practices,[32] U.S. corporations

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29. Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 139 (2007).

30. Gul, *supra* note 4, at 394.

31. Beth Stephens, Comment, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 538 (2004-2005).

32. Civil penalties and other relief are available under several federal statutes: the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7691q (2000); the Clean Water Act (CWA) of 1977, 33 U.S.C. §§ 1281a-1294 (2000); the Oil Pollution Act (OPA) of 1990, 33 U.S.C. §§ 2701-2762 (2000); the Safe Drinking Water Act (SDWA) of 1974, 42 U.S.C. §§ 300-300j-25 (2000); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (2000); the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (2000); the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901-6992k (2000); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (2000); and the Emergency Planning and Community Right-to-Know Act (EPCRA)of 1986, 42 U.S.C. §§ 11001-11050 (2000). These statutes grant enforcement authority to the Environmental Protection Agency, and actions are generally adjudicated by administrative law judges. Civil penalties, enforcement of regulatory orders, and injunctive relief may also be obtained through claims brought in federal district court by the United States Department of Justice. Some federal pollution prevention statutes include criminal sanctions under cer-

operating abroad essentially operate in the absence of any enforceable international or domestic standards for such practices.[33]

Current international law does not hold MNCs liable for environmental destruction or its associated human rights abuses because environmental harm to individuals is not considered to be connected to a substantive right.[34] Moreover, as Alison Lindsay Shinsato argues, "[t]he body of international human rights law does not effectively protect against human rights violations which result from environmental degradation because it has not evolved to keep pace with the rapid advance of economic globalization and the privatization of resources."[35] Therefore, Shinsato continues, "human rights violations stemming from environmental destruction by [multinational corporations] are not addressed in current international human rights law."[36]

Furthermore, because international law traditionally monitors relations between nation-states, not private entities,[37] some scholars characterize MNCs as "legally untouchable" under international law.[38] While the Organization for Economic Cooperation and Development and the United Nations have attempted to fashion codes of conduct for MNCs, these guidelines are, by their own language, "voluntary and not legally enforceable."[39] Thus, MNCs are not subject to any "comprehensive *mandatory* international code of corporate conduct targeting human rights practices."[40]

Moreover, international efforts to hold MNCs accountable are futile against the often collusive relationships between host governments of developing countries and MNCs, who condone each other's second-rate treatment of native citizens and the environment.[41] According to Professor Saman Zia-Zarifi, when a developing host country is eager to gain corporate capital and expertise

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tain circumstances. John C. Cruden and Bruce S. Gelber, *Federal Civil Environmental Enforcement — Processes, Actors, and Trends, in* ALI-ABA COURSE OF STUDY MATERIALS, ENVIRONMENTAL AND TOXIC TORT LITIGATION, SM072 ALI-ABA 695 (Feb. 2007).

33. *See* Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. U. J. INT'L HUM. RTS. 186 (2005).

34. *Id.*

35. *Id.* at 195.

36. *Id.*

37. Kieserman, *supra* note 3, at 882-83.

38. Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 751 (2004).

39. Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 85 (1999) (quoting Organization for Economic Cooperation and Development, *Declaration on International Investment and Multinational Enterprises*, 15 I.L.M. 969, 970, annex (1976)).

40. Kieserman, *supra* note 3, at 883 (emphasis added).

41. *Id.* at 884.

the host government often does not monitor corporate conduct, and as a result, the corporation acts in the absence of domestic or international judicial scrutiny.[42] Thus, the relationship between the host country and the MNC is effectively unregulated.[43] Some scholars even declare that MNCs are so far beyond the control of national governments that they "operate in a legal and moral vacuum."[44]

Given that international and domestic law fails to effectively regulate the environmental practices of MNCs, the availability of punitive damages for environmental human rights abuse under the ATCA provides an alternate form of indirect governance. Specifically, the availability of punitive damages for international environmental human rights abuses could provide an incentive for plaintiffs to bring suit, thereby bringing corporate environmental human rights violators under the scrutiny of U.S. courts.

The assessment of punitive damages pursuant to the ATCA is necessary to provide a check on the corporate environmental practices in developing countries given the lack of effective international and domestic environmental regulations. Because many "corporate decisions are driven by cost-benefit analysis rather than social responsibility,"[45] the threat of punitive damages is a fundamentally necessary check. As Professor Zygmunt J.B. Plater explains, "[w]e cannot expect people to maximize the public good and minimize the public detriments of their activities on the basis of altruism, which is why we have law."[46]

Economic analysis clearly supports the notion that punitive damage awards impact corporate decision-making.[47] Corporate decision-making focuses primarily on economic efficiency, with utmost emphasis placed on wealth maximization.[48] Efficiency is the only value of relevance, and if protection of the environment is calculated to reduce efficiency, such protection will be disregarded.[49] However, if the threat of punitive damages is a consideration, ra-

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42. Zia-Zarifi, *supra* note 39, at 86-87.

43. Kieserman, *supra* note 3, at 883.

44. *Id.* (quoting Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 2 (1995)).

45. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 935 (2005).

46. Zygmunt J.B. Plater, *Facing a Time of Counter Revolution—The Keypone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 694 (1995).

47. Michael Lewis Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1073, 1076 (1989) (responding to E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989)).

48. *See* Shinsato, *supra* note 33, at 188.

49. *Id.*

tional actors will avoid conduct that generates punitive damages in order to minimize their liability.[50]

Professor Michael Lewis Wells argues that punitive damages are an efficient deterrence mechanism because the threat of punitive damage awards forces corporations to take full account of the social costs generated where compensatory damages are not sufficient to remedy the harm caused to the plaintiffs.[51] Actual damages cannot sufficiently account for all of the harm caused by severe environmental destruction because of the difficulty in monetization.[52] Therefore, punitive damages are necessary to ensure that U.S. corporations take responsibility for the full social costs of the environmental damage and threats to human health and well-being caused by the corporations' operations in developing countries.

Moreover, according to Professor A. Mitchell Polinsky and Professor Steven Shavell, punitive damages should be awarded only when an injurer has a significant chance of escaping liability for the harm he caused.[53] Given the unavailability of punitive damages in foreign jurisdictions, the dearth of international and domestic environmental law standards, and the lack of adequate judicial redress for victims of international environmental human rights abuses, MNCs have a significant chance of escaping liability for environmental harm and concomitant human rights abuses. Therefore, punitive damages are necessary to ensure that corporations do not continue to benefit from engaging in conduct that gives rise to environmental human rights harm.

B. The ATCA Provides a Forum to Victims of Environmental Human Rights Violations

Provided that the perpetrators of environmental harms are subsidiaries of U.S. corporations, and given that the victims are largely unable to obtain adequate compensation or redress internationally or domestically, it is rational to contemplate utilization of U.S. courts. By allowing foreign plaintiffs to bring suit in the United States for violations of international law, the ATCA provides a much needed forum for victims of environmental human rights abuses. As Natalie Bridgeman argues, "plaintiffs should

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50. Wells, *supra* note 47, at 1076.

51. *See id.*

52. *See* Alex Sienkiewicz, *Toward a Legal Land Ethic: Punitive Damages, Natural Value, and the Ecological Commons*, 15 PENN ST. ENVTL. L. REV. 91, 95-96 (2006).

53. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REVIEW 869, 873-74 (1998).

benefit from a globalization of justice, just as corporations have benefited from a globalization of resources and labor."[54]

Professor Hari Osofsky argues that the ATCA offers the "best" chance of relief for victims of corporations' environmentally destructive practices and concomitant human rights abuses who cannot obtain justice elsewhere.[55] The victims of environmental human rights violations are most often indigenous citizens of developing countries, where the prospects for redress are limited at best.[56] To the extent that domestic law protects citizens from environmental harm, the victims' native countries often "provide little hope of recovery due to lack of democratic governance, inadequate environmental legislation, limited tort law, and low potential amounts granted from judgments."[57]

A number of factors weigh against recovery in a developing nation including (1) cases are tried by judges, not juries; (2) punitive damages are generally unavailable in foreign jurisdictions or are available in very limited circumstances; (3) foreign countries do not allow American-style contingency fees; (4) foreign courts award lower tort damages and use less plaintiff-friendly standards for liability; and, (5) cultural factors lead to less litigiousness.[58] Professor Henry Saint Dahl notes that "[p]unitive damages for pain and suffering . . . are usually unavailable to plaintiffs in civil law systems."[59] Furthermore, according to Professor Benjamin C. Zipursky, many foreign jurisdictions have eliminated punitive damages from their tort law system.[60]

The plaintiffs' chances of recovery from an international tribunal are not much better, because most international tribunals generally do not recognize an individual right of action.[61] Efforts by individual plaintiffs seeking to represent the interests of a larger group or class are also generally unsuccessful.[62] Unfortunately, most international institutions limit the right of petition to state

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54. Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 1-2 (2003).

55. Osofsky, *supra* note 7, at 340.

56. *See generally id.* at 336-45.

57. *Id.* at 340.

58. Houser, *supra* note 2, at 491 (quoting *In re* Dow Corning Corp., 244 B.R. 634, 660 (Bankr. E.D. Mich. 1999)).

59. Henry Saint Dahl , *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 42 n. 89 (2003-2004) (quoting Antonio Gidi, *Class Actions in Brazil*, 51 AM. J. COMP. L. 311, 319-20 (Spring 2003)).

60. Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 155 (2005).

61. Osofsky, *supra* note 7, at 340.

62. William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353, 356 (2003).

actors.[63]

C. Actual Damages Do Not Fully Compensate Victims or Meet the Policy Objectives of Transnational Public Litigation

Because the harm caused by environmental destruction and human rights violations is difficult, if not impossible, to monetize, punitive damages are necessary to fully compensate victims. As Alex Sienkiewicz notes, once wide scale environmental harm occurs, "its scale, intensity, duration, and short and long-term effects are extremely costly to measure."[64] Moreover, actual damages cannot necessarily account for the lasting health effects of consuming contaminated air or water.[65] Because the harms inflicted by environmental destruction and its associated human rights abuses often defy monetization, Sienkiewicz argues that punitive damages are more effective than any reactive law or policy because reactionary measures are unlikely to sufficiently compensate all of those harmed.[66]

In addition, the public policy implications associated with transnational public litigation and environmental litigation necessitate the use of exemplary damages to denounce socially reprehensible corporate conduct and establish conduct norms. Claims brought under the ATCA are considered a type of "transnational public law litigation"[67] because foreign plaintiffs seek not only redress for their harms, but a decision regarding whether a particular defendant's actions are egregious enough to meet the ATCA threshold.[68]

Professor Saman Zia-Zarifi observes that transnational public law litigation "seeks redress for individual victims at the same time as articulating a norm of international law that can be applied to other violators of international law."[69] Thus, transnational public litigation by its very nature seeks to make examples of corporate violators and pronounce new customary international codes of conduct. Because actual damages seek only to redress plaintiffs

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63. *Id.*
64. Sienkiewicz, *supra* note 52, at 95.
65. *See id.* at 96.
66. *Id.* at 95.
67. Transnational public law litigation refers to claims brought by "private individuals, in U.S. courts, alleging a violation of international law." Lyndsy Rutherford, Note, *Redressing US Corporate Harms Abroad Through Transnational Public Law Litigation: Generating A Global Discourse on the International Definition of Justice*, 14 GEO. INT'L ENVTL. L. REV. 807, 810 (2002).
68. *Id.* at 812.
69. Zia-Zarifi, *supra* note 39, at 87.

for losses incurred by reason of the defendant's unlawful conduct,[70] they are inadequate to meet the broad policy objectives of transnational public litigation. In contrast, the exemplary nature of punitive damages is well-aligned with the policy objectives of transnational public litigation.

Moreover, environmental claims in and of themselves encompass questions of public policy and values. Sienkiewicz characterizes the public and ethical nature of environmental law claims:

> The problems and social tensions surrounding harm to the natural environment are not mere matters of private property and tortious behavior. They are ethical dilemmas of the highest order and touch upon the existential and metaphysical foundations of civil society, the rule of law, and humanity's role on earth. . . . Whether disastrous or *de minimis*, harm to the natural environment comprises an ethical problem. This holds true independent of whether environmental harm is born of a malicious crime or an unwitting act of negligence. Natural values are often public by their very nature, transcending notions of private property.[71]

Accordingly, actual damages cannot adequately encompass all of the ethical and public dimensions of environmental harm. Indeed, punitive damages are "particularly prevalent" in U.S. environmental torts litigation.[72] Accordingly, punitive damages under the ATCA should be utilized to compensate victims of environmental human rights abuse committed by U.S. corporations.

IV. AMENDING THE ATCA TO RECOGNIZE ENVIRONMENTAL HUMAN RIGHTS CLAIMS AGAINST U.S. CORPORATIONS

Essentially, the hesitancy of courts to recognize ATCA claims

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70. *See* E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 295 (2002) (recognizing that while punitive damage awards may benefit an individual plaintiff employee, punitive damages "serve an obvious public function in deterring future violations"); *see also* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (recognizing that while compensatory damages serve to redress harm caused to the plaintiff by the defendant, punitive damages serve as 'private fines' aimed at punishing the defendant and deterring future unlawful conduct; moreover, unlike compensatory damages, punitive damage awards are an expression of the jury's moral condemnation).

71. Sienkiewicz, *supra* note 52, at 93.

72. James R. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance. Co. v. Haslip*, 22 ENVTL. L. 573, 583 (1992).

arising from environmental harm and the lack of judicial guidance regarding the appropriate scope of the ATCA necessitates amending the statute to provide an express right of action for environmental human rights claims against U.S. corporations. Such an amendment would help make corporations accountable for their environmental practices abroad and provide redress to victims.

A. The Unclear Scope of the ATCA

Under the current ATCA, the potential for punitive damages is great; however, successfully establishing an environmental human rights claim under the Act is difficult. In *Beanal v. Freeport-McMoran, Inc.*, where the plaintiff sought to establish a claim for cultural genocide on the basis of three different international environmental law principles—the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle[73]—the Fifth Circuit Court of Appeals found that these sources of international law merely referred to a general sense of environmental responsibility and lacked "articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts."[74] The *Beanal* court's rejection of the plaintiff's reliance on three different principles of international environmental law demonstrates the difficulty in establishing a successful environmental human rights claim.

In addition, the dearth of environmental jurisprudence under the Act and the lack of clear judicial guidance regarding the appropriate scope of the statute also disfavor environmental human rights claimants. While the Supreme Court's recent decision in *Sosa v. Alvarez-Machain* offered clarification with respect to the intended purpose of the ATCA, the decision left many scholars questioning the scope of the Act.[75]

In *Sosa*, the Supreme Court held that the statute's purpose was not simply to provide jurisdiction, but to implicitly provide a right of action for a limited number of claims.[76] The Supreme Court found that "[the statute's] jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the

73. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 n.5 (5th Cir. 1999).

74. *Id.* at 167.

75. James Boeving, Essay, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 133 (2005).

76. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

time."[77]

Based on this interpretation of legislative intent, the Court determined that any claim based on "the present-day [L]aw of [N]ations [resting] on a norm of international character *accepted by the civilized world* and *defined with a specificity* comparable to the features of the 18th-century paradigms [the Court has] recognized" may be actionable under the ATCA.[78] These eighteenth century paradigms were "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[79] Unfortunately, the Court offered no further guidance as to the precise meaning of this standard.

Writing for the majority in *Sosa*, Justice Souter noted that the Court "would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations" and that "Congress . . . may modify or cancel any judicial decision [with respect to the ATCA] so far as it rests on recognizing an international norm as such."[80] Therefore, before proposing an amendment to the ATCA, it is necessary to show that environmental human rights rest on international norms.

B. Why Environmental Human Rights Abuse Constitutes a Violation of Customary International Law: The Relationship Between Extreme Environmental Harm and Human Health and Well-Being

This section will analyze the close relationship between extreme environmental harm and human health and well-being to argue that environmental human rights abuses infringe upon indigenous citizens' rights to health and well-being. This section will further show that these rights are recognized by "articulable or discernable" international norms, as required by the ATCA.[81]

Human casualties arise from corporate environmental harm in one of two ways. First, severe environmental degradation directly compromises the health and sustainable development of indigenous citizens. Alison Lindsay Shinsato describes how environmentally destructive projects are in and of themselves threatening to humans:

> Environmental destruction leaves local populations with two basic options: a) to leave the degraded en-

77. *Id.* at 724.
78. *Id.* at 725 (emphasis added).
79. *Id.* at 724.
80. *Id.* at 731.
81. Beanal, 197 F.3d at 167.

> vironment for a more habitable place and become environmental refugees or environmentally displaced people; or b) to remain in the degraded environment and risk increased morbidity and mortality through exposure to pollution and depleted, degraded, or contaminated food and water sources.[82]

Second, human rights violations arise in connection with environmentally destructive, large scale resource extraction projects when MNCs in search of cheap labor and lax environmental standards form alliances with some of the "most barbarous and illegitimate regimes on earth."[83] The political structure and socio-economic landscape of these countries typically require MNCs to form joint ventures with government-run corporations or share ownership of a private corporation with the host nation.[84] International legal scholar Pauline Abadie describes a common scenario which leads to environmental and human rights abuses as a result of the relationship between the MNC and host government:

> [The] MNC invests in a country with a poor human rights record, undertakes large oil or gas developments, mining or commercial forestry operations that provide substantial cash flow to the regime in power. The MNC contracts private guards (often a "subsidiary" of governmental police forces) or contracts directly with military officials to provide security on the worksite. In most cases, instead of securing the operation against potential robbers or other legitimate threats, the private guards or military junta understand their mission as eliminating any opposition against the given project. . . . In most instances, the MNC is not the violator *per se*. Most human rights reports, however, establish substantial ties exist between those who commit the atrocities and the MNC operating in the region.[85]

As the above example demonstrates, indigenous citizens become victims of human rights atrocities as a direct consequence of their opposition to the corporation's large scale, environmentally

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82. Shinsato, *supra* note 33, at 188.

83. Kieserman, *supra* note 3, at 882 (quoting John Vidal, *A Dirty Business Bogged Down in a Moral and Political Mire*, GUARDIAN, Aug. 15, 1998, at 5).

84. Holton, *supra* note 13, § 2.

85. Abadie, *supra* note 38, at 754-55.

destructive resource extraction project which threatens their health and very existence. The human rights atrocities committed by hired security personnel are likewise attributable, at least in part, to the corporation's desire to squelch opposition to the environmentally destructive project.

Thus, in some instances, corporate environmental harm leads to infringement upon indigenous citizens' rights to health, well-being, safety, and even dignity. Three international instruments arguably demonstrate that these rights are "*accepted by the civilized world* and *defined with . . . specificity*," as required under *Sosa* to establish a violation of the Law of Nations.[86] First, the Hague Declaration expressly acknowledges "the right to live in dignity in a viable global environment."[87] Second, the Declaration of the Right to Development provides for "equality of access to basic resources and food."[88] And third, while the Stockholm Declaration allows nations the "sovereign right to exploit their own resources pursuant to their own environmental policies," it also grants citizens the "fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being. . . ."[89]

These international instruments show that protection of environmental human rights is recognized at the international level. However, because the determination of a violation of an internationally recognized norm requires a case-by-case analysis, a court might determine the above declarations are not sufficiently binding on the individual defendant or that these norms are not sufficiently particularized. The lack of environmental ATCA jurisprudence and the vaguely defined scope of the ATCA also make the determination of the Law of Nations in the environmental arena difficult. Therefore, an amendment to the ATCA is necessary to ensure that U.S. corporations are held accountable for environmental human rights abuses committed in developing countries and to ensure that punitive damages are available to the victims of these violations.

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86. Sosa, 542 U.S. at 725 (emphasis added).

87. Shinsato, *supra* note 33, at 198 (quoting Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308, *reprinted in Selected International Legal Materials for Global Warming*, 5 AM. U.J. INT'L L. & POL'Y 513, 567 (1990)).

88. *Id.*

89. *Id.* (quoting U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14).

C. Proposed Amendment

> Right of action for international human rights violations: in a civil action for tort only, an alien may establish a cause of action under the Statute for severe environmental harm, provided that the environmental harm is accompanied by a direct, substantial, and widespread effect on human health and well-being, and that the environmental harm results from the practices or operations of a publicly-traded corporation incorporated in the United States, or the subsidiary of a publicly-traded corporation incorporated in the United States, or an employee of a publicly-traded corporation incorporated in the United States.

V. OBJECTIONS, COSTS, AND DISADVANTAGES

Admittedly, the proposed amendment is not without its weaknesses and related costs. This section will address: skepticism regarding the effectiveness of the ATCA as an effective vehicle for the imposition of punitive damages; criticism of the use of punitive damages under the ATCA as an alternative regulatory device for environmental human rights violations; and, problems inherent in the proposed amendment.

A. Is the ATCA the Appropriate Vehicle for Imposing Punitive Damages on Corporate Environmental Human Rights Violators?

Even after a plaintiff establishes the threshold violation of customary international law, some judges may be hesitant to adjudicate ATCA claims, particularly environmental ATCA claims, because of the inherent political nature of the claims. In *Beanal v. Freeport-McMoran, Inc.*, the Fifth Circuit Court of Appeals determined that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to ensure that environmental policies of the United States do not displace environmental policies of other governments . . . especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries."[90] Likewise, in *Sosa v. Alvarez-Machain*, the Supreme Court signaled

90. Beanal, 197 F.3d at 167.

that ATCA claims that would require a U.S. federal court to "go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits," will likely fail.[91]

Thus, under *Sosa* and *Beanal*, ATCA claims are likely to be unsuccessful when they require U.S. courts to supplant the laws of foreign governments or limit a foreign government's sovereignty. However, because the proposed amendment only provides a right of action against publicly traded United States corporations and their subsidiaries and employees, not foreign officials or foreign corporations, these concerns are diminished. As Justice Breyer noted in his concurring opinion in *Sosa*, political concerns "normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action *or if that conduct involves that country's own national. . . .*"[92]

Moreover, even if all ATCA claims are regarded as political by their very nature, U.S. courts have a responsibility to regulate U.S. corporations and impose liability in the form of punitive damages for their misconduct abroad because the U.S. is in a better position to regulate the activities of MNCs than politically unstable developing nations.[93] As Alison Shinsato argues, "[t]he US, in particular, could put its weight behind the environmental human rights movement because it has a surplus of resources and technology that it can commit to environmental protection, unlike [developing] countries . . . which tend to focus their limited resource to provide basis services."[94]

B. Are Punitive Damages the Appropriate Remedy for Environmental Human Rights Violations?

The potential for very large punitive damage awards under the ATCA is naturally troublesome to corporations. The U.S. Chamber of Commerce warned that the ATCA invites "global venue shopping," and Chamber President Thomas Donohue declared that the "U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs."[95] Fortune magazine also expressed fear that ATCA claims "could become the next asbestos litigation,"[96]

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91. Sosa, 542 U.S. at 726.

92. *Id.* at 761 (Breyer, J., concurring) (emphasis added).

93. *See* Shinsato, *supra* note 33, at 202.

94. *Id.* at 203.

95. Gul, *supra* note 4, at 382 (quoting Tony Mauro, *Justices Debate Alien Tort Law*, LEG. TIMES, Apr. 5, 2004, at 8).

96. *Id.* (citing Cait Murphy, *Is This the Next Tort Trap? Using an Ancient Statute, Lawyers Make Business Quake*, FORTUNE, June 23, 2003, § 1, p.30).

and Britain's Financial Times warned that plaintiff lawyers' efforts at expanding the ATCA were positioning the U.S. litigation system to be the "world's civil court of first resort."[97]

While these claims have merit, they do not necessarily present relevant objections to the proposed amendment, because the amendment only applies to a narrow range of cases. Establishing a right of action for foreign plaintiffs to sue U.S. corporate defendants for environmental harm which is accompanied by a direct, substantial, and widespread effect on human health and well-being does not provide for an overly broad expansion of the ATCA.

The argument that criminal punishment, rather than civil fines, would more efficiently punish corporate violators ignores the plight of the victims of extreme environmental degradation who are without adequate domestic or international remedies for redress. Moreover, punitive damages are necessary to provide an incentive for plaintiffs to bring suit against defendants in the United States. Under the private attorney general rationale, the availability of punitive damages "induces plaintiffs to act as 'private attorneys general,' thereby helping to increase the number of wrongdoers who are properly 'brought to justice.'"[98] This incentive is important, particularly with respect to environmental human rights violations committed abroad, because these misdeeds deserve punishment, but are largely beyond the reach of international and domestic regulation.

C. Practical Problems Inherent in Proposed Amendment

Because the statute only provides for a right of action against *publicly-traded* corporations *incorporated in the United States*, corporations could simply reincorporate in a foreign country and offer securities in a foreign stock exchange to avoid civil liability for environmental human rights claims. Unfortunately, this is a problem which cannot be avoided within the framework of my proposed amendment. If the amendment were to include a right of action against foreign corporations, the scope of civil liability would unnecessarily infringe upon the sovereignty of foreign nations and likely compromise the success of the environmental human rights claim.

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97. *Id.* (quoting Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, (London), Nov. 6, 2002, at 15).

98. E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 851 n.57 (1993) (quoting David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH L. REV. 1257, 1287-88 (1976)).

VI. CONCLUSION

Despite the limitations of the proposed amendment and the ATCA itself, the assessment of punitive damages under the ATCA for international human rights abuse is the strongest available mechanism to monitor the largely unregulated environmental practices of U.S. corporations in developing countries. Likewise, the ATCA provides the best chance of redress for the victims of environmental human rights abuse who otherwise lack incentives and an adequate forum to bring claims forward. Because of the lack of judicial guidance regarding the appropriate scope of environmental claims under the ATCA, amending the statute is necessary to ensure that a narrow range of environmental harms committed by U.S. corporations are actionable under the statute.