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Conjoining International Human Rights Law with Enterprise Liability for Accidents

Anita Bernstein*

A near-consensus in American law reviews maintains that American courts offer a good forum to hold business enterprises, especially those that have headquarters in the United States, responsible for numerous wrongful acts that injure persons and environments located outside of this country.¹ The near-consensus is not unanimous. Dissenters, however, acknowledge that they are challenging a strong “proposition” or “position.”² Much of the literature focuses on international human rights.³ From this central point of agreement, writers diverge a bit. Most want to use the provision of the Judiciary Act of 1789 (the Alien Tort statute) that bestows original jurisdiction on the federal courts to hear aliens’ claims for “a tort only, committed in

* Sam Nunn Professor of Law, Emory University. Because Charlene Smith was so well-focused, Tony Weir and Gary Schwartz so supportive, and the intellectual ambiance at Washburn so lively, I found the Ahrens symposium instructive and enjoyable; my thanks to the entire Topeka team. Tony Weir and my Emory colleagues Johan van der Vyver and David Bederman provided guidance on international human rights law, but are not responsible for what I learned or failed to learn. Thanks also to Sean Lowe and Aly Morin for research assistance.

1. A representative slice of the literature was published in just one calendar year. See John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMPLOYMENT L. 463, 500 (2000) (recommending, among other measures, the enactment of new federal legislation); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545 (2000) (offering guidance for litigators); Peggy Rodgers Kalas, *The Implications of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT’L L. REV. 47, 77 (2000) (concluding that adjudication in the United States “is the only tool available at present . . . to provide at least some type of remedy to victims, and prod multinational actors into responsive actions.”); Scott Holwick, Note, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations*, 11 COLO. J. INT’L ENVTL. L. & POL’Y 183 (2000) (encouraging more litigation to assert a human right to a satisfying environment); Douglas S. Morrin, Book Review, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act*, 20 B.C. THIRD WORLD L.J. 427 (2000) (urging an expansive view of subject-matter jurisdiction).

2. See, e.g., M.O. Chibundu, *Making Customary Law Through Municipal Adjudications: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1093-1101 (1999) (critiquing “the Filartiga Proposition,” which expands jurisdiction to hear claims alleging injury from violations of customary international law); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

3. The most famous attempt to seek redress in the United States for an offshore accident, the *Bhopal* litigation, was structured as a personal injury/wrongful death case rather than a human rights claim. See *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986). “*Bhopal*” is thought of as an accident that could have happened almost anywhere—rather than an affront to indigenous people or a threat to human rights, such as a right to culture and a safe environment. It is the latter type of claim that occupies this Essay.

violation of the law of nations;"⁴ some downplay this legislation.⁵ Some favor modest expansions, whereas some want to bestow *justice sans frontières* on the entire world. For many writers, the great evil abroad is the face-to-face brutality—torture, summary execution, slave labor—that business enterprises have reputedly encouraged or condoned. Other commentators focus—as will I in this Essay—on harms to the environment, especially those occasioned by resource extraction.

Although the writings contain divergences, writers of the literature are not an especially diverse lot. Most of the American legal scholarship on this topic comes from students, with a few practicing lawyers contributing; almost all get published in student-edited journals specializing in international, transnational, or comparative law.⁶ Because the authors are relatively new to publishing, they do not fall neatly into the specialist categories that describe law professors; but to the extent these writings can be associated with a particular academic specialty, that specialty is international law.⁷

In this Essay, I argue that international or transnational law is not the only specialty with something to say about offshore wrongs. Coming to the literature from a different field—a discipline whose perspective should have been weighing in, but has so far contributed little to the discussion—I know I sound like one of John Godfrey Saxe's famous blind men of India who think they can apprehend the nature of an elephant by using their hands.⁸ To some of us, the offshore-harms elephant is

4. 28 U.S.C. § 1350 (1994). Contemporary writers speak of "the Alien Tort Claims Act," or "ATCA," the latter being something of an anachronism; eighteenth-century legislators did not identify their laws using New Deal-style alphabets. Some writers use Alien Tort Statute. Because the words "alien" and "tort" appear in the statute, my editorial choice is to capitalize those words and leave the rest of the name uncapitalized.

5. Writers who are uninterested in the Alien Tort statute typically focus on courts outside the United States, such as an "international corporate dispute settlement court," *see, e.g.,* Sadhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Meld for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235, 239 (1994), while agreeing that United States courts offer a good venue in the meantime. *See id.* at 249; *see also* John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 292-93 & n.28 (2000) (noting litigation pending in the United States in search of "a reliable remedy.").

6. Academics who specialize in international law appear less inclined than students or practitioners to favor expansive or liberal conceptions of jurisdiction. *See supra* note 1 (noting views of Professors Chibundu, Bradley, and Goldsmith). For expressions of the expansive view by academic lawyers, *see* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Anthony D'Amato, *What Does Tel-Oren Tell Lawyers?*, 79 AM. J. INT'L L. 92 (1985).

7. Following guidance from John Barrett, in this Essay I use "international law" loosely, generally including the law of relations between states and the law of "interactions between private citizens of different states or between a state and citizens of a different state," as well as other related subdivisions in the field. John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT'L L. & POL'Y 975, 977-78 (1997).

8. The man who has touched the tail likens the elephant to a rope, while the one who has touched the side proclaims, "God bless me! but the Elephant/Is very like a wall," and so on. John Godfrey Saxe, *The Blind Men and the Elephant: A Hindoo Fable*, in *THE POETICAL WORKS OF JOHN GODFREY SAXE* 111 (1892).

Torts.⁹ Summary execution? One might call it wrongful death. Torture? Battery, outrage, intentional infliction of emotional distress. Pollution around Indonesian mines or Ecuadorian fields? Nuisance, maybe trespass, maybe strict liability. You say slave labor, I say false imprisonment. When you mention treaty violations, I think of negligence *per se*.¹⁰

Seen through this Torts lens, the venerable concept called "enterprise liability" can describe one category of offshore injuries: accidental harms to groups of persons and their environments caused by entrepreneurial activity.¹¹ Such claims have been prosecuted in the United States on behalf of foreign plaintiffs. A subset of these lawsuits allege that the actions of the corporate defendants violated the plaintiffs' human rights. Two paradigmatic cases are *Jota v. Texaco, Inc.*, still pending as of this writing, against Texaco for environmental damage to the Oriente region in Ecuador,¹² and *Beanal v. Freeport-McMoran*, a claim alleging that Louisiana-based Freeport-McMoran violated the Amungme habitat in Indonesia.¹³ In both *Jota* and *Beanal*, the plaintiffs contended that their rights with respect to environment and culture were "specific, universal, and obligatory" enough to constitute binding international law, and that their claims against private

9. Examples of this small corpus of literature include Derek Brown, Comment, *Litigating the Holocaust: A Consistent Theory in Tort for the Private Enforcement of Human Rights Violations*, 27 PEPP. L. REV. 553, 581-82 (2000) (proposing a new tort of "private human rights reparations."); Adam Karp, Note, *Genitort in the Global Context: Female Genital Mutilation as a Tort Under the Alien Tort Claims Act, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act*, 18 WOMEN'S RTS. L. REP. 315, 317-21 (1997) (analyzing female genital mutilation in a torts perspective).

10. As one commentator has detailed, many offshore wrongs recognized as tortious conduct in the United States have been deemed outside the scope of Alien Tort jurisdiction because they do not affront an international consensus. See Morrin, *supra* note 1, at 432 (citing cases where American courts refused to hear claims of offshore fraud, conversion, negligence, wrongful death, and defamation). See also *id.* at 435 ("To date, only piracy, slave trade, genocide, war crimes, and attacks on or hijacking of aircraft have been considered undisputed violations of universal concern.").

11. The phrase "enterprise liability" means different things to different writers, although all seem to think of it as applying to accidents rather than intentional harms. George Priest, author of a noted article on the subject, defines enterprise liability as a theory "that business enterprises ought to be responsible for losses resulting from products they introduce into commerce." George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985). Although scholarly treatments of enterprise liability overlap with studies of the harms caused by mass-marketed products, see generally Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965) (noting that products liability presents a potential "wealth of analogy."), there is no necessary connection between products liability and enterprise liability. One important founder of enterprise liability, Albert Ehrenzweig, specifically went beyond the products liability antecedents proposed by his contemporaries Fleming James and Roger Traynor, advocating liability for business activities generally, not just for the marketing of products that cause injury. See Albert Ehrenzweig, *Negligence Without Fault*, 54 CAL. L. REV. 1422, 1457 (1966). On the seminal nature of this work, see Priest, *supra*, at 463 n. 10 (citing to Ehrenzweig in defining the term enterprise liability). Virginia Nolan and Edmund Ursin go so far as to argue that strict products liability has been the wrong place for an enterprise liability experiment. To Nolan and Ursin, business premises (supermarkets, restaurants, department stores) offer a better venue. See VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY* 168-69 (1995).

12. 157 F.3d 153 (2d Cir. 1998).

13. 197 F.3d 161 (5th Cir. 1999).

defendants were not barred by a state action requirement.¹⁴ *Jota* and *Beanal* are central to the paradigm because they conjoin the two elements: by alleging that the defendant violated customary international law, they invoke international human rights law; and by accusing business-enterprise defendants of having caused accidental harm,¹⁵ they invoke enterprise liability.¹⁶

Although international human rights law and enterprise liability are very separate spheres in the academy, they share terrain in common. Enterprise liability endorses the idea of accident law as public law—with the word “public” signifying systemic, aggregative, comprehensive, and inclined to focus more on societal consequences than on individual redress. Although this premise has divided the Torts community, alienating some scholars who prefer to think of Torts in terms of reparation or correction,¹⁷ it also suggests bases for alliance as well as estrangement. The idea of tort law as public law¹⁸ implies common ground with a more literal kind of public law: the developing international law of personal and environmental injury. For this purpose, the Alien Tort statute stands for a critical conjunction: it has been read as allowing persons who live outside the United States to bring enterprise liability actions in American courts for injuries caused by tortious conduct in violation of customary international law.

Bringing the two domains together in the sense of offering remedies in American courts to individuals and environments like those described in *Jota* and *Beanal* remains a distant prospect, and several judges and commentators would apparently prefer to delay this conjunction indefinitely. From my own vantage point outside the

14. See generally Herz, *supra* note 1, at 556-58 (discussing the “specific, universal, and obligatory” requirement); *id.* at 559-62 (discussing the state action requirement). Regarding state action, plaintiffs who sue private defendants using the Alien Tort statute must prove either “that the norm at issue does not require state action or that the defendant [corporation] . . . is a state actor” by virtue of its relationship with government. *Id.* at 559-61.

15. Some readers may disagree with the characterization of the harm as accidental, in part because conventions of human-rights litigation encourage plaintiffs to describe defendants’ behavior as outrageous. I use the word to distinguish the environmental-despoliation cases from cases involving direct, intentional brutality; I am assuming that Texaco inflicted injuries in Ecuador incidentally to drilling oil, and Freeport-McMoran desecrated land in Indonesia incidentally to mining copper and gold. This division between accidental and intentional harms does not work well in other contexts—notably the human rights claims against foreign oil companies for harms in Nigeria, which contained allegations of both environmental despoliation and deliberate brutalities that included extrajudicial execution. See generally HUMAN RIGHTS WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES* (1999).

16. Other commentators also regard these two cases as paradigmatic. See Herz, *supra* note 1, at 547-49; 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, 337-38 (1997). In this Essay, I use “customary international law” as a modern-day synonym for the Alien Tort statute’s “law of nations.” See Osofsky, *supra*, at 339.

17. The division is laid out in Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

18. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

community of international law scholars, I am not entirely convinced that American municipal courts are the best (or even a good) place to adjudicate international human rights claims made by such persons as the Amungme of Indonesia, or Ecuadorians of the Amazon interior.¹⁹ Nor do I wish to assert that litigation is the best (or even a good) way to deal with the problem of corporate despoliation of environments around the world.²⁰ Given my uncertainty, the thesis of this Essay is more predictive than normative: despite occasional reversals and a slow pace of change, I argue, various indicators suggest that enterprise liability will in future years come together with international human rights law in American courts, probably (but not exclusively) via the Alien Tort statute, serving as vehicle to provide a human-rights based remedy for accidents that injure persons and environments.²¹

Evidence to support the thesis is less than conclusive, but strongly suggestive. I present it in three succeeding parts. Part I explores the phenomenon of *global reckoning* in the United States, by which I mean a growing sense that boundaries of the nation-state do not delimit the beginning or the end of legal and political responsibility for geographically distant events. Part II surveys offshore-harms litigation in American courts decided after *Filartiga v. Peña-Irala*,²² the judicial decision that opened a wide new avenue of redress for plaintiffs under the Alien Tort statute. Many offshore-harms plaintiffs have lost in the courts since then, and the rejectionist doctrine of *forum non conveniens* may be growing stronger rather than weaker, but indicators point toward a more open reception for future litigation. Moving to a more theoretical plane, Part III examines enterprise liability and international human rights law as doctrines that can each encourage the other toward liberal acceptance of new claims. This Part emphatically does not deny

19. Compare Chibundu, *supra* note 1, at 1072-73 (worrying about "the consequences to international law of using domestic institutions to generate and contour it") with Herz, *supra* note 1, at 551 (arguing that customary international law is broader and more generous to plaintiffs than is commonly believed).

20. One scholar states the anti-litigation position in strong terms:

Litigation only addresses the race to the bottom concern indirectly, at best, through whatever cumulative impact judgments against particular defendants might inspire. It largely fails as preventative. It does not offer much promise of cooperative solutions to race to the bottom issues, which generally require governmental participation. And even if such litigation could constitute deterrence, it is too imprecise to be of much value. Environmental . . . protection requires the specificity of legislation and regulations, much of it technical, or process oriented, as demonstrated by the nature of the domestic regulatory regimes.

Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT'L & FOREIGN. AFF. 1, 32 (2000).

21. International-law scholars posit a tendency toward meliorism in the area of international human rights. See generally Thomas Buergenthal, *The Human Rights Revolution*, in INTERNATIONAL LAW ANTHOLOGY 205 (Anthony D'Amato ed., 1994) ("[W]hen you are tempted to despair . . . try to remember what has been achieved in a few short decades.").

22. 630 F.2d 875 (2d Cir. 1980).

the force of counter-tendencies, among them political hostility in the United States toward personal-injury claims, but seeks instead to identify commonalities shared by these two apparently disparate subjects. Part IV identifies a growing inclination among key personnel in the United States—judges and legal educators—to see their work-domain as extending beyond national boundaries.

I. A CONSENSUS ABOUT GLOBAL RECKONING

“Globalization,” still a newish word, is for many a term of opprobrium. Activists describe a world ravaged by the imperatives of capital set free from the nation-state. In this view, business enterprises can disregard almost all constraints, most pertinently the labor and environmental regulations that a rich country would favor, by moving exploitative activities offshore. Leaders of poor nations tolerate this despoiling presence in the hope of achieving economic gain: they welcome jobs, or bribes, or large-scale construction projects, or other consequences of foreign direct investment.²³ Released from such oppressions as taxation, wage demands, concern for the environment, and indeed the rule of law—or so the pessimists argue—capital migrates to where it can do the most harm and reap the greatest profit.²⁴

This gloomy account of privilege, lawlessness, and ruination (an account that in this Essay need be neither confirmed nor denied) overlooks a complementary phenomenon. Along with globalization, I contend, a notion of *global reckoning* has arisen.²⁵ Like globalization, the concept of global reckoning begins with the idea of a world made smaller.²⁶ Expansions of foreign investment, the growth of communication technologies, and new interdependencies among the financial markets all link divergent places together. Yet, whereas hostility to globalization focuses on how these developments weaken domestic laws and other forces of progress, the consensus about global reckoning suggests that in a smaller world, there is—and ought to be—less

23. See generally RUSSELL MOKHIBER & ROBERT WEISSMAN, *CORPORATE PREDATORS: THE HUNT FOR MEGA-PROFITS AND THE ATTACK ON DEMOCRACY* 68-70 (1999) (describing gaps in bargaining power between multinational corporations and the governments of poor countries). Environmental lawyer Peggy Kalas notes the less cynical motives for poor nations to welcome foreign investment. See Kalas, *supra* note 1, at 65 (quoting United Nations reports that link foreign investment with gains in the status of women, enhanced technology transfer, and improvements in “social and economic development” generally).

24. See ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM* 293 (2000) (summarizing this view); Noam Chomsky, *Power in the Global Arena*, *NEW LEFT REV.* 3, 18-19 (1998). See also DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 2 (1997) (recommending a turn-away from globalization and toward local communities).

25. Although the phenomenon has manifested itself all over the world, see *infra* notes 37,55, 71 (citing sources from Canada, Britain, and Singapore), my focus on global reckoning here emphasizes American acceptances of the idea.

26. See KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (1991).

room to hide.²⁷ Wrongdoers may try to race to the bottom, seeking weak or vulnerable or corruptible national governments and populations to exploit, but the locale in which they do business will no longer be exotic or remote. Miscreants, victims, investors, consumers, regulators, and billions of bystanders can no longer deny that they share a crowded planet. What happens next is another story, of course: the consensus about a need for global reckoning does not extend to a consensus about how to achieve it.²⁸ The shift is only in perspective.

Global reckoning is an ancient as well as a contemporary idea. Eastern religions, for instance, have taught for millennia that accountability is no less real for being removed in time and space. Reincarnation as a religious tenet resembles global reckoning, as does the notion of karma. To a more attenuated extent, all religions share the theme of a reckoning that stretches beyond human frontiers. In the modern, secular West, global reckoning has met with contrary thought, particularly during the late fifteenth through the late twentieth centuries. Expansions of science and technology, conquests in the New World, and the rise of markets all started with an ideology of limitlessness.²⁹ Yet, even during those centuries of denial about the price of entrepreneurial growth, Western voices of reckoning were occasionally heard. Malthusian gloom about the relationship between famine and population size, for example, declared that behaviors in the present would generate adversity in the future.³⁰ Karl Marx said that capitalism would be the agent of its own destruction.³¹ The twentieth century brought a great harvest of global reckoning: two world wars with grievous and interconnected consequences; an "atomic age" that decreed all of humanity to be in mortal peril; the awakening of a worldwide environmental movement; and what one might call entire sciences of reckoning, including the theory of relativity (which relates

27. International-finance lawyer Herbert Morais makes a similar point, describing "global governance":

[F]or the first time in human history, we now have a truly global society, and we live in one big global village This new phenomenon of globalization has created the need for developing and implementing principles of good global governance. Global governance, including global neighborhood values (such as respect for life, liberty, justice and equity, mutual respect, caring and integrity) and a global civil ethic consists of rights and responsibilities, the promotion of democracy and combating corruption, all of which could be achieved without compromising traditional national sovereignty.

Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 G.W. INT'L L. REV. 71, 78 (2000).

28. See *infra* notes 52-57 and accompanying text (noting that debate over the Multilateral Agreement on Investment positioned two camps, both of which held views that could be fit into the global-reckoning mode, in opposition to each other).

29. I elaborate in Anita Bernstein, *Engendered by Technologies* (forthcoming).

30. See Thomas Robert Malthus, *An Essay on the Principle of Population*, in AN ESSAY ON THE PRINCIPLE OF POPULATION AND A SUMMARY VIEW OF THE PRINCIPLE OF POPULATION 59, 109-19 (Anthony Flew ed., 1985).

31. See Richard Ball, *Individualism, Collectivism, and Economic Development*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 75-77 (2001) (summarizing "the self-destruction thesis").

matter to energy, thereby asserting that space imposes consequences on time, and vice versa) and chaos theory (featuring the famous “butterfly effect,” whereby experiences in the life of one butterfly can change climates and waterways).³²

How forceful is this claim about a tendency toward greater global reckoning? Any reference to a consensus—and in this Essay I have made two such references—contains a certain peril. Perhaps my claim is wrong. Beliefs that the offshore world is remote (like those that helped to construct a penal colony in Australia in the eighteenth century) may still hold sway. Even if some consensus does exist, furthermore, the details of that consensus remain somewhat fuzzy. Let us therefore see what we can find about a broad-based sense that the fact of globalization calls for global reckoning.

First, the theoretics. Scholarship in a variety of disciplines describes an ever-closer integration of national economies, making the movement toward reckoning inevitable. One might retort that certain academic specialists make a career of proclaiming a perpetual increase in world order: international economics, trade regulation, foreign relations, and the like start with a certain *a priori* disbelief in isolationism. Occupational bias cannot, however, explain the dramatic increase in academic writing on international economic integration that has followed the collapse of the Iron Curtain. After all, internationalists have always been internationalists, inclined to see what their training tells them; the concern for globalization that increased in the 1990s marked a departure from the past.³³

In a study of the future of government in the global economy, one scholar envisions only two alternatives to untrammelled and disastrous sprawls of neoliberal prerogative: either national governments will reassert themselves, or transnational institutions will be devised to effect regulation.³⁴ This new institutionalization “means a trade regime that puts labour and environmental rights on a par with property rights,” he continues. “It means a financial regulatory regime with global standards, and an end to *unregulated offshore havens*.”³⁵ In this view, transnational accountability ought to be installed as quickly as possible, but it is not inevitable. An English theorist disagrees, deeming global

32. A casebook on international environmental law surveys these developments. See EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 5-18 (1998).

33. It is hard to compose a footnote in support of my assertion that the literature on globalization and related topics has grown voluminous in recent years, beginning approximately in the mid-1990s. A sense of the topic's vastness, however, comes from the two sentences used to begin an essay. See Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 158 (2000) (“Globalization marks the end of an epoch. Not merely an epoch in the colloquial sense, but an epoch in the geological sense.”).

34. See Robert Kuttner, *The Role of Governments in the Global Economy*, in *GLOBAL CAPITALISM* 147, 156-57 (Will Hutton & Anthony Giddens eds., 2000).

35. *Id.* at 158 (emphasis supplied).

reckoning inevitable: "Companies will huff and puff, but in the end they will not leave—or only a tiny handful will. Most big multinationals are very anxious to be seen as good corporate citizens If you've got a big trading presence here, it's no use trying to pretend you're offshore. We will treat you as if you were resident in Britain."³⁶

International institutions have manifested responses to this perspective. Consider international trade regulation, for example. From the 1947 General Agreement on Tariffs and Trade, which focused on the reduction of tariffs, quotas, and subsidies, the contemporary international-trade regime has expanded to cover services, investment measures, and intellectual property. States have lost a large share of their power to veto the adverse decisions of dispute-settlement panels.³⁷ This wider conception of the term "trade" has created a vehicle of reckoning.

Turmoil in Asian national economies during the 1990s, widely perceived as a problem of international urgency,³⁸ revived the idea of global reckoning with respect to the international capital markets. Global reckoning had been a cornerstone of the Bretton Woods agreement of 1946, which installed international financial regulation; around 1973 the Bretton Woods controls were greatly loosened, liberalizing transnational investment.³⁹ Scholars attribute the financial crisis in Asia that started in 1997 to a panicky stampede of capital away from vulnerable national economies.⁴⁰ Many regulators now identify a task of increased reckoning ahead. "The problem [of the Asian crisis] is not regional, but international," according to the former chairman of the Federal Reserve Bank.⁴¹ "And there is every indication that it is systemic . . . from within the ordinary workings of the international financial system itself."⁴² In this context, global reckoning emerges as a response to free-flowing, often speculative or heedless, movements in the national capital markets that can wreak severe havoc whenever investors pull (or stampede) out.

The development banks, which have not distinguished themselves as solvers of this problem of fleeing capital, have taken stands elsewhere in behalf of accountability: although the International Monetary Fund has drawn a large share of criticism for inaction and unwise interventions in the Asian financial crisis,⁴³ as a development bank it has

36. *Id.*

37. See *Global Law Trends Changing Concept of State*, STRAITS TIMES (Singapore), Jul. 12, 2000 (available on Westlaw) [hereinafter *Global Law*].

38. See Mark Weisbrot, *Globalization for Whom?*, 31 CORNELL INT'L L. J. 631, 645 (1998).

39. See *id.* at 641.

40. See *id.*

41. Paul A. Volcker, *The Sea of Global Finance*, in GLOBAL CAPITALISM, *supra* note 34, at 75, 77.

42. *Id.*

43. See Weisbrot, *supra* note 37, at 650 (summarizing criticisms and noting that in "a unique

been a strong player in the movement toward global reckoning, extending itself in the area of human rights and social policy. Because the mandate of the IMF is to promote international monetary cooperation, advance sound national macroeconomic policies, and extend short-term financing to alleviate balance of payments problems, the Fund does not have an obvious warrant to promote global reckoning in a social or political sense.⁴⁴ Nevertheless, the IMF has interpreted its Articles of Agreement, entered into in 1944, to give it authority in such socioeconomic endeavors as combating corruption, reforming civil service, promoting women's rights, and aiding families displaced or burdened by IMF-funded projects.⁴⁵ Other development banks, led by the World Bank, have applied themselves forthrightly to promoting international human rights. Rejecting the view that economic development is separate and distinct from human rights development, the World Bank finds a link between the two insofar as wealth is a source of health.⁴⁶ A newer international-finance institution, the European Bank for Reconstruction and Development (EBRD), announced at its formation that member states shared a commitment to "multiparty democracy, the rule of law, respect for human rights and market economics."⁴⁷

Moving closer to the international entities at the center of this Essay—business enterprises with headquarters in one country and risky activities in another—we may now consider global reckoning as applied to foreign direct investment, a phrase that Robert Gilpin has defined as investment in "services, manufacturing, or commodity production" by a firm "with partially or wholly owned subsidiaries within two or more national economies."⁴⁸ Commentators agree that much needs to be done: Gilpin, for instance, finds "the absence of international rules to govern FDI . . . remarkable. No rules exist comparable to those affecting international trade and monetary affairs."⁴⁹ At the moment, the consensus about global reckoning here appears limited to a sentiment that more rules are needed, rather than a commitment to living according to any particular code among those that have been published: the Organization for Economic Development's guidelines on

breach of protocol," the chief economist of the World Bank reproached the IMF); Chomsky, *supra* note 24, at 17.

44. See Morais, *supra* note 27, at 86-87 (noting gap between macroeconomic policymaking and the well-being of individuals).

45. See *id.* at 89-90.

46. See Daniel D. Bradlow, *The World Bank, IMF and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 58 (1996).

47. Agreement Establishing the European Bank for Reconstruction and Development, May 29, art. 3, 1990 O.J. (L 372(3) 1,2). Morais adds that although this "commitment" imposes no binding obligations, it at least moots the criticism that international financial institutions have no authority to press for human rights or other social change. See *id.*

48. GILPIN, *supra* note 24, at 164.

49. *Id.* at 183.

the subject of accidental injury attributable to foreign investment (including directives to mitigate adverse effects on the environment) are not binding,⁵⁰ and the United Nations has been struggling, thus far without success, to come up with a version of its Code of Conduct for Transnational Corporations that member states would accept.⁵¹

The OECD-sponsored Multinational Agreement on Investment (MAI), first secretly negotiated in 1995 and aired in public starting in 1997 and 1998, sought to establish order in foreign direct investment by looking out for the prerogatives of investors.⁵² Debate over the Agreement, which its enemies now appear to have won, has been a dispute over what constitutes genuine global reckoning. Proponents of the agreement spoke of "high standards for the liberalization" of investment and a weapon against various kinds of irregularity, particularly host-country discrimination against multinational corporations.⁵³ Opponents retorted that MAI imposed only privileges on multinational corporations and only obligations on "people and governments."⁵⁴ The apparent victory of the anti-MAI view supports a conception of global reckoning that is contrary to the neo-liberal concern for investors' prerogatives: this approach to global reckoning regards investors as putative injurers who should not escape accountability. A third-way alternative to the MAI/anti-MAI dichotomy comes from Canadian trade negotiator Sylvia Ostry, who focuses on the characteristics of an international investment regime that would balance the interests of citizens and investors.⁵⁵ Ostry identifies several privileges and entitlements that multinational corporations should receive, including a "right of establishment," which grants firms the right to invest anywhere, and a principle of nondiscrimination against foreign companies by the host government.⁵⁶ She moderates these MAI-like prescriptions by ceding to national governments the

50. See *Organization for Economic Co-Operation and Development: Clarification of Environmental Concerns in OECD Guidelines for Multinational Enterprises*, 25 I. L. M. 494 (1986).

51. See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 3 (1995).

52. See Chomsky, *supra* note 24.

53. GILPIN, *supra* note 24, at 184.

54. Chomsky, *supra* note 24, at 26. Chomsky adds that the MAI introduces "standstill" and "rollback:"

'Standstill' means that signers cannot introduce any legislation which interferes with unrestricted corporate rights to do anything they feel like. 'Rollback' refers to the fact that signers are obliged to roll back existing legislation that interferes with those rights. There is a twenty-year lock so, once you get into it, you are stuck for twenty years. Of course, that doesn't apply equally: if the US wants to get out of it, it will treat it like the Uruguay Round when it decides to ban super-computers. But for the weaker people, it's a lock. Investors are freed from even the most minimal obligations that might be imposed by some democratic interference with private tyrannies.

Id. at 26-27.

55. See SYLVIA OSTRY, *A NEW REGIME FOR FOREIGN DIRECT INVESTMENT* (1997), noted in GILPIN, *supra* note 24, at 183.

56. *Id.*

power to restrict or limit investment in certain sectors.⁵⁷ These three perspectives on the regulation of foreign direct investment, though very divergent in their politics, share a concern with treating people and institutions alike regardless of where they are located—a hallmark of global reckoning.

So much for what elite experts think: evidence also suggests that the consensus about global reckoning extends to those who have money or other interests on the line. Consider the views of randomly surveyed Americans, as gathered by the Program on International Policy Attitudes (PIPA), a center associated with the University of Maryland's graduate schools of public affairs and international security studies. PIPA undertook in 1999 to learn what Americans think about globalization. The Program reviewed all previous poll results, held focus groups around the United States, and conducted a new poll in October 1999.⁵⁸ The review identified support for globalization, a concept left somewhat open-ended in the survey. Respondents described globalization as tending to strengthen not only economic ties but also cultural influence, institutional engagement, and values that are "more oriented to a global context."⁵⁹

More directly pertinent to global reckoning, the survey respondents consistently endorsed accountability while disapproving of measures that truncate accountability, such as the "fast track" approach to trade regulation that allows the executive branch to move rapidly ahead without the delays of congressional debate.⁶⁰ PIPA respondents strongly supported greater attention to, if not outright protection of, the needs of American labor.⁶¹ A large majority felt that products made in violation of international labor standards ought to be barred from importation.⁶² Respondents also endorsed trade sanctions while disapproving of the World Trade Organization's portion that countries should not be permitted to restrict importation of goods based on the effects of production on the environment.⁶³ PIPA also identified what looks like empathy among Americans: a majority said that suffering outside the United States is almost as important as suffering within the nation; they also expressed willingness to pay higher prices for goods not made in sweatshops, as well as for goods made and marketed in compliance with American environmental laws.⁶⁴

57. *Id.*

58. See www.pipa.org/OnlineReports/Globalization/executive_summary.html (visited Jan. 21, 2001).

59. *Id.*

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

The other sector that has money on the line is that portion of the business community with a presence in both advanced and developing nations: if the globalization critics are to be credited, this sector wants to eat its multinational cake and have it too, profiting from operating selectively in both rich and poor regions of the world. Again, the record reveals acceptance of global reckoning. Although a “stakeholder” or “social responsibility” view of corporate governance—the idea that corporation managers should act with regard for a wide set of interests and communities, rather than work merely toward wealth maximization for shareholders—does not dominate the law, practice, or scholarship concerning American business,⁶⁵ a narrower proposition that offshore wrongs are about as bad as domestic wrongs has emerged in the transnational business community, according to an analysis published in *The Economist*.⁶⁶ Certainly, American companies do not yet operate in foreign countries as if the Department of Labor and the EPA were there with authority to sanction them. They do, however, experience the glare of television news cameras and the Internet in such remote locations as Nigeria and the North Sea. Consequently, most American businesses with offshore operations at least pay lip service to the idea of legal and ethical duties unbounded by national frontiers. They no longer assert a general prerogative to operate as they please outside the United States, as they may implicitly have done before the *Bhopal* disaster of 1984.

In accepting the idea of global reckoning, both American survey respondents and American businesses have not, to be sure, paid any cash price up front.⁶⁷ Conceding that national boundaries do not delimit obligations has not stopped American corporate defendants from making what are in effect contrary statements in litigation, such as motions to dismiss on grounds related to jurisdiction or *forum non conveniens*. My point here is to note a stance in principle, a posture that endures even when affected entities try to wriggle out from its demands.

The remaining question about the phenomenon of global reckoning concerns the role of law in its promotion. Some of the increased force of law in advancing global reckoning has been blared in newspaper headlines; it is hard to miss the formation of new tribunals, including those for Rwanda and the former Yugoslavia as well as the emergent International Criminal Court, that assert jurisdiction over

65. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 442, 444 (2001) (noting solid rise of the shareholder over the stakeholder focus).

66. See *Doing Well by Doing Good*, THE ECONOMIST, Apr. 22, 2000, at 65.

67. The widely practiced research technique called “contingent valuation” finds empirical validity in stated expressions about what something is worth, even though the person making the statement has not in fact paid a price for what he or she purports to value. See generally Mark Sagoff, *At the Monument to General Meade, or On the Difference Between Beliefs and Benefits*, 42 ARIZ. L. REV. 433 (2000) (reflecting on the validity of the technique).

individual perpetrators.⁶⁸ Humanitarian intervention into foreign nations has become almost commonplace.⁶⁹ At the same time, some of the force of law as a force of global reckoning lies below the surface. Some writers think that the law of global reckoning has only begun to develop. For example, one commentator predicts that litigators will soon be arguing “relevant international law issues” on behalf of American citizens in American courts.⁷⁰ Scholar-strategist Edward Luttwak, writing from a base of admiration for markets, advocates “two cheers for nasty lawyers” and “two more cheers for greedy lawyers” in a chapter about the winners and losers of what he calls “turbo-capitalism.”⁷¹ According to Luttwak, private enterprise now whirls through the world almost entirely unchecked.⁷² The American legal system applies a unique, and necessary, brake on the engine:

It is the biggest corporations . . . that have gained most in wealth and power from turbo-capitalism, not least through the opening of world markets, and it is their power that needs to be tamed to preserve the balance. When tempted to cut costs by cutting safety margins, their executives remember liability claims and refrain; when contemplating a high-handed imposition on suppliers or clients, they think of breach-of-contract suits and step back; when attracted by other people’s technology, they recall what the jury did to the last big company accused of infringing the patents of an inventive small company; when top executives calculate how well they could do personally by manipulating the stock price just a little, they also calculate what a lost shareholder suit could cost them, even before the Securities and Exchange Commission gets into the act. Famously greedy American lawyers . . . thus serve a higher purpose after all, by intimidating structurally greedy corporations.⁷³

This view of civil litigation as a source of global reckoning regards liability exposure as a crucial inhibitor of what would otherwise be untrammelled corporate power. If Luttwak is correct on both of his points—first, that “turbo-capitalism” is inflicting high-speed destruction through the world and, second, that fear of litigation conduces to safer, more prudent, and more lawful corporate choices—then the conjunction of international human rights law with enterprise liability, or the importation of foreign plaintiffs into American courts to allege injury in violation of customary law, becomes a beneficent phenomenon. The next Part examines the phenomenon in more detail.

68. See *Global Law*, *supra* note 37.

69. See *id.*

70. John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 INT’L L. 845, 849 (1997) [hereinafter Barrett, *Plenty of Offerings*].

71. EDWARD LUTTWAK, *TURBO-CAPITALISM: WINNERS AND LOSERS IN THE GLOBAL ECONOMY* 7, 12 (1998).

72. See *id.*

73. *Id.* at 14-15.

II. THE CONSENSUS GAINS INFLUENCE IN THE COURTS: OFFSHORE HARMS AS TORTS ACTIONABLE IN THE UNITED STATES

Plaintiffs residing outside the United States who seek redress for accidental injury occupy a simultaneously favored and disfavored position in American courts. On the one hand, subject matter jurisdiction is expansive and generous, at least in principle. State courts have jurisdiction over common law claims brought against defendants that do business inside the United States, no matter where plaintiffs reside. Federal courts have jurisdiction based on diversity: plaintiffs reside offshore; defendants reside in one state of the United States. Even for cases where the plaintiff is located outside the United States, *and* the injury occurred outside the United States, *and* the defendant does not reside or do business inside the United States, the federal district courts often have subject matter jurisdiction. According to the Judiciary Act of 1789, "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" may be heard in the federal courts.⁷⁴ No other national legal system in the world welcomes foreign litigants so openly.

On the other hand, plaintiffs' victories in practice have typically been limited to surviving motions to dismiss. Acknowledging subject matter jurisdiction, trial judges tend to shove offshore-harms litigation against business enterprises out of their courtrooms. A supporter of such litigation might conclude that generous jurisdictional provisions do nothing more than tease potential claimants with a false hope of redress in American courts.

Such a conclusion would be premature. Although American judges have not yet conjoined international human rights law with enterprise liability for accidents, in the last two decades they have taken several key steps to create prospects for more liberal redress in the future.⁷⁵ This Part surveys developments in American law that parallel the consensus about global reckoning previously recounted.

A. *Liberal Treatments of the Alien Tort Statute*

This simply worded Alien Tort statute, a part of the Judiciary Act of 1789, lacking an official name of its own, has long been shrouded in

74. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77, *codified at* 28 U.S.C. § 1350 (1994). The original clause, written by Oliver Ellsworth, provided that the district courts "shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all cases where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 448 (1995). Congress went on to modify this language three times; the current version dates back to 1948. *See id.* at 449.

75. *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (noting "a growing consensus" that the Alien Tort statute covers "'certain international common law torts.'").

mystery.⁷⁶ Awakened from slumber in 1980 by activists who persuaded the Second Circuit to apply it to human rights litigation,⁷⁷ the Alien Tort statute continues to escape consensus about its meaning. Yet, although Alien Tort claimants as a group have received very little by way of remedy, post-1980 constructions of the statute have moved toward favoring expansion of their rights and interests.⁷⁸ Consider several junctures.

1. "A Tort Only."

Whatever the First Congress meant when it provided in 1789 for jurisdiction over "tort" claims, we may confidently assume that it did not intend the subject matter taught today under that rubric in contemporary American law schools. Although the word is old, the concept of Torts as a professional specialty or a division of the curriculum did not arise until the latter half of the nineteenth century. Moreover, "tort" is not the only obscure word in this phrase: why does the statute add the adverb "only?" "I never could see," writes Joseph Sweeney, "why granting jurisdiction over a 'tort' should be read as implying a grant of jurisdiction over something other than a tort, this creating a need to exclude the possibility."⁷⁹ He concludes that the phrase "a tort only" must refer to the law of prize, and "tort only" must have meant claims for reparation based on a capture that was otherwise lawful.⁸⁰ Despite Professor Sweeney's lengthy and learned review of prize and admiralty case law, however, this originalist interpretation of the Alien Tort statute has not carried the day. Other commentators, whose works both preceded and followed Sweeney's article, have insisted that the Alien Tort statute does not impose originalist limitations on contemporary judicial interpretation.⁸¹ Current case law reads the Alien Tort statute to permit actions alleging a wide array of wrongs beyond prize, piracy, the infringement of ambassadors' rights, and other perils of eighteenth-century international relations.

76. See *IIT v. Vensap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (referring to the statute as "a kind of legal Lohengrin . . . no one seems to know whence it came.").

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

78. But see Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421 (2000) (distinguishing among various types of Alien Tort litigation to suggest that the trend toward expansion and liberalization may be narrower than it appears).

79. Sweeney, *supra* note 74, at 446.

80. See *id.*

81. See William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996) (replying to Sweeney); Burley, *supra* note 6, at 464 (1989) (urging liberality in interpreting the statute); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 28 (1985) (arguing that "a tort only" does not greatly affect federal jurisdiction over aliens' claims).

One Alien Tort defendant tried to use the Sweeney article as a centerpiece of a petition for rehearing—unsuccessfully, it turned out. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 515 U.S. 1005 (1996).

2. "The Law of Nations" and the Individual's Right to Sue.

Alien Tort case law contains one major exception to this consensus about a broad mandate to effect global reckoning in American courts: the 1986 decision of the Court of Appeals for the District of Columbia, expressed in three concurring opinions, in *Tel-Oren v. Libyan Arab Republic*.⁸² *Tel-Oren*, though currently repudiated and disfavored, warrants attention for setting forth three separate paths to nonjusticiability. Each of these paths has been cogently laid out, and thus the rejection of all three alternatives shows that the emergent liberal view of the Alien Tort statute has overcome several separate obstacles.

Of the three *Tel-Oren* opinions, the concurrence by Robert Bork has provoked the most law review commentary.⁸³ In *Tel-Oren*, Judge Bork maintained that the Alien Tort statute was written to recognize the three types of injuries that William Blackstone identified as violations of the law of nations: piracy, violation of safe conducts, and infringement of ambassadors' rights.⁸⁴ This narrow framework having been set in place, contemporary human-rights claimants have little recourse under the statute. More fundamentally, Bork identified the law of nations as having "no impact on individuals. Only a self-executing treaty, or a rule of international law that itself provides for enforcement by individuals, can give rise to a cause of action in courts of the United States."⁸⁵

As Anthony D'Amato has demonstrated, the notion that international law imposes rights and duties only on states derives from the government-focused jurisprudential views of the English positivist Lassa Oppenheim and, before him, Jeremy Bentham, coiner of the phrase "international law."⁸⁶ This perspective was explicitly revisionist in its time, departing from more organic, norms-based "law of nations" or *jus gentium*.⁸⁷ Today the view of international law as applying only to states has been drastically modified, so as no longer to obstruct the claims of individuals alleging violations of their human rights.⁸⁸

82. 726 F.2d 774 (D.C. Cir. 1986).

83. See D'Amato, *supra* note 6, at 92.

84. See *Tel-Oren*, 726 F.2d at 816 (Bork, J., concurring).

85. D'Amato, *supra* note 5, at 97.

86. See *id.* at 101-02. Lassa Oppenheim was hostile enough to individual human rights claims to argue that the Universal Declaration of Human Rights of 1948 imposed no legal obligations. See Morais, *supra* note 27, at 72 (citing OPPENHEIM'S INTERNATIONAL LAW 1001-05 (Robert Jennings & Arthur Watts eds., 1992)).

87. See D'Amato, *supra* note 6, at 103.

88. See Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347 (1998) (deeming state-centered paradigm inadequate in the enforcement of international human rights); Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 83 (1999) (attributing this move away from a state-focus to the rise of non-government forces that hold government-like power: "death squads, paramilitary forces, insurgent armies, organized criminal

Judge Harry Edwards, clearly uncomfortable with both expansive and narrow readings of Alien Tort jurisdiction,⁸⁹ tried to stake out a centrist position that rejected the plaintiffs' claim. "I do not believe that the law of nations, as presently developed and construed, holds individuals responsible for most private acts," he wrote in his *Tel-Oren* concurrence; "it follows logically that the law of nations provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal court."⁹⁰ Judge Edwards did not define "private acts," although he did expound on the ambiguous status of "the individual" within international law.⁹¹ His seeking-the-center position later was moved to the stringent end of the continuum upon the publication of *Kadic v. Karadzic*,⁹² which permitted plaintiffs injured by soldiers in the former Yugoslavia to sue in the United States under the Alien Tort statute. The defendants in *Kadic* were similar to the *Tel-Oren* defendants in that they fell into a middle category between state actors and private citizens. This gray area, which Judge Edwards wanted to deem outside the bounds of international law is, after *Kadic*, now covered by a strong precedent to the contrary.⁹³

The third concurrence in *Tel-Oren* rejected the plaintiff's claims using the political question doctrine. In this view, only "Congress and the President" can apply, and decree compliance with, the law of nations.⁹⁴ Although Judge Robb devoted most of his opinion to discussing the difficulty of adjudicating claims of international terrorism in domestic courts, his proffered framework would be equally hostile to accident claims. Almost any contemporary tort claim would collide with Judge Robb's barrier,⁹⁵ as he explained: "Tort law requires both agreement on the action which constitutes the tort and the means by which it can be determined who bears responsibility for the unlawful injury . . . But international 'law,' or the absence thereof, renders even

entities, family-based political cliques, clans, [and] sub-clans."). As Dinah Shelton has pointed out, even Oppenheim's treatise on international law manifested some retreat from a strict state-focus. See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 613 (1994) (comparing the 1912 edition, which had declared that "States only and exclusively are subjects of the Law of Nations," to the 1955 edition, which noted that events related to the two world wars had made that proposition no longer true).

89. Judge Edwards implored the Supreme Court to expound on Alien Tort jurisdiction, for the benefit of litigants and lower-court judges. See *Tel-Oren*, 726 F.2d at 774, 775.

90. *Id.* at 779.

91. *Id.* at 792-94.

92. 70 F.3d 232 (2d Cir. 1995).

93. See *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 444 (D.N.J. 1999) ("*Kadic's* recent interpretation of international law in 1995 carries greater weight than the conflicting interpretations of the three concurring opinions in *Tel-Oren*, which examined international law as it stood over fifteen years ago").

94. *Tel-Oren*, 726 F.2d at 827.

95. See *Klinghoffer v. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990), as an exception. In *Klinghoffer* the plaintiffs expressed their claim as piracy, a venerable violation of international law. See *id.* at 860 (rejecting Judge Robb's approach). Piracy claims are rare today, however.

the search for the least common denominator of civilized conduct in this area, an impossible-to-accomplish judicial task.”⁹⁶ Because intentional harm has been more decisively condemned than accidents by “the law of nations” in D’Amato’s sense of the term—norms and shared understandings about right and wrong—the Robb approach would reject accident claims *a fortiori*, even if dealing with environmental degradation is deemed less of a “political question” than dealing with terrorism.

In sum, judges who wish to reject claims brought under the Alien Tort statute have plenty of material about the limited meaning of the statute to work with. Among other devices that would support a rejectionist attitude,⁹⁷ a well-researched originalist argument and three separate concurring opinions from a prominent court offering alternative paths to dismissal are available. Despite these bows in the quiver, however, decisional law reveals a steady liberal interpretation regarding the question of subject matter jurisdiction under the statute.⁹⁸ *Tel-Oren* has been spurned even in the United States District Court for the District of Columbia, where decisional law from the Court of Appeals for the District of Columbia is supposed to be binding precedent, in favor of the more liberal approach stated in *Kadic v. Karadzic*.⁹⁹ Judges are regarding the Alien Tort statute as a basis for global reckoning.¹⁰⁰

B. Liberalizing Portents Beyond the Alien Tort Statute

1. The Torture Victim Prevention Act.

When Congress enacted the Torture Victim Prevention Act (TVPA) in 1991,¹⁰¹ its legislative purpose was to reject the *Tel-Oren*

96. *Tel-Oren*, 726 F.2d at 823.

97. See *infra* Part II.B. (describing uses of *forum non conveniens*) and Part IV (noting conservative tendencies among the judiciary).

98. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (holding that the Alien Tort statute provides “both a private cause of action and a federal forum.”); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (mentioning “genocide, war crimes, and official torture”); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994) (holding that the statute “creates a course of action for violations of specific, universal and obligatory human rights standards.”); *Jama v. Immigration and Naturalization Serv.*, 22 F. Supp.2d 353, 362 (D.N.J. 1998) (allowing claim that alleged abuses in detention center); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (finding “both a jurisdictional grant and a private right to sue for tortious violations of international law.”). As was mentioned above, these holdings in themselves are far from victories for plaintiffs.

99. See *Jane Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998).

100. See generally *The Enforcement of Human Rights and Humanitarian Law by Civil Suits in Municipal Courts: The Civil Dimension of Universal Jurisdiction*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: NEW FORMS, NEW APPLICATIONS 156, 158 (1997) (remarks of David Bederman) (“The ground-work is being laid in US courts for the future refinement—and enforcement—of international law obligations.”).

101. 28 U.S.C. § 1350 (1997).

decision.¹⁰² In this statute, Congress not only wrote into statutory law the *Filartiga* holding that federal courts have jurisdiction over aliens' claims alleging torture under color of law outside the United States; it also expanded Alien Tort remedies to cover United States citizens.¹⁰³

Passage of the TVPA stands for more than just redress against torturers. A recent Alien Tort decision, *Wiwa v. Royal Dutch Petroleum Co.*,¹⁰⁴ declared that the TVPA expresses "a policy favoring receptivity" of lawsuits alleging violations of the law of nations generally, not just torture.¹⁰⁵ The court added that the TVPA has "communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business."¹⁰⁶ It would be only a small step from *Wiwa* for judges to regard the TVPA as encouraging litigation in the United States to enforce a wide array of human rights, beyond freedom from torture.

2. *The Forum Non Conveniens Glass Is Not Empty.*

Many plaintiffs who suffer injuries offshore do not need the Alien Tort statute in order to achieve jurisdiction over defendants: a foreign plaintiff can sue in the United States (in either federal or state court) using municipal tort law, if the defendant is sufficiently present in the American forum to fulfill jurisdictional requirements. For decades, however, defendants have routinely defeated foreign plaintiffs with the help of *forum non conveniens*, a principle of federal law that has also won adherence in most of the state judicial systems.¹⁰⁷ A definition of the term appears in the Uniform Interstate and International Procedure Act: "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."¹⁰⁸ Because of its dependence on adjectives rather than strict criteria, *forum non conveniens* provides judges with an option, not strict orders to decline jurisdiction. It is formally available in Alien Tort litigation, but

102. See Rachael E. Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 283 (1994); see also Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT'L L. REV. 197, 208 (1994) (stating that the statute "is intended to ensure that alien victims of official torture do not encounter *Tel-Oren* type obstacles when bringing suit in a U.S. court.").

103. See H.R. REP. NO. 102-367, at 4 (1994) reprinted in 1992 U.S.C.C.A.N. 84, 86 (noting these purposes of the statute).

104. 226 F.3d 88 (2d Cir. 2000).

105. *Id.* at 105.

106. *Id.* at 106.

107. See David I. Becker, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT'L L.J. 183, 195 (1998). Some judges use a related consideration, "comity," which instructs courts to decline to exercise jurisdiction "in deference to the laws and interests of another foreign country." Garvey, *supra* note 27, at 31.

108. See Becker, *supra* note 107, at 195-96 (quoting Uniform Interstate and International Procedure Act, 13 U.L.A. § 105 (1986)).

arises much more often in cases alleging violations of municipal law;¹⁰⁹ in municipal-law litigation, judges generally find the option attractive. *Forum non conveniens* has amounted to a shoal in the path of foreign plaintiffs; most founder on it.¹¹⁰

Some judges, however, prefer to keep cases that they could dismiss. The colorful set of judicial opinions in *Dow Chemical Co. v. Castro Alfaro*¹¹¹ airs a discussion among judges of the Texas Supreme Court about *forum non conveniens*. Over spirited dissents, this court rejected the doctrine and provided a forum for workers of the Standard Fruit Company in Costa Rica who alleged that exposure to a pesticide called dibromochloropropane had made them sterile. The case was later settled on terms that observers deemed favorable to the plaintiffs;¹¹² perhaps more important to their supporters, the precedent went on to aid thousands of other banana workers, who went on to file claims in the Texas and Louisiana courts during the mid-1990s, winning settlements.¹¹³ A more recent precedent curbs the freedom of trial judges to avail themselves of *forum non conveniens*: in the litigation against Texaco for environmental damage in Ecuador, Judge Jed Rakoff, who had inherited the case upon the death of another judge, dismissed the case on *forum non conveniens* grounds. Reversing, the Second Circuit directed Judge Rakoff to take note of political developments in Ecuador that made its judiciary less suited to hear the litigation, as well as relevant decisions that Texaco made within the United States.¹¹⁴

Occasional judicial inclinations to keep cases that could be dismissed notwithstanding, it appears fair to conclude that *forum non conveniens* has been and will remain a serious obstacle for plaintiffs who seek redress in the United States for offshore harms. Its flexibility, however, should foster optimism among proponents of offshore-harms litigation. Because *forum non conveniens* does not force judges to dismiss actions, it can recede as an obstacle when judges are inclined—or educated—to keep offshore-harms cases in their courts.

109. See Sarah H. Cleveland, *Book Review: Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1576 (1998).

110. See Becker, *supra* note 107, at 197 (noting various explanations for defendants successful invocations of *forum non conveniens*, including the principle of *lex loci delictus*, which means that the court would have to apply the law of the place where the plaintiff was injured, and Supreme Court precedent opposing difference to the plaintiffs choice of forum when the plaintiff is not a U.S. citizen).

111. 786 S.W. 2d 674 (Tex. 1990).

112. See Cleveland, *supra* note 108, at 1555.

113. See *id.* Slamming the courthouse door on foreign plaintiffs, the Texas Legislature, reacting to *Castro Alfaro*, installed *forum non conveniens* into state law. See TEX. CIV. PRAC. & REM. CODE § 71.051 (1993).

114. See *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).

III. GROUND HELD IN COMMON BY INTERNATIONAL HUMAN RIGHTS LAW AND ENTERPRISE LIABILITY

International human rights law and enterprise liability hold ground in common in two senses of the phrase. First, they share some common purposes. Second, they differ from each other in ways that suggest expansion, extension, and reinforcement of the two domains. This Part discusses both their shared terrain and areas of potential mutual influence toward expansion.

A. *Honest Bookkeeping*

Both enterprise liability and international law generally, not only human rights law, seek to break down false barriers that instruct an honest understanding of the reach of harm. Even the conservative vision of the Alien Tort statute, expressed by Judge Bork expressed in *Tel-Oren* and Joseph Sweeney in his much-cited article, agree that the statute's purpose is to right some kind of wrong, or fill some kind of gap. International law seeks to solve the problems of its day, and the concerns identified in this Essay have brought tort-like problems to the forefront.¹¹⁵ Customary international law, the center of the Alien Tort statute, can be seen as just one of many international law devices to achieve honest bookkeeping.¹¹⁶

For its part, enterprise liability emphasizes the related concept of cost internalization. Proponents of enterprise liability do not necessarily endorse an expansive vision of cost; some academics have favored limiting this type of liability to certain kinds of damages, while others would eliminate certain activities from the enterprise liability expansion.¹¹⁷ Nevertheless, the concept focuses on accuracy: enterprises need to be made aware of the full cost that their activities generate. Proponents of enterprise liability seek to gather together the harmful consequences of business activities and return them to the enterprise, rather than leave them where they fell on injured persons.¹¹⁸ The

115. See ANTHONY D'AMATO, *The Domain of International Law*, in INTERNATIONAL LAW ANTHOLOGY 3 (Anthony D'Amato ed., 1994) ("A hundred years ago, the topics of belligerency, neutrality, and state acquisition of territory loomed much larger than they do today. On the other hand, a hundred years ago you could find very little in the international law literature on human rights and practically nothing on the global environment.").

116. For example, the *Restatement of Foreign Relations* identifies extraterritorial jurisdiction based on United States statutes on a variety of bases, including the effects principle, where actions that have effects within the U.S. borders may be subject to redress in American courts. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. d (1987).

117. See *supra* note 11 and accompanying text.

118. Oliver Wendell Holmes was perhaps the first tort theorist who wrote about the way in which tort law resembles a "state-compelled mutual insurance society" where individuals could await recompense for injuries in advance, having prepaid into a distribution system. NOLAN & URSIN,

central point here is that hurt persons are not to be saddled with (all of) their losses, despite the tendency of tort and contract rules framed in the nineteenth century to impose this responsibility on hurt persons rather than enterprises.

National boundaries have protected enterprises from responsibility that would otherwise have been imposed under the law of enterprise liability, in a manner that respects no central tenet or logic of the concept. The fortuity of a plaintiff's geographical location plays a central part in other areas of doctrine, such as the law of civil procedure, but not in enterprise liability, whose boundary is the reach or scope of the entrepreneurial activity in question. Like the notice provision of the Sales Act that Justice Traynor obliterated from consumer litigation in *Greenman v. Yuba Power Products, Inc.*,¹¹⁹ the border around the nation-state does not delineate anything meaningful to the endeavor of measuring the real costs of entrepreneurial activity. Similarly, persons injured by manufactured products or careless motorists during the first half of the twentieth century may have been kept out of court by prevailing interpretations of privity or negligence, but enterprise liability theorists refused to regard those doctrinal boundaries as inviolate; they focused on injuries rather than the legal bases to dismiss hurt persons from view.

Brought to influence enterprise liability, international human rights law—in its contemporary form that reaches through the barriers of nation-state boundaries—facilitates accurate assessment of costs.¹²⁰ Without the procedural and adjudicative advantages that modern international human rights law gives individual claimants, business enterprises that conduct risky operations offshore receive inaccurate information about the costs of their doing business. We have seen that *forum non conveniens* keeps foreign plaintiffs out of American courts when they allege only violations of municipal law.¹²¹ International human rights law, less vulnerable to this doctrinal defense, provides a way around the barrier and thereby carries necessary factual information to the injurious enterprise.

supra note 11, at 16-17. Although he disapproved of equating tort liability with insurance, Holmes nevertheless recognized that adjudication of accident claims against entrepreneurial defendants necessarily creates a compensation system that imposes an insurance-like blend of benefits and burdens on the public. Unlike defendants of the pre-industrial common law, business enterprises (starting with the great paradigmatic railroad companies) pass along their costs of tort liability to others.

119. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 899 (Cal. 1963).

120. Cf. Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95, 136 (1999) (noting that the United States "has the technology, the capital, and the capacity to treat, store, and dispose of all of its own hazardous waste. While it may be cheaper in the short run for domestic generators to export hazardous waste, the cost savings is really an externality . . .").

121. See *supra* notes 109-10 and accompanying text.

B. Expanding Conceptions of Harm

The theme of honest bookkeeping goes deeper when both enterprise liability and international human rights law delve into the dynamic concept of harm. Whereas national and doctrinal boundaries keep some real harms from the books, thereby defeating honest bookkeeping, other harms get omitted because the doctrines cannot see them: each has an incomplete understanding of the nature of injury.

In the hands of economic analysts, enterprise liability has become bloodless. The mechanics of cost internalization and risk shifting have taken attention away from injury; aggregation of personal and environmental injuries makes them more actuarial than real.¹²² Conjoining international human rights law with enterprise liability for accidents would bring to the forefront a concern with pain and injustice.

In a complementary way, conjoining enterprising liability with international human rights law accommodates the deficiencies of an excessive emphasis on ogres, holocausts, slavery, torture, and similar deviations. Monstrousness is not a necessary element of wrongdoing. Because "fault," not intent to hurt and not strict liability, is at the center of common law responsibility for injury, tort law regards intent and negligence as comparable: the notion of fault imposes the same compensatory responsibility for, say, using a blade to cut a person's finger out of hatred and using a blade to cut a person's finger by accident (an accident, that is, that could have been avoided if the defendant had exercised "reasonable care" or "ordinary prudence"), when damages are the same for both injuries. International human rights violations, by contrast, have connoted Nuremberg, the Geneva Convention, the killing fields of Vietnam and Cambodia, land mines on several continents, or torture and genocide. I do not deny the difference between accidentally inflicted injury on the one hand and intentional injury on the other. Neither, for that matter, does tort law deny the difference.¹²³ Instead I raise a question: does the rubric of "fault," which emphasizes what accidents have in common with intentional wrongs, have a place in the adjudication of international human rights claims?

The great innovation of modern tort law was to find blameworthiness in a subset of unintended consequences that stem from entrepreneurial activity. Those writers who denounce the "subsidy" inherent in fault-based tort law in the nineteenth century—a shift that, by moving away from strict liability, burdened injured people and enriched

122. Gregory Keating makes a related point when he faults theoreticians of accident law for focusing on risk rather than harm. See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1328-31 (1997).

123. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881) (pointing out that a dog knows the difference between being tripped over and being kicked).

business¹²⁴—neglect a complimentary development whereby injured people began to ascribe fault to an enterprise. Tort doctrine had to change in the nineteenth century when a significant fraction of the population began regularly to encounter engine-powered railroad cars, dangerous factory machinery, devices like scaffolds and cranes used routinely rather than to build one lone town church and, later, mass-marketed products.¹²⁵ Technological innovation, thus, built plaintiffs and potential plaintiffs. It also built a new kind of defendant, one who could be deemed blameworthy in a negative sense of waste or foregone opportunity to take precautions, rather than in terms of a blameworthy soul or mental state, which requires human personhood.

Contemporary tort law understands that fault does not require animate, corporeal human existence. In this understanding of wrongdoing, a non-human legal fiction—for instance, an entity that calls itself “Texaco” or “Freeport-McMoran”—can violate the law of international human rights. Accidents that threaten lives, environments, and indigenous cultures evoke both enterprise liability and international human rights law.¹²⁶

C. *Methods, Parties, Procedures*

The conjunction of enterprise liability for accidents with international human rights law brings the vexing, yet pertinent, common law to bear on human rights questions. Once it is recognized that the law of nations can be violated without intent to inflict grievous harm on a person, an entire corpus of American law—now spread among products liability, toxic torts, environmental law, and other areas—becomes relevant to human rights litigation as it seeks to explore the parameters of this liability.

To be sure, several commentators would reject this contribution to international law. Inasmuch as scholars like Maxwell Chibundi, Curtis Bradley, and Jack Goldsmith have argued that customary international law does not belong in American courts, they would likely find the common law as expressed in enterprise liability case law an even more alien version of the same unfortunate contaminant. One can readily accept a portion of this concern about forcing business enterprises to follow an unwritten, vaguely formulated conception of customary international law in their offshore activities, at the risk of being hauled

124. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-108 (1977); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382 (1951).

125. See John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement*, 114 HARV. L. REV. 690, 694 (2001) (“In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and none any Western nation has witnessed since.”).

126. See Herz, *supra* note 1, at 572-73, 581 and *passim*.

into an American court by anyone injured anywhere. A code, or a set of cross-border regulations, might offer business enterprises better guidance than the common law can provide.¹²⁷ Maintaining this Essay's focus on prediction rather than normative guidance, however, I would contend that the common law of enterprise liability is familiar enough to common-law tendencies within contemporary international human rights law to develop congruently with it.

Having lost much of its preoccupation with states and only states as actors, international human rights law now depends on common law like recourse to analogy and pragmatics. State action, for instance, mutes into shades of gray as plaintiffs seek redress against paramilitary officials, soldiers in not-quite-national armies, and other quasi-private entities.¹²⁸ Customary international law moves very slowly through the barriers of international consensus; with activists urging expansion and common law development resisting change, the task of identifying new norms and rules becomes crucial.¹²⁹ Moreover, the Alien Tort statute bestows obligations on the federal judiciary that cannot be dodged indefinitely with recourse to jurisdiction-denying devices.¹³⁰ Judges have had to struggle with the content of enterprise liability, and they will have to struggle increasingly with challenges of the common law in adjudicating international human rights claims.

The conjunction of enterprise liability for accidents with international human rights law provides a new, juxtaposing contrast between substance and procedure—a contrast that may prove instructive to specialists in both fields. It might bear mention that not all of the common law treatment of accident claims has enriched plaintiffs. Many of them lose, despite the liberalization of their access to court. International human rights law, in a contrasting tradition, starts with the premise that the claims are good but the procedural barriers—act of state doctrine, foreign sovereign immunity, standing, limited extraterritorial application and so forth—are insurmountable. Common law enterprise liability presents the reverse phenomenon: barriers melt away, but plaintiffs often lose on the merits. Conjoining the two brings to international human rights law the problem of what to do with a claim that is bad on the merits, a question that looms on its horizon. For enterprise liability practitioners and scholars, the even more looming trend toward keeping plaintiffs out of courts raises the specter of procedural difficulty. In each of these subjects, experts combine

127. See Garvey, *supra* note 20.

128. See generally Moore, *supra* note 88.

129. See Beth Stephens, *Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393, 458-58 (1997).

130. See *id.*; see also Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and Separation of Powers*, 74 *GEO. L.J.* 163, 166 (1985).

familiarity with one and unfamiliarity with the other; when working together on international human rights claims for accidental harm—the point of conjunction—these professionals can each share with the other a crucial perspective.

The two subjects also share an ambiguous relation with the state. Like the vanquishing of *Tel-Oren* by the progeny of *Filartiga*, the outcome of this struggle seems close to certain. Strife in what had been Yugoslavia during the early 1990s bequeathed to international law a permanent critique of its positivist, state-focused perspective. Anthony D'Amato's claim in 1988 that international human rights law had reversed direction away from its Oppenheim/Bentham positivism has proved prescient. With the nation-state no longer so pivotal in this area of international law, contemporary institutions will have to fill the void. Enterprise liability is well qualified to contribute to the newer regime of international law that extends beyond the state. Its founders wrote and taught with a similar sense of the missing national government: theorists like Fleming James recognized the state would not deliver a full measure of social insurance, and so they set out to build doctrines that could work collaboratively with governments on programs like no-fault automobile insurance and workmen's compensation. If, after Yugoslavia, international human rights law will always combine public wrongs with private rights and remedies, then the experiences of enterprise liability become relevant.

IV. CONCLUSION: THE FUTURE CONJUNCTION

As we have seen, the conjunction of enterprise liability with international human rights law requires numerous players—including, but not limited to, judges, litigators, and legislators. *Forum non conveniens*, for instance, is, to a large extent, a permissive doctrine: as a general matter, judges who want to keep a case in their courts can do so, while rejectionist judges have a basis for dismissal.¹³¹ Litigators decide whether to file offshore-harms claims in United States courts.¹³² Legislators can enact, or decline to enact, statutory invitations and deterrents to litigation on behalf of offshore plaintiffs.¹³³ These events suggest that when key players choose to “think globally,” as the phrase goes, they work to effect the conjunction that is under study here.

Scholars report a phenomenon of growing internationalization in

131. See *supra* Part II.B.2. For a negative statement of this point, see Patrick M. McFadden, 81 CORNELL L. REV. 4, 5 (1995) (“Because international law is law . . . judges might be expected to lead the fight to apply it. Instead, they appear to have led the retreat.”).

132. See generally Herz, *supra* note 1.

133. See *supra* notes 101-103, 113 and accompanying text (noting the passage of the TVPA and the adoption of *forum non conveniens* by the Texas legislature).

American legal education.¹³⁴ At one level, the phenomenon is not new: for instance, one hundred years ago law schools were more likely than they are today to have required a course in international law.¹³⁵ By most indicators, however, international law and related subjects have lately been burgeoning in American legal education.¹³⁶ Two studies done by the American Bar Association, one in 1963-1964 and a follow-up in 1996, demonstrate an exponential rate of growth in the number and variety of international law course offerings in the span of a generation.¹³⁷ Because these courses are elective, some educators are now seeking to go further by requiring international- and comparative-law enrichments in the first-year curriculum, a notion under consideration at Harvard and N.Y.U.¹³⁸ "Sure it's trendy," acknowledged NYU law professor Norman Dorsen in response to a reporter's question. "But it's also real. It's like clinical programs years ago. A few law schools got into them, and they took hold."¹³⁹

In this respect, law schools have lagged behind business schools, which have been favoring a strong international approach to the curriculum since at least the early 1990s.¹⁴⁰ In October 1998, *Business Week* featured six prominent schools on its cover; according to journalist Aric Press, four of the six—Wharton, Michigan, Harvard, and Columbia—have required courses in international business, while the other two, Kellogg and Chicago, are known for emphasizing international studies.¹⁴¹ Business practice as well as business education bespeaks the trend: in 1999 a journalist who covers banking began an article by noting a recent change: "[m]entioning international mutual funds to a bank brokerage customer just five years ago was a risky proposition. Older customers were not inclined to think globally . . ."¹⁴²

134. See John B. Altanasio, *The Globalization of the American Law School*, 46 J-LEGAL EDUC. 311 (1996); Alberto Bernabe-Riefkohl, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137 (1995). Professor John Barrett has reported on the phenomenon extensively both in his law-review writings and in his work as a consultant for the American Bar Association. See Barrett, *Plenty of Offerings*, *supra* note 70, Barnett, *supra* note 7.

135. See McFadden, *supra* note 131, at 65.

136. A journalist reports:

Columbia [Law School] is busily trying to remind everyone of its longtime commitment to international studies. And, in the process, trying to catch up in the 212 area code with New York University's new programs and bold declaration that it is now the global law school. Stanford has its famous SLIPS program; Georgetown is a permanent State Department-in-waiting. Wisconsin-Madison offers a world-class program in East Asian studies; Pitt's law school suggests that its students take a foreign language. More than 100 law schools offer summer programs abroad. You get the idea.

Aric Press, *We're All Connected*, AM. LAWYER, Nov. 1998, at 5.

137. Barnett, *Plenty of Offerings*, *supra* note 70, at 847, 859-867.

138. See Press, *supra* note 136.

139. *Id.*

140. See Alan Rugman, *Internationalization of the Curriculum*, 21 J. BUS. ADMIN. 13, 15 (1992) (adverting to the disagreement among business educators over whether internationalization should be addressed in a separate course sequence, or mainstreamed into the central M.B.A. program).

141. See Press, *supra* note 136.

142. Michael O'D. Moore, *Breaking Down Resistance to Global Funds*, AM. BANKER, June 2,

As for practicing lawyers, they increasingly identify international law as central to the practice of virtually anyone who serves as an advocate for clients, especially business clients. The National Association for Law Placement began publishing a resource guide for international law careers in 1999.¹⁴³ One international lawyer, who has worked as a diplomat and a teacher of international law before moving to a corporate law department, writes that his fellow in-house counsel employed by American corporations should think of international legal work as "just standard practice."¹⁴⁴ The American Law Institute has teamed up with Rome-based International Institute for the Unification of Private Law, or Unidroit, to draft procedural rules covering the adjudication of private international disputes.¹⁴⁵

Skeptics may continue to think that there is less here than meets the eye, and some evidence does support this view. For example, law students continually express interest in international law to law school admissions officers, and just as continually tend to avoid the elective courses that are duly offered in response to that expression. Studies of international law education in the United States, which reveal all kinds of growth—summer-abroad programs, widespread participation in the Jessup International Moot Court competition, post-degree graduate programs, concentrations or certificate programs in international law, and the like—also report that at most American law schools fewer than 20 percent of J.D. students take a course in international law, a percentage that has remained constant for many decades.¹⁴⁶ The gap between students' preliminary expressions of interest and their ultimate enrollment in elective courses suggests that their early expressions of interest in international law are naive or poorly thought out. In deciding whether to exploit this naivete, law school administrators (who compete for student enrollment) have a motive to exaggerate the extent to which their schools emphasize international law. Moreover, all fads attract hangers-on, suggesting that the total number of people who appear to be part of the internationalization of American law is a number padded by opportunism.

Yet, one cannot dismiss global legal education as entirely a fad or a stack of press releases. In addition to all the genuine changes in legal education that John Barrett and the ABA have reported, the pre-enrollment personal experiences of law students also make a difference.

1999, at 8.

143. See Rafael X. Zahralddin-Aravena, *International Legal Education*, 34 INT'L. L. 817, 826 (2000).

144. Frank A. Orban III, *Legal Globalization: The Challenges for In-House Counsel*, ACCA DOCKET, Feb. 2001, at 48.

145. See Rolf Stürner, *Some European Remarks on a New Joint of the American Law Institute and UNIDROIT*, 34 INT'L L. 1071, 1071 (2000).

146. See Barrett, *Plenty of Offerings*, *supra* note 70, at 853-55.

Persons enrolled in law school in 2001 take for granted the Internet, personal computers, CNN-style television coverage of remote events, and low prices for international telephone calls and air travel to foreign locations. Many participated in, or observed, campus demonstrations against offshore labor abuses. Few are old enough to remember a time before worldwide environmentalism arose in the early 1970s. Because none of these biographical conditions applies to the incumbent generation in control of American law at this moment—judges, legislators, experienced litigators, and senior administrators of law schools—it is reasonable to identify a real generational change, and, thus, to expect globalization to have a genuine effect on the study and practice of law.¹⁴⁷

Judges—who in the United States start out as lawyers and before that were law students—stand at an end point in a sequence of development. A pipeline leads to the creation of judges who can be expected in future years to have internalized the phenomenon of globalization. In the meantime, many judges whose training and experience predate these developments are becoming educated in international law and related subjects. New bench books have recently been prepared for them: Patrick McFadden, a leading critic of provincialism in American courts,¹⁴⁸ has written such a book, and the Federal Judicial Center has several manuscripts in press or newly published as of this writing.¹⁴⁹ Justice Sandra Day O'Connor of the Supreme Court, who is active in the American Society for International Law, has in recent years taken on the project of international law education for the judiciary.¹⁵⁰

These changes, admittedly both gradual and reversible, suggest that the future conjunction of international human rights law with enterprise liability lies at a distant point in the future, perhaps well after the day that claims alleging slavery and torture as violations of customary international law are routinely heard in United States courts. One scholar's pointed 1997 reminder—that no Alien Tort suit featuring an international environmental law claim has ever proceeded to trial¹⁵¹—still holds true. Current developments suggest, however, that enterprise liability and international human rights law are destined to meet, coming together in the task of measuring the scope and magnitude of

147. See *supra* note 6 and accompanying text (noting that scholarship by law students tends to favor liberal conceptions of jurisdiction, whereas senior scholars are more likely to oppose this liberality). Of course, it is possible that scholars simply grow less receptive to liberal jurisdiction as they grow older and wiser. But this large block of student writing is fairly recent; earlier generations of international law scholars did not memorialize a transient phase with publications like these.

148. See McFadden, *supra* note 131.

149. See Zahraiddin-Aravina, *supra* note 143, at 827.

150. See *id.*

151. See Bederman, *supra* note 100, at 156.

harms that extend beyond national frontiers.