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Multinational in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act For Human Rights Violations?

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MULTINATIONALS IN HOST COUNTRIES: CAN THEY BE HELD LIABLE UNDER THE ALIEN TORT CLAIMS ACT FOR HUMAN RIGHTS VIOLATIONS?

I. INTRODUCTION

The United Fruit Company (UFC), a U.S. multinational corporation specializing in bananas, orchestrated the 1954 coup in Guatemala because of its fear that the land reform policies going on in Guatemala at the time could result in the expropriation of its property.[1] In the early 1950s, the banana company alerted the U.S. news media, in particular the New York Times publisher Arthur Hays Sulzberger and certain members of Congress, of the alleged infiltration of communists in the Guatemalan government.[2] Through the expenditure of over half a million dollars a year on lobbyists and publicists the UFC successfully infiltrated the United States with red scare propaganda.[3] The Eisenhower Administration finally gave the green light to the CIA in 1954, ordering a coup in Guatemala.[4]

Today, multinational corporations (MNCs) doing business in countries such as Burma,[5] Indonesia, China and Nigeria—countries whose internal social and political policies are at

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1. *See generally* STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT 79-97 (1983). The UFC had some prior experience in the internal politics of Central American governments—in 1910, it had organized an armed invasion of Honduras, run by its hired mercenary, Machine Gun Maloney. *See* THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 9 (1989).

2. *See* SCHLESINGER & KINZER, *supra* note 1, at 83-85.

3. *See id.* at 97. During the time of land reform in Guatemala, agents of UFC organized and paid for "choreographed" press tours in Guatemala for U.S. journalists and presented the Guatemalan government as a Marxist regime. In 1953, one year before the CIA-backed coup, the UFC wrote and circulated a "confidential" newsletter to approximately 250 American journalists on the political and economic climate in Guatemala. *See id.* at 89-90. Eventually these newsletters found their way into U.S. newspapers. *See id.*

4. *See id.* at 117.

5. When the military dictatorship took over Burma in 1989, it changed its country's name from Burma to Myanmar. *See* G. Pascal Zachary, *U.S. Companies Back Out of Burma, Citing Human-Rights Concerns, Graft*, WALL ST. J., Apr. 13, 1995, at A10. However, the name Burma is still commonly used by dissidents and outsiders.

odds with those of the United States—are on the defensive.[6] If an MNC is doing business in a well-publicized, non-democratic dictatorship accused of perpetrating human rights violations, such as Burma, the MNC must justify its presence. MNCs usually handle this attack by arguing that their presence in hostile countries encourages those countries to embrace democracy. For example, MNCs such as Unocal and Texaco claim that by doing business in Burma they are providing an alternative to dictatorship, a model of democracy and that divesting will only isolate the country and prolong the control of military dictatorship.[7] This defense contradicts the position that their presence sustains the Burmese military dictatorship, and accordingly, they argue that it is their corporate responsibility to remain in Burma, not to divest.[8]

MNCs first recognized the importance of corporate responsibility when they were threatened with boycotts in the 1970s, during the campaign to end apartheid in South Africa.[9] Corporate responsibility advocates who came from within the industry imposed codes of conduct on themselves when they were doing business in a well-known rogue country, so as to preempt the impending call for divestiture.[10] Today, these self-imposed codes and other external voluntary codes conform to the international community's own uniform reaction to disagreeable countries, such as Burma, and are only referred to when the international community has agreed to condemn a government to isolation.[11] Only then are MNCs forced to justify their presence and possibly self-impose codes. When the international community is not consistently reminded of a

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6. While the U.S. government and its citizens have been educated on the internal policies of these countries by a different method than they had been about Guatemala, the final view of the policies of these countries and of Guatemala is that they are antithetical to the policies of the United States.

7. *See* Zachary, *supra* note 5; *The Burma Freedom and Democracy Act of 1995: Hearings on S. 1511 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong. 76-80 (1996) [hereinafter *Burma Hearings*]. Unocal claims that by laying down a gas pipeline in the Karen and Mon States of Burma, the people in the vicinity will prosper because of the attendant improved standard of living. *See* Zachary, *supra* note 5.

8. *See* Zachary, *supra* note 5; *Burma Hearings*, *supra* note 7, at 76-80.

9. *See* Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1970-1971 (1996).

10. *See id.*

11. *Cf.* DONALDSON, *supra* note 1, at 23-24 (describing the motivations of organizations involved in international affairs in terms of the "Prisoner's Dilemma.").

rogue government, or when it is not in agreement regarding how to handle such governments, the focus on the role of an MNC in such a country is at a low and pressure to self-impose is slight.[12] When the economic policies of Western countries override an international response to human rights violations and the international community continues to do business with disagreeable countries, MNCs and the international community have no incentive to self-impose or adhere to externally imposed codes. As a result, MNCs accused of propping up obscure dictatorships, or violating human rights along with an unsensationalized dictatorship, are basically immune.[13] These arbitrary corporate codes are only utilized when a relatively uniform voice within the international community speaks out against an insupportable dictatorship.[14] Only then is an MNC's role in such a country reviewed; a review that has no legally-binding force because an MNC is not legally accountable to any system,[15] except for that of the host country.[16] Consequently, the international community has neglected its responsibility to respond to human rights violations. By allowing an arbitrary system of compliance to be the sole structure in controlling MNCs, the international community has signaled that MNCs should not be held responsible for their direct and indirect violations of human rights.

This Note argues that when an MNC acts in collusion with a government in violating human rights, the MNC must be held liable for these human rights violations. Part II discusses the voluntary system of compliance that the international

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12. *Cf. id.*

13. *Cf. id.*

14. *Cf. id.*

15. Under traditional concepts of international law MNCs are not accountable for human rights violations because they are not sovereign states. *Cf.* J.L. BRIERLY, THE LAW OF NATIONS 1 (Humphrey Waldock ed., 6th ed. 1963) (describing international law as a "body of rules and principles of action which are binding upon civilized states in their relations with one another."). One exception to this rule would be if the human rights violations were perpetrated in the pursuit of genocide. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IV, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention].

16. Most host countries certainly have the legal capacity to bring charges or allow civil suits against an MNC, but often this is not a viable choice when a government is colluding with the MNC in violation of human rights, or when it is sanctioning the activities of the MNC.

community has relied on thus far and the limitations of this system. Part III argues that a move toward holding MNCs liable for such violations must be made and that the Alien Tort Claims Act[17] (ATCA) is one method that can be used to hold MNCs liable under international law.[18] Part III also examines some of the obstacles in holding an MNC liable under international law, which has historically held states exclusively responsible for illegal acts, but not private actors. Part IV considers Shell Oil's activities in Nigeria, where Shell Oil has been accused of assisting the Nigerian government in its violation of its citizens' human rights, as a case study in applying the ATCA to a private actor. Part V concludes by arguing in favor of holding MNCs accountable for human rights violations and discusses how the Alien Tort Claims Act is an avenue toward breaking down the political shield protecting MNCs from scrutiny.

II. THE IMPORTANCE OF, AND DIFFICULTIES IN, HOLDING MNCS LIABLE

"[T]here is one and only one social responsibility of business—to increase its . . . profits."[19] This view, held by many economists and business supporters, reveals the heart of the problem in holding MNCs responsible for their activities in host countries. An example of the antagonism toward controlling business occurred in 1977, when the United States passed the Foreign Corrupt Practices Act,[20] barring U.S. corporations from bribing foreign government officials.[21] U.S. corporations resented this impediment to their competitive edge over other countries, particularly former West Germany, Japan and England, who did not have internal laws barring bribery.[22] The U.S. corporations claimed that if MNCs were to be regulated in this manner, an international response would be necessary.[23]

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17. 28 U.S.C. § 1350 (1994).

18. The Alien Tort Claims Act also is referred to as the Alien Tort Act and the Alien Tort Statute. For consistency purposes, this Note will use its current, formal title: Alien Tort Claims Act (ATCA).

19. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).

20. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (1994)).

21. *See* DONALDSON, *supra* note 1, at 31.

22. *See id.*

23. *See id.*

This example, while not relevant when an MNC is accused of violating human rights law, is relevant to an understanding of the political and economic climate that opposes any regulation of MNCs.

"The multinational corporation has been defined as 'a national company in two or more countries operating in association, with one controlling the other in whole or in part.'"[24] Modern MNCs, a post-World War II product, have been successful for a variety reasons, including lower labor costs in developing countries.[25] MNCs find developing countries desirable because they provide the most efficient production in today's market.[26] Production in developing countries is more efficient today in part because many developing countries do not maintain the same environmental and labor standards that are found in the countries of MNC headquarters.[27] As of yet, the MNCs are not required to follow any international or home[28] standards for the treatment of the environment and their employees. Instead, they are only required to comply with the laws and standards of the host country.[29] Given that these standards often do not conform with international standards for labor or the environment,[30] or when they do conform, they are not enforced, the MNC is attracted to the developing country, where costs are low.[31] Competitive host countries do not

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24. DONALDSON, *supra* note 1, at 30.

25. *See id.* Donaldson notes that the success of MNCs is also attributable to the "increasing importance of economies of scale in manufacturing, improved communication and transportation systems, and rising worldwide consumer demand for new products." *Id.*

26. *See* LOUIS TURNER, MULTINATIONAL COMPANIES AND THE THIRD WORLD 175-176 (1973) ("Classical economic theorists like Adam Smith and David Ricardo put forward the theory that, under free trade, geographical specialization will permit production to occur where it can be carried out most efficiently.").

27. *See* DONALDSON, *supra* note 1, at 95-98. There is much debate on whether MNCs should conform to the environmental and labor standards of its home country. For example, the argument that salaries in a host country should be equal to salaries in the home country for comparable work (adjusting for standards of living) eliminates the role of the international market in establishing salary levels. *See id.* at 98.

28. "Home" refers to the MNCs' place of incorporation, distinguished from "host," a country where an MNC has its business.

29. *See* DONALDSON, *supra* note 1, at 95-101.

30. *See* Genevieve Mullett, Note, *ISO 1400: Harmonizing Environmental Standards and Certification Procedures Worldwide*, 6 MINN. J. GLOBAL TRADE 379, 396-97 (1997).

31. *See generally* Judith Kimerling, *The Environmental Audit of Texaco's Ama-*

want to enact or enforce environmental or labor laws because MNCs will not find the host country as economically desirable.[32] This is particularly true with host countries that have partially nationalized their industries, because the host country economically benefits from an MNC whose costs are low and profits are high.[33] When an MNC and a host country are in a partnership, neither side has an incentive to increase costs of production. Further, the failure on the part of MNCs and host countries to embrace higher standards in production has not been challenged by the international community, but instead has provided only a loose framework of aspirational corporate codes. This framework is the only set of principles and goals guiding the decision-making process of an MNC which endeavors to invest globally.

A. International Attempts to Control MNCs

In the late 1950s, the only concern over MNCs conducting business in host countries was expressed by developed countries interested in an international standard for the treatment and protection of foreign investment.[34] In 1976, the Organization for Economic Co-operation and Development (OECD) established an international standard for the protection of for-

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zon Oil Fields: Environmental Justice or Business As Usual?, 7 HARV. HUM. RTS. J. 199 (1994). An example of an MNC violating the environmental standards of both the international community and a host country can be found in Texaco's activities in Ecuador, which ceased as recently as 1992. *See id.* at 199-208. Even though Ecuador had respectable environmental laws on the books, the government did not enforce them because it would have been politically unpopular. *See id.* at 207-08.

32. A comparison to the position of host country governments is the position of U.S. corporations after the Foreign Corrupt Practices Act was passed—both parties want to be able to compete with entities that are not subject to strict regulation. If one host country enacts or enforces its environmental and labor laws, the MNC will find another host country which does not.

33. *See* Brooke Clagett, Comment, *Forum Non Conveniens In International Environmental Tort Suits: Closing the Doors of the U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 522 (1996) ("U.S. multinational corporations will continue to injure the environment in developing countries whose needs for foreign investment appear greater than their interest in preserving a healthy natural environment for their own citizens."); *see also* Thomas M. Kerr, *What's Good for General Motors is Not Always Good for Developing Nations: Standardizing Environmental Assessment of Foreign-Investment Projects in Developing Countries*, 29 INT'L LAW. 153, 162 (1995).

34. *See The United Nations Code of Conduct on Transnational Corporations*, at 4, U.N. Doc. ST/CTC/SER.A/4 (1988) [hereinafter *1988 UNCTC*].

eign investment.[35] Departing from the purely foreign investment perspective,[36] these guidelines promoted cooperation between the host government and the MNC by introducing a labor standard for MNCs and by presenting the goal of having MNCs respect the economic policies of developing countries.[37] In the Commentary of the guidelines, the OECD stresses the importance of MNCs refraining "from any improper involvement in local political activities," and expresses the general expectation that business in host countries remain separate from politics.[38] The International Labor Organization (ILO) adopted similar codes in 1977 specifically focusing on workers' rights in employment.[39] The 1970s movement towards creating a framework that protected both host countries and MNCs carried over into the 1980s and, in 1990, resulted in the most recent international code of conduct, the United Nations Code of Conduct on Transnational Corporations (UNCTC).[40] Like its predecessors, UNCTC established standards for the treatment of MNCs by host countries, while also creating standards for MNC conduct.[41] Developing countries wanted a mandatory or legally binding code, but the developed countries preferred, and won, a voluntary code.[42] Therefore, UNCTC laid down aspirational codes, such as, "transnational corporations shall respect human rights and fundamental freedoms," and non-interference in internal political affairs.[43] These codes presup-

35. *See* Organization for Economic Co-operation and Development, Declaration on International Investment and Multinational Enterprises, June 21, 1976, Annex on Guidelines for Multinational Enterprises, 15 I.L.M. 967, 969-77 [hereinafter OECD Guidelines].

36. This perspective was reflected in early attempts to protect investment through the creation of dispute-settlement mechanisms and insurance coverage for non-commercial risk. *See 1988 UNCTC, supra* note 34, at 4.

37. *See* OECD Guidelines, *supra* note 35, 15 I.L.M. at 972, 976-77 (Guidelines regarding "General Policies" and "Employment and Industrial Relations.").

38. *Id.* at 972. These policies have a double-edged sword effect: they target the MNC that colludes with a dictatorship in violation of human rights while also targeting the MNC who speaks out against a dictatorship. Advocates of universal corporate responsibility want to target the first type of MNC and not the latter.

39. *See generally* International Labor Organization: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422, 422-31 [hereinafter ILO Declaration].

40. *Development and International Economic Co-operation: Transnational Corporations*, U.N. ESCOR, 2d Sess., U.N. Doc. E/1990/94 (1990) [hereinafter *UNCTC*].

41. *See id.* at 6.

42. *See 1988 UNCTC, supra* note 34, at 26; *UNCTC, supra* note 40, at 1.

43. *UNCTC, supra* note 40, at 7-8.

pose an antagonistic relationship between the MNC and the government of the host country and, therefore, they only protect the host country from MNCs like the UFC. However, for those governments who condone the activities of its MNCs, these protective codes lose their purpose.

B. U.S. Adoption of Model Business Principles

During the 1980s and 1990s, human rights organizations lobbied the U.S. government to alter its trade policies with China because of China's human rights record.[44] These organizations have proposed that the United States withhold China's most-favored nation status (MFN) if China continues to refuse to make changes in the area of human rights.[45] While the trade relations between the United States and China have never resulted in a denial of the MFN status, each Administration has felt pressure to offer a substitute to an all-out human-rights linkage to trade.[46] Most recently, in May 1995, the Clinton Administration adopted a set of principles named the Model Business Principles as a substitute for a human rights-linkage to trade with China.[47] The Model Principles address U.S. MNCs doing business globally and refer to conduct involving forced labor, child labor, labor organizing and bargaining, non-discrimination and worker health and safety.[48] By issuing the voluntary Model Principles, the Clinton Administration not only protected an MNC's choice to adopt the Model Principles, but it also shielded MNCs from the threat of government monitoring and enforcement.[49] Not only are the Model Principles voluntary and unenforceable,[50] but the U.S. Department of Commerce, which is responsible for

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44. *See* Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, NW. J. INT'L L. & BUS. 66, 71-72 (1993).

45. *See id.* at 75-76.

46. *See id.* at 82 (A proposed code-of-conduct specific to business operations in China "asks companies with a significant presence in China to adhere to a set of basic human rights principles.").

47. *See Voluntary "Model Business Principles" Issued By the Clinton Administration May 26, 1995*, DAILY REP. FOR EXECUTIVES (BNA) (May 31, 1995), *available in* LEXIS, Exec Library, Drexel File [hereinafter *Model Principles*]; *see also* Cassel, *supra* note 9, at 1974.

48. *See Model Principles*, *supra* note 47, paras. 1-2.

49. *See* Cassel, *supra* note 9, at 1974.

50. *See Model Principles*, *supra* note 47, pmbl.

implementation of the codes, has failed to monitor the MNCs' implementation of the Model Principles.[51] The failure on the part of the Commerce Department may be attributable to the lack of support for the Model Principles from both human rights and business groups.[52] Human rights groups consider the Model Principles as being both ineffectual and vague, and thus, unable to target human rights violations.[53] Business groups argued for a multilateral approach to corporate conduct in host countries so as to protect U.S. companies from an economic competitive disadvantage that may accompany the adoption of the Model Principles.[54] With or without the support of these groups, the Model Principles still fall short of any comprehensive mandatory code targeting human rights violations.

C. *Self-Regulation by MNCs*

The concept of self-imposed corporate responsibility first developed in the 1970s and 1980s as a response to the movement to end apartheid in South Africa through divestiture.[55] In an attempt to fashion a publicly acceptable alternative to divestiture, Reverend Leon Sullivan, a General Motors board member, developed a set of principles for MNCs doing business in South Africa.[56] The Sullivan Principles demanded corporate responsibility on the part of MNCs by conforming to certain standards in South Africa: (1) commitment to racially nondiscriminatory employment facilities;[57] (2) paying fair wages well above the minimum cost of living;[58] (3) increasing the number of blacks and other non-whites in managerial positions;[59] and most notably and controversially, (4) the use of corporate influence to help improve the plight of black employ-

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51. *See* Cassel, *supra* note 9, at 1975.

52. *See id.* at 1974-75.

53. *See id.*

54. *See U.S. Council Comments on Business Principles*, BUS. WIRE, Apr. 5, 1995, *available in* LEXIS, News Library, Curnws File. The United States Council for International Business favors the OECD and ILO multilateral guidelines. *See* Cassel, *supra* note 9, at 1975.

55. *See* Cassel, *supra* note 9, at 1970-71.

56. *See* Sullivan Principles For U.S. Corporations Operating in South Africa, Nov. 8, 1984, 24 I.L.M. 1496 [hereinafter Sullivan Principles]; *see also* Cassel, *supra* note 9, at 1970-71.

57. *See* Sullivan Principles, *supra* note 56, Principle II, 24 I.L.M. 1496.

58. *See id.* Principle III, 24 I.L.M. 1487.

59. *See id.* Principle V, 24 I.L.M. 1498.

ees outside of the workplace and to help put an end to South Africa's apartheid system.[60] Each MNC adopting the Sullivan Principles agreed to outside audits and public reports as a way of ensuring compliance.[61] In 1977, when the Sullivan Principles were created, only twelve U.S. MNCs adopted them, but by 1986, 200 of the 260 U.S. MNCs doing business in South Africa had adopted the Sullivan Principles.[62] This commendable attempt to pacify those calling for divestiture lasted until the mid-1980s when the failure of the Sullivan Principles to end apartheid became apparent.[63] However, the underlying principles of the model survived and many other attempts have been made by MNCs to self-regulate.[64]

Northern Ireland is one country that has experimented with a corporate code. Still in existence today, the MacBride Principles were developed in the mid-1980s.[65] While the MacBride Principles are limited in scope compared with the Sullivan Principles, one Principle demands that MNCs be responsible for the personal safety of workers, not only at the place of employment, but also while traveling to and from work.[66] Other examples of countries that have been targeted for corporate codes of conduct are China and the former Soviet Union.[67] When the former Soviet Union dissolved, support for these corporate codes dissolved too, revealing the ephemeral nature of corporate codes.[68] Even taken together, these codes of conduct have a minimal impact on the operation of an MNC, or on its decision to invest in a country of its choice. Furthermore, these codes fail to compel MNCs to conduct business in a

60. *See id.* Principle VI, 24 I.L.M. 1498. This Principle was and is controversial because corporate codes generally do not promote MNCs' involvement in the political structure of a host country. *See* OECD Guidelines, *supra* note 35, 15 I.L.M. at 972; *UNCTC*, *supra* note 40, at 8.

61. *See* Cassel, *supra* note 9, at 1971; Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 666 (1995).

62. *See* Cassel, *supra* note 9, at 1970.

63. *See id.* at 1971. The Sullivan Principles were ineffectual in bringing any significant change to the apartheid system because they alone were not incentive enough for the South African government to turn over power. *See id.*

64. *See* Compa & Hinchliffe-Darricarrère, *supra* note 61, at 671-74.

65. *See* Sean MacBride, The MacBride Principles (Irish National Caucus, Wash., D.C. 1984).

66. *See id.* art. 2.

67. *See* Compa & Hinchliffe-Darricarrère, *supra* note 61, at 672-73.

68. *See id.*

manner that is acceptable to the host country's government and, when the host country's standards are substandard, in a manner that is acceptable to the international community.

Without a tradition of oversight, MNCs may engage in conduct that is, at best, a violation of workers' rights and, at worst, a violation of human rights.[69] If an MNC has no accountability (other than to its own economic well-being), there will be no way to require an MNC to comply with other international standards, such as human rights standards. MNCs are sheltered by the voluntary and unenforceable nature of corporate codes of conduct and by the lack of an international body with the necessary jurisdiction to hear claims against them for alleged violations of human rights. For now, MNCs are protected against any mandatory enforcement of corporate codes and can continue to enjoy minimal environment and labor standards. In the worst case scenarios, MNCs are free from taking legal responsibility for human rights violations when a host country chooses to do nothing.

III. ALIEN TORT CLAIMS ACT

A. *History*

The ATCA provides one possible solution to the present-day inability to hold an MNC accountable for human rights violations.[70] While the ATCA does not reach violations of workers' rights, it does reach environmental violations.[71] By starting with the most egregious acts—human rights violations—the international community can slowly adapt to holding MNCs responsible for their activities in host countries. If the ATCA finds an MNC liable, it not only will be providing a civil remedy for victims of human rights violations, but the ATCA will be promoting a restructuring of the statist paradigm of international law.

The ATCA evolved from Section 9 of the Judiciary Act of

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69. Some people would argue that workers' rights are human rights. For the purposes of this Note, workers' rights refer to the right to organize unions and be paid a living wage. Human rights include the right to be free from torture.

70. *See* 28 U.S.C. § 1350 (1994).

71. *See* Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994). The ATCA does not reach violations of workers' rights because the plaintiff must show that a tort has been committed for ATCA purposes. *See* 28 U.S.C. § 1350.

1789[72] and, in its current form, gives "[t]he district courts . . . original jurisdiction [over] any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States."[73] While legislative history is scarce on the purpose of the ATCA,[74] one purpose was to provide a remedy in U.S. courts for aliens who were mistreated on U.S. soil.[75] The ATCA was to be applied when foreign affairs were implicated and U.S. interests were at stake.[76] In the early years of the ATCA, the assumption was that foreign affairs would only be implicated when tortious conduct occurred in the United States.[77] However, the ATCA was rarely invoked and claims were rarely seen in federal courts throughout the 19th century and the first part of the 20th century.[78]

While an ATCA claim was finally upheld in the 1961 case of *Adra v. Clift*[79], the courts generally remained hesitant to uphold claims under the statute.[80] This hesitancy was due, in part, to the vague definition of customary law[81] and to the

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72. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77; *see also* Charles F. Marshall, Note, *Re-framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1995).

73. 28 U.S.C. § 1350. Under the ATCA, two possible violations that could occur are of a U.S. treaty or customary law, *i.e.*, the law of nations. *See id.* For the purposes of the violation of customary law, this Note will use the current usage "customary law."

74. *See* Marshall, *supra* note 72, at 597-98.

75. *See id.* at 598-99.

76. *See* Tel-Oren v. Libyan-Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) ("There is evidence . . . that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

77. *See* William R. Castro, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 484 (1986).

78. *See* Marshall, *supra* note 72, at 599.

79. Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961) (involving a Lebanese plaintiff who sued his former wife and her husband for custody of their child).

80. *See, e.g.*, Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976) (rejecting the argument that the wrongful confiscation of property in Nazi Germany violated "law of nations" so as to give rise to claim under the ATCA); ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (rejecting the argument that alleged conversion was in violation of the "law of nations" for purposes of the ATCA).

81. Customary law, as defined by the Statute of the International Court of Justice, is an "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 [hereinafter ICJ Statute]. To prove that there is a customary law, a party

lack of agreement on what conduct fell within customary law.[82] Since the ATCA was enacted, customary law has not only evolved into a different body of law, it has also become a part of the law of the United States.[83] A court deciding an ATCA claim would need to be confident that the customary law claimed to have been violated was in fact a custom and that any court hearing the claim would agree.

B. *Expansion of the Alien Tort Claims Act*

In 1980, the Second Circuit in *Filartiga v. Pena-Irala*[84] held that an alien may bring a tort claim against a foreign defendant under the ATCA for a violation of customary law that did not occur on U.S. soil, did not implicate U.S. foreign affairs, but instead, involved another country's treatment of its own citizens.[85] The failure on the part of prior courts to find a violation of customary law,[86] was not a problem for the *Filartiga* court who, by relying on *The Paquette Habana*,[87] interpreted customary law as it exists today and not in

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must prove that this custom is established in such a manner that it has become binding on the other Party . . . that the rule invoked . . . is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20).

82. *See, e.g.*, Dreyfus, 534 F.2d at 30 ("[t]here has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase."); ITT, 519 F.2d at 1015 (discussing the lack of precedent interpreting the ATCA, especially with respect to the term "law of nations."). The courts generally rely on customary law rather than treaty law in ATCA claims because most human rights claims are based on custom and not on treaty.

83. The Supreme Court made it clear that customary international law is a part of U.S. law in The Paquette Habana, 175 U.S. 677, 700 (1900). The Court went on to state that:

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id.

84. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

85. *See id.* at 876-77. Filartiga involved a Paraguayan citizen whose brother had been tortured to death by a Paraguayan public official acting under color of law. *See id.*

86. *See, e.g.*, Dreyfus, 534 F.2d at 30-31; ITT, 519 F.2d at 1015.

87. The Paquette Habana, 175 U.S. 677 (1900).

1789.[88] The Supreme Court had long established that a court can ascertain the status of customary international law by "consulting the works of jurists, writing professedly on public law; or . . . the general usage and practice of nations; or . . . judicial decisions recognising and enforcing that law."[89] Therefore, the *Filartiga* court looked to whether the conduct complained of, torture, was a violation of customary law in 1980 and, based on numerous international declarations[90] against torture committed under color of law, the *Filartiga* court concluded that torture did violate customary law.[91] It is important to note that this finding did not narrow the violations recognized by the ATCA to acts similar to torture, but rather "open[ed] the federal courts for adjudication of the rights already recognized by international law."[92]

C. *The Rise and Fall of the State Actor Requirement*

A state actor requirement inadvertently evolved from the *Filartiga* decision. The court concluded that the substantive, customary law condemned torture only when the actor is act-

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88. *See* Filartiga, 630 F.2d at 881.

89. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Underlying the court's decision appeared to be sentiment for asserting jurisdiction in the United States because the courts in Paraguay were unable to hear the claim: "Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause." Filartiga, 630 F.2d at 878. The court seemed to make an underlying argument, albeit not legal, that because this claim could not be heard in Paraguay and, since both the plaintiffs and defendants had moved to the United States, the claim should be heard in the United States. The policy behind this argument is similar to the policy behind denying a forum non conveniens motion.

90. Declarations, which also are referred to as Resolutions, are non-binding laws adopted by the United Nations General Assembly. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14 (3d ed. 1979). While these laws are not binding on member states, "when they are concerned with general norms or international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions." *Id.*

91. *See* Filartiga, 630 F.2d at 881-82.

92. *Id.* at 887. The *Filartiga* court held that it is proper to assert jurisdiction over a claim where acts occurred outside its jurisdiction as long as the act committed was unlawful where performed. *See id.* at 885. In an expression of comity, the court was willing to hear a claim in its own jurisdiction even though the wrong was committed in another jurisdiction. *See id.* at 885. Even though the torture was state-sanctioned by the Paraguayan dictatorship, the acts were still in violation of Paraguayan law. *See id.* at 880, 885.

ing under color of law.[93] The court held that when a state actor commits torture, customary law is violated; the court did not hold that the ATCA does not reach private action.[94] Whether the ATCA reaches private action was not reviewed until the court in *Tel-Oren v. Libyan Arab Republic*[95] held that a general state actor requirement barred the plaintiffs from recovering and concluded that established international law was statist and had not been extended to hold non-state actors liable as of 1984.[96] While acknowledging the finding by some commentators that individual non-state actors can violate international law, the court was not convinced that this was the general consensus.[97]

Even though the court in *Tel-Oren* found it difficult to assert jurisdiction over private actors, other courts have not been as wary.[98] Most notable is the recent Second Circuit decision, involving Bosnian Serb leader Radovan Karadžić, which held that certain violations of customary law hold private actors, as well as state actors, liable for genocide and war crimes.[99] In *Kadic v. Karadžić*,[100] the court distinguished

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93. *See id.* at 880.

94. *See id.*

95. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). The plaintiffs in *Tel-Oren* were survivors and representatives of decedents who were killed during a PLO terrorist attack on a civilian bus in Israel where 22 adults and 12 children were killed and 73 adults and 14 children were seriously injured. *See id.* at 776. The court held that jurisdiction could not be asserted over the PLO based on the ATCA. *See id.* at 775. The three opinions for this decision were written by Justices Edwards, Bork and Robb. For the purposes of this Note, the opinion of Justice Edwards is referred to as the opinion of the court.

96. *See id.* at 792-95.

97. *See id.* The next year, in *Sanchez-Espinoza v. Reagan*, the D.C. Circuit followed Justice Edward's opinion in *Tel-Oren* when Nicaraguan plaintiffs brought an action against the Nicaraguan Contra Forces, stating that the ATCA did "not reach private, non-state conduct *of this sort*" leaving the possibility of other private conduct reachable under the ATCA. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (emphasis added).

98. *See, e.g.*, Carmichael v. United Technologies Corp., 835 F.2d 109, 113-14 (5th Cir. 1988) (court stated in dicta that a private actor can be held liable when it aids and abets an official in torture); Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 WL 142006, at *7 (S.D.N.Y. Apr. 11, 1994) (jurisdiction over MNC for acts committed on foreign soil are proper when steps taken in the United States are an integral part of the commissioned acts); Adra v. Clift, 195 F. Supp. 857, 862-65 (D. Md. 1961) (finding jurisdiction where foreign mother kidnapped baby with the use of an illegal passport).

99. *See* Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995), *reh'g denied*, 74

genocide and war crimes from "other instances of inflicting death, torture, and degrading treatment" in determining whether the state actor requirement was necessary for each of these acts.[101] After reviewing numerous treaties and declarations, the court held that for both genocide and war crimes, a non-state individual actor should be held liable.[102]

When the court reviewed "other instances of inflicting death, torture, and degrading treatment," which were not committed in the pursuit of genocide or war crimes, it did not find any treaties or declarations condemning these acts when committed by private actors.[103] The current state of international substantive law on death, torture or degrading treatment not

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F.3d 377 (2d Cir. 1996). The petition for a rehearing was based on a law review article arguing that the only violations of law that should be considered by a court was the one category Congress intended to confer federal jurisdiction over: tort committed by crews of vessels when boarding ships believed to be aiding the enemy. *See* Kadic v. Karadžić, 74 F.3d 377 (2d Cir. 1996). However, the court rejected this analysis based on *Filartiga* and Congress codified *Filartiga* in 1991 with the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 (1994)). *See id.* at 378. The court, in the first *Kadic* opinion, chronicles the history of finding jurisdiction over non-state actors beginning with the prohibition against piracy and extending to the slave trade and some war crimes. *See* Kadic, 70 F.3d at 239. The court cites a Supreme Court decision from 1844 which characterized pirates as "'*hostis humani generis*'"—an enemy of all mankind—in part because they acted "'without . . . any pretense of public authority.'" *Id.* (quoting The Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844)). Therefore, the court followed *Filartiga* by concluding that customary law should be construed based on the body of law today, not in 1789. *See* Kadic, 70 F.3d at 238-39.

100. 70 F.3d at 232.

101. *See id.* at 241. The court looked to a 1989 Second Circuit decision to determine when state action was required: "'evolving standards of international law govern who is within the [ATCA's] jurisdictional grant.'" *Id.* (quoting Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987)).

102. *See* Kadic, 70 F.3d at 241-43. For example, in 1946 when the General Assembly of the United Nations declared that genocide was a crime in violation of international law, the Resolution expressly included private actors as potential perpetrators. *See* G.A. Res. 96, U.N. GAOR, 1st Sess., 55th mtg., at 175-76, U.N. Doc. A/64/Add.1 (1946); *see also* Genocide Convention, *supra* note 15, art. IV ("Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.").

103. *See* Kadic, 70 F.3d at 243-44. Some modern commentators have argued that private individuals have duties under international law while others concede that there is a long way to go before individual private actors can be held liable under a treaty or customary law. *See* Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 51-53 (1992); Ian Brownlie, *The Place of the Individual in International Law*, 50 VA. L. REV. 435, 459-60 (1964).

in the pursuit of war crimes or genocide, only holds state actors liable for these acts.[104] The court therefore concluded that torture and summary execution could be actionable under the ATCA in two scenarios: if the conduct occurred in the course of the commission of genocide and war crimes; and if the acts were committed by a state actor not in the course of the commission of genocide and war crimes.[105] When the acts complained of were not in the process of committing genocide or war crimes, a defendant may be a state actor in two scenarios.[106] First, a defendant could qualify as a state, or agent of the state, according to the definitions of international law.[107] Second, a defendant who acts in concert with a foreign state may qualify as a state actor because he is deemed to be acting under color of law.[108] In this latter example, the court held that the "color of law" jurisprudence of 42 U.S.C. § 1983[109] was a relevant guide in finding state action by a private actor.[110] The court, however, did not explain how municipal law[111]—42 U.S.C. § 1983 jurisprudence—could be used by

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104. *See* Kadic, 70 F.3d 243-44.

105. *See id.* at 244.

106. *See id.* at 244-45.

107. *See id.* The definition of a state under international law is "an entity which has a defined territory and a permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986). For purposes of this Note, this part of the opinion is not relevant because an MNC would not fall within this definition.

108. *See* Kadic, 70 F.3d at 245.

109. 42 U.S.C. § 1983 (1994) states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

110. *See* Kadic, 70 F.3d at 245. In *Kadic*, the court stated that the appellants were allowed to prove that Karadžić acted in concert with Yugoslav officials or with Yugoslavian aid. *See id.* When international law determines that the violation requires state action, then a court may use § 1983 jurisprudence as a guide in determining when a non-state actor, like Karadžić, has acted under color of law. *See id.*

111. For the purposes of this argument, the Note will use municipal law when referring to domestic law.

international law. The curious result of this holding is that a foreign defendant's liability for a violation of international law could hinge on the application of municipal law. However, international law does, to some extent, incorporate concepts that exist in municipal law, in the context of general principles of international law. Based on this connection between international law and municipal law, a private actor who is not liable under a treaty or customary law, could be found liable under a general principle of law which finds its origins in municipal law.

This borrowing from U.S. jurisprudence cannot be taken too lightly because, in order to adopt this jurisprudence, a court must reassess whether private actors shall be held accountable under international law. If Section 1983 jurisprudence can be used by analogy to hold private actors liable for death, torture or degrading treatment, it will be circumventing treaty and custom based international law, and instead relying on general principles of law. By characterizing private action as state action, judges could conceivably expand which entities are to be held accountable under international law, albeit, through a semantic back door. Thus, an MNC, who colludes with a host country in violation of human rights law may be behaving like a state actor. If it is, the MNC should be treated as a state actor under international law. However, before this recharacterization of state action under international law can occur, a judge must first decide whether it is appropriate for international law to adopt Section 1983 jurisprudence as a general principle of law. If it is appropriate, the question becomes: How exactly should Section 1983 jurisprudence be adopted?

D. General Principles of Law

"General principles of law recognized by civilized nations" is the third source of international law under Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute).[112] This source of law was originally included in the pre-

112. *See* ICJ Statute, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187. The first, second and fourth sources of international law are: first, "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;" second, "international custom, as evidence of a general practice accepted as law;" and fourth "judicial decisions and

decessor to the ICJ Statute, the Statute of the Permanent Court of International Justice (PCIJ Statute),[113] in order to allow judges the room necessary to develop international law.[114] Another purpose in adding this source of law was to fill gaps left in international law by treaties, customary law and judicial decisions, where these sources of law would sometimes be insufficient for the making of a determination.[115] By allowing courts to invoke general principles of law, the draftsmen of the PCIJ Statute:

> enabled the Court to replenish, without subterfuge, the rules of international law by principles tested within the shelter of more mature and closely integrated legal systems.
>
> They opened a new channel through which concepts of natural law could be received into international law.
>
> They held out to other international judicial institutions a tempting set of rules which these might be encouraged to adopt, as a last resort, in their own practice.
>
> They made it possible for the World Court to strike out a bolder line in its application of international law than, in the absence of such wide reserve powers, the Court might have found it possible to take . . . .
>
> Finally, they threw out a challenge to the Doctrine of International Law to sail into new and uncharted seas.[116]

General principles of law ideally would take over when the other sources of law failed to solve a legal dispute, however:

> [n]o decision of the [ICJ], or indeed the [PCIJ], has yet been based explicitly upon a principle or rule of law drawn from

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the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *Id.* art. 38(1)(a), (b), (d).

113. Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 390.

114. *See* BROWNLIE, *supra* note 90, at 15-16.

115. *See* Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"*, 5 DUKE J. COMP. & INT'L L. 35, 63 (1994). In 1920, when the Statute of the PCIJ was drafted, the practice of invoking general principles of law was already established. *See id.* at 63. Article 38 carried over general principles of law from the Statute of the PCIJ in order to prevent the phenomenon of non liquet decisions. *See id.* at 64. In Roman courts when a judge concluded that a case had not been made clear for him, he had the right to sign the opinion N.L., the abbreviated form of the phrase "non liquet," i.e. it is not clear. *See* BLACK'S LAW DICTIONARY 1055 (6th ed. 1990).

116. Georg Schwarzenberger, *Forward* to BIN CHENG, GENERAL PRINCIPLES OF LAW xi (1987).

> the 'general principles of law recognized by civilized nations' . . . . Even where referred to by a party to proceedings, the general principles tend to be employed as something of a makeweight or last resort, a supplementary argument in case the contentions based on customary law or treaties fail to convince; with the result that the Court hardly if ever needs to refer to them . . . .[117]

Part of the problem of basing a legal theory on general principles of law is that there is no clear understanding of how to define "general principles of law recognized by civilized nations."[118] One of the drafters of the PCIJ Statute, the Belgian jurist, Baron Descamps, likened general principles of law to natural law.[119] However, other drafters feared this natural law interpretation would allow judges to rely too heavily on their subjective views as to what was "just" and reworked the phrasing so judges could look to municipal laws for guidance, while still being afforded the room necessary to develop international law.[120] In response to the confusion around the purpose of article 38(1)(c), two schools of thought developed, comparativist and categoricist, each explaining not only how to discern what a "general principle of law recognized by civilized nations" is but also what method should be used to make this determination.[121] Due to certain weaknesses in both of these approaches, a merger has occurred where principles from both schools of thought are being used to assess potential general

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117. Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, 1990 BRIT. Y.B. INT'L L. 1, 110-11.

118. ICJ Statute, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187. In the *North Sea Continental Shelf* cases, Judge Ammoun took issue with the European relic, "civilized nations," as the locator of general principles. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 4, 132-40 (Feb. 20) (separate opinion of Judge Ammoun). Thirlway has responded to Judge Ammoun's opinion with the explanation that the term "civilized nations" is used to "limit consideration of municipal systems to those which are sufficiently developed to reveal the extent to which they share underlying principles." Thirlway, *supra* note 117, at 124.

119. *See* BROWNLIE, *supra* note 90, at 16 (referring to Descamps' draft, which did not make it into the Statute of the PCIJ: "the rules of international law recognized by the legal conscience of civilized peoples.").

120. *See id.*

121. *See* Ford, *supra* note 115, at 66. Ford labeled these two schools of thought "comparativist" and "categoricist" for the purposes of his article and this Note will also use these labels.

principles of international law.[122]

The comparativist approach requires an exhaustive study of municipal legal systems in the hopes that a general principle of law emerges.[123] This study would ideally produce a principle shared by the "major legal systems of the world" and find "the maximum measure of agreement on the principles relevant to the case at hand."[124] The comparativist approach recognizes that a municipal principle need not be a mirror image of itself when used in an international context:

> If any real meaning is to be given to the words 'general' or 'universal' and the like, the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognized in substance by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.[125]

What followed from this approach were time-consuming comparative studies of municipal systems by academics, which resulted in few results because, as it turns out, generally shared principles by municipal systems are rare.[126] In addition to the scant body of law produced by the comparativist approach, the possibility existed of holding a state accountable for a law of which the state was unaware, which violates a basic maxim and therefore,

> [t]he conclusion must be that it is insufficient to point to unanimity of municipal legal systems on a particular point unless the rule which it is sought to derive from them possesses such a degree of reasonableness and appropriateness

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122. *See id.* at 66.

123. *See id.*

124. Wolfgang Friedmann, *The Uses Of "General Principles" In the Development of International Law*, 57 AM. J. INT'L L. 279, 284 (1963).

125. H.C. GUTTERIDGE, COMPARATIVE LAW 65 (H. C. Gutteridge et al. eds., 2d ed. 1949).

126. *See* Ford, *supra* note 115, at 67-68. One such study was produced by Portugal in the *Right of Passage* case where Portugal surveyed 64 municipal legal systems to prove that since 61 of those systems recognized the right of passage for enclaved territory, a general principle of law existed. *See id.*; *see also* Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, 11-12 (Apr. 12) (Portuguese final submissions). The court never reached this issue since Portugal's argument primarily relied on general and specific practice. *See* Ford, *supra* note 115, at 68 n.120.

> for application on the international plane for a State which acts in a contrary manner at least to have been conscious of a possibility that a rule of law might point in the opposite direction. Put another way, . . . the Court will be slow to recognize the existence of a general principle of law, even if there is good evidence of unanimity of municipal legal systems, unless it is such that it would be likely to guide or inspire State action.[127]

For a principle to "possess such a degree of reasonableness and appropriateness" the categoricist approach holds that the principle should be inherent to the essence of the law. Its universality alone does not make the principle a general principle of law, but the logic and reasoning of the principle transforms it into a general principal of law. This approach does not endorse a borrowing of specific rules, nor does "[t]his part of international law . . . consist . . . in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law."[128] What is essential to the categoricist approach is the process of reasoning used by a judge in deciding which legal principles should be used.[129] In the process of reasoning, a judge should:

> look for applicable principles both in public international law and, to the extent that this does not yield an answer, in principles extracted from recognized national systems of law . . . . [T]his process might lead to the acceptance of some, and the rejection of other, principles of even a highly developed system of law, since almost any national system is a mixture of modern and antiquated principles, of those of general applicability and those of historic or national peculiarity.[130]

The categoricist approach, while having a certain logical appeal, fails to protect against the subjective nature of the pro-

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127. Thirlway, *supra* note 117, at 112-13. In the *South West Africa* cases in 1966, South African Judge ad hoc Van Wyk pointed out that in applying general principles of law, "[i]t certainly does not mean that by legislating on particular domestic matters a majority of civilized nations could compel a minority to introduce similar legislation." South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 170 (July 18) (separate opinion of Judge Van Wyk).

128. CHENG, *supra* note 116, at 24.

129. *See* Friedmann, *supra* note 124, at 284.

130. *Id.*

cess whereby a judge, without any guidelines, would be expected to discern what the "Law" is, in order to discern the principles of the "Law."

Therefore, when deciding whether a principle is in fact a general principle of law, a judge may use municipal systems as a guide in the assessment of whether a municipal law should be borrowed.[131] However, the inquiry does not discontinue if a quota is not met, the search's purpose being to answer questions of international law through the use of municipal principles. However,

> [w]hen having recourse to municipal law, in search of a principle which may be sufficiently general to warrant its being treated as 'accepted' by nations, the principle must be defined in a pure form: the individual subjects of law between whom it operates must be replaced, as in an algebraic equation, by x and y. Then, in the context of international law, x and y may be given the values 'State A' and 'State B', or 'State' and 'international organization', for example, and the congruity of the principle assessed.[132]

When relying on analogy as a way of transferring municipal law to the international plane, ubiquity within municipal systems is not required and "it suffices to suggest that the current problem in international law is analogous to one which arises in the municipal sphere, and that the municipal solution is one which recommends itself for disposing of the international law problem."[133]

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131. *See* Ford, *supra* note 115, at 73.

132. Thirlway, *supra* note 117, at 118. This formula was the basis of South Africa's argument countering the premise that a general principle of law against discrimination existed and that South Africa had breached this law by having an apartheid system in *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18). As Thirlway describes, "[t]he argument of the applicants in the *South West Africa* cases represented a short-circuiting of this analysis: it involved transferring the alleged principle to the international plane with the subjects of municipal law still in place, as it were." Thirlway, *supra* note 117, at 118. The court in the *South West Africa* cases still found that non-discrimination was a general principle of law, but in Thirlway's view, this basis was founded on a "wider concept" of general principles of law, "containing a much more marked element of natural law." *Id.*

133. Thirlway, *supra* note 117, at 119. In the *Appeal Relating to the Jurisdiction of the ICAO Council*, Judge Dillard used an analogy to U.S. jurisprudence to decide an issue dealing with a compromissory clause in a treaty. *See* Appeal Relating to the Jurisdiction of the ICAO Council, 1972 I.C.J. 46, 109-14 (Aug. 1972)

Therefore, when a judge is presented with a legal issue which cannot be answered with applicable treaties, customary law or judicial decisions, that judge must use her discretion in reviewing municipal systems in search of a general principle of law.[134] Depending on the legal issue, the judge may want to see widespread consistency among municipal systems, or may simply want to borrow a reasonable principle from a municipal system, in order to fill a gap. In the case of finding state action by private actors, a judge can look to international law to decide this question. She cannot, however, look to international law to determine whether that private actor, engaged in state action, should be held liable. A judge can skirt the state action issue by relying on the current state of international law, which has not reached this issue, or a judge can decide this issue by reviewing municipal systems, such as the United States', that have been presented with this same problem.

1. State Action within International Law.

Imputing private action to the state certainly has been an issue contemplated by international courts, tribunals and scholars.[135] The international, statist perspective frames the issue as whether the state should be held responsible for the acts of private persons:

> Imputability in international law is the juridical attribution of a particular act by a physical person, or a group of physical persons, to a State, or other international person, whereby it is regarded as the latter's own act. Imputability is a basic notion in the concept of State responsibility and is fundamentally linked with the juridical concept of the State in international law.[136]

A maxim of international law is that the state shall only be responsible for the acts of its agents or for acts for which it has assumed responsibility, conforming to the tenets of culpability.[137] The state will only be responsible for activities of pri-

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(separate opinion of Judge Dillard).

134. *See generally* Ford, *supra* note 115, at 79.

135. *See generally Ian Brownlie*, SYSTEM OF THE LAW OF NATIONS STATE RESPONSIBILITY (PART I) 159-66 (1983).

136. CHENG, *supra* note 116, at 180-81.

137. *See id.* at 208.

vate actors if the state "approves" or "ratifies" them.[138] When such private actors appear to be acting under the authority of the state, the acts should be imputed to the state.[139] The International Law Commission drafted articles and commentaries regarding state responsibility between 1973 and 1975[140] and extended imputability through Draft Article 8, entitled "Attribution to the State of the conduct of persons acting in fact on behalf of the State."[141] Draft Article 8 states that "the conduct of a person or group of persons shall also be considered as an act of State under international law if (a) it is established that such person or group of persons was in fact acting on behalf of that State."[142] "Person" is used in Draft Article 8 instead of "individual" so as not to exclude associations and private companies from the article.[143] The Commentary accompanying Draft Article 8 does not give a litany of examples because it claims that the principle embodied therein is "practically undisputed:"[144]

> The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf, though without thereby acquiring the status of organs either of the State itself or of some other entity empowered to exercise elements of the governmental authority, is unanimously upheld by the writers on international law who have dealt

138. Cotesworth & Powell Case (Gr. Brit. v. Colom. 1875), 2 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, MIS. DOC. NO. 212, at 2050, 2082 (53d Cong., 2d Sess., 1898) (alleged denial of justice by the courts of Colombia).

139. *See* Stephens Case (Mex. v. U.S.), 4 Rep. Int'l Arb. Awards 265, 267 (Gen. Claims Comm. 1927) ("It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico.").

140. These reports currently consist of 35 articles and commentaries which have been consolidated in one volume. *See* THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY, pt. 1, arts. 1-35, at vii-ix (Shabtai Rosenne ed., 1991) [hereinafter DRAFT ARTICLES].

141. *See* Draft Articles on State Responsibility, art. 8, *in Report of the Commission to the General Assembly*, U.N. International Law Commission, 26th Sess., ch. III(B), U.N. Doc. A/9610/Rev.1 (1974), *reprinted in* [1974] 2 Y.B. Int'l L. Comm. 157, 277, U.N. Doc. A/CN.4/SER/A/1974/Add.1 (Part One).

142. *Id.*

143. *See id.* art. 8 cmt. 13. For purposes of consistency, this Note uses "private actor(s)" when referring to "persons," as meant by the International Law Commission.

144. *Id.* art. 8 cmt. 7.

with this question.[145]

When a person acts on behalf of the state, it must be established that "persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty . . . ."[146] Therefore, if a state authorizes the private actor to act on behalf of the state and the burden of proof is met, the private actor becomes a de facto state actor.

Six scenarios have been outlined where the activities of private actors can be imputed to the state: "(a) [a]dmission of responsibility; (b) [e]xpress authorization or ratification; (c) [a]pproval and adoption of harmful acts; (d) [b]reach of a duty to exercise due diligence in control of private persons; (e) [a]cts of officials outside their official competence; [and] (f) '[q]uasi-public' legal persons."[147] In a stark example of Subparagraph (c), "approval and adoption of harmful acts" by the state, which involved the taking of hostages in Iran in 1979,[148] the ICJ held:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government, was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.[149]

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145. *Id.*

146. *Id.* art. 8 cmt. 8.

147. *See* BROWNLIE, *supra* note 135, at 160-63.

148. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

149. *Id.* para. 74, at 36. Khomeini was found to have approved of the acts by the militants who took over the U.S. Embassy because of his decree that stated, in part, that the U.S. Embassy was "'a centre of espionage and conspiracy'" and

There were no findings that the Iranian government and the militants had officially colluded prior to the seizure of the embassy, or that the militants "had any form of official status as recognized 'agents' or organs of the Iranian State."[150] Nevertheless, based on the endorsement by the Iranian government of the acts of the militants, the entire takeover of the embassy was imputed to the Iranian government, as a violation of international law.[151]

International law, therefore, has a long history of holding a state responsible for the activities of private actors, as long as the activities are in violation of international law. However, international law goes only so far: the state is responsible for the private action, but the private actor is not held accountable for its own unlawful act under international law. Interestingly, international organizations, such as the United Nations, do hold themselves accountable for internationally wrongful acts, albeit voluntarily.[152] Although these wrongful acts cannot be imputed to the state in which the acts occurred, the international organization can be found to be legally liable.[153] For instance, when the United Nations sent a force to the Congo in the early 1960s, complaints were lodged against the organization for damages caused by its personnel.[154] While the United Nations had voluntarily agreed to pay a lump-sum settlement to the harmed nationals, the Secretary-General stressed the importance of facing its responsibility "for which the Organization was legally liable."[155] However, international law has been resistant to setting up rules for determining an interna-

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that "'those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect.'" *Id.* para. 73, at 34.

150. *Id.* para. 58, at 30.

151. *See id.* para. 76, at 36. The ICJ found that the Iranian government violated international law by breaching provisions of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. *See id.*

152. *See* Draft Articles on State Responsibility, art. 13 cmt. 3, *Report of the Commission to the General Assembly*, U.N. International Law Commission, ch. II(B), U.N. Doc. A/10010/Rev.1 [hereinafter 1975 Report], *reprinted in* 1975 Y.B. Int'l L. Comm'n 47, 87-88, U.N. Doc. A/CN.4/SER.A/1975/Add.1.

153. *See id.* art. 13 cmt. 4.

154. *See id.* art 13 cmts. 3-4. Nationals from Belgium, Greece, Italy, Luxembourg and Switzerland, situated in the Congo during the time of the operations of the U.N., suffered damages to their person and property. *See id.* art. 13 cmt. 3.

155. Letter from Secretary General of the United Nations to the Acting Representative of the Union of Soviet Socialist Republics (Aug. 6, 1965), *reprinted in* 1965 U.N. Jurid. Y.B. 41, U.N. Doc. ST/LEG/SER.C/3.

tional organization's liability.[156]

Thus, as it stands now, international law has not endorsed the principle that a private actor, when acting under color of law, is legally responsible for its acts that are in violation of international laws, even though the state giving the authority is responsible for those acts. By finding private actors liable for their wrongful acts, a judge would be expanding international law's reach.[157] Since the current state of international law does not embrace this principle, a judge deciding this issue must either avoid the question of whether international law should reach private actors altogether,[158] or, if choosing not to pass on this issue, look to general principles of law to determine whether state action doctrine within international law should be extended to private actors.

2. Private Persons acting under color of state law: U.S. Jurisprudence

The import of Section 1983 jurisprudence for the purposes of international law is the principle that a private actor can be held accountable for activities that are characterized as state action.[159] The tests used under Section 1983 to find a private

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156. *See* 1975 Report *supra* note 152, art. 13 cmt. 8. The Commission declined to create any rules regarding the international responsibility of international organizations because such a task was beyond the scope of the draft. *See id.* The Commission believed it was not required to: "establish how an international organization may become a subject of international law distinct from its constituent States; to indicate when the responsibility of the international organization or its member States may be incurred, or in what cases there may be joint, concurrent or alternative responsibility . . . ." *Id.*

157. *Cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 101 (1986) ("'International law' . . . deals with the conduct of states and of international organizations, and with their relations inter se, as well as some of their relations with persons, whether natural or juridical.").

158. In choosing to pass on this issue, a U.S. court can rely on the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, which held that U.S. courts should not decide issues that have not been clearly defined within international law. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). This defense in an ATCA case is a formidable one but not insurmountable. General principles of law are a source of international law. Municipal law can be subsumed within this source and applied in an international law context. If a private actor is found to be engaged in state action, finding liability on the part of the private actor, under U.S. municipal law, is very clearly defined: liability may be imposed.

159. *See generally* Adickes v. Kress & Co., 398 U.S. 144 (1970). In *Adickes*, the Court held that a private store that refused to serve a white woman because she

actor liable are not relevant for the purposes of international law because within international law, a body of law for assessing the existence of state action already exists.[160] The general principle of law that should be extracted from Section 1983 is simply that the private actor, along with the state actor, should be held accountable for its unlawful acts. If a petitioner in a Section 1983 claim can prove that his civil rights have been violated by either a state official or a private party acting under color of law, then relief will be granted, with a judgment against the private actor.[161] This principle is important not only for its purpose of holding persons accountable for their acts, but also because objectionable activity by private actors can be controlled by the federal judiciary.[162] Even though Section 1983 was enacted with an express limitation exempting non-state activity, private actors are not completely out of the reach of Section 1983.

3. General principle of law: Private actors acting under color of state law are liable.

As a general principle of law, private actors should be held accountable for their activities when acting under color of law. This principle can be borrowed from the U.S. municipal legal system by international law because the principle is analogous in both systems and can be successfully transferred from the municipal context to the international.[163] In the municipal setting, a private actor cannot be touched by 42 U.S.C. § 1983 for activities that, if committed by a state actor, would fall within the law.[164] However, if the private actor is found to be

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was in "the company of Negro students" violated 42 U.S.C. § 1983 by conspiring with the local police to deprive the woman of her civil rights. *See id.* at 149. The woman and six African American students, after being denied access to a public library, went to the store to eat. *See id.* A police officer entered the restaurant at the time the woman and her students were seated at a booth. *See id.* A waitress then took the orders of the students, but refused to serve Ms. Adickes, causing the woman and the students to leave. After leaving the restaurant, the woman was arrested by the same police officer who had been in the store on groundless charges of vagrancy. *See id.*

160. *See supra* Part III.D.1.

161. *See Adickes*, 398 U.S. at 150-52.

162. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1689 (2d ed. 1988).

163. *See generally supra* Part III.D.1.

164. *See generally* 42 U.S.C. § 1983 (1994).

acting under color of law, then both it, a de facto state actor and the state may be held liable under Section 1983. In the international context, under certain substantive international law, such as that of torture or death, private actors cannot be touched by the applicable international law for activities that, if committed by a state actor, would fall within the law.[165] If, however, the private actor is found to be acting under color of law, only the state can be held liable, even though its liability is established because of the activity of the private actor, a de facto state actor. The algebraic formula loosely referred to by Thirlway in the context of the *South West Africa* cases[166] is satisfied where, in both the municipal setting and the international setting, x represents the de facto state actor and y represents the state.[167] The similarity between the municipal and international law is tantamount to an analogy and, therefore, it is appropriate to look to municipal law for guidance.[168]

Under international law, when a judge is confronted with a private actor who has been accused of acting under color of law in violation of international law, the judge first will review the substantive law to determine whether the private actor can be held accountable.[169] If the judge determines that the substantive law does not hold private actors liable, then the private actor is immune, even though the state, which either authorized or adopted the activities, is not. The state is held liable because it has breached an international obligation by sanctioning the acts of the private actor; the liability of the state is wholly contingent upon its endorsement of the activities of the private actor. The private actor does not have an obligation to the international community as a private actor, but it does have an obligation as a state actor. Otherwise, the state could not be found liable based on the private actor's activities. The state co-opts the private actor for state purposes

165. *See* Kadic v. Karadžić, 70 F.3d 232, 243 (2d Cir. 1996).

166. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).

167. *See* Thirlway, *supra* note 117, at 118 (analyzing the *South West Africa* Cases).

168. In the *South West Africa* cases, the litigants argued that the general principle of law against discrimination, once found, should be applied to those same litigants rather than transplanting the general principle of law into an international context. *See id.*

169. *See supra* Part III.C.

and all activities incurred during the period of co-option are characterized as state action. If the state is held accountable for a private actor's activities because an actor is deemed a de facto state actor, then it should be treated as such. The fact that it is not a de jure state actor has no bearing on the state's liability; it is irrelevant. The distinction between de jure state actors and de facto state actors is only relevant when the private actor is called upon to fulfill its obligation to the international community. By providing immunity for this de facto state actor, international law ignores the fact that an international obligation by the *state* has been breached.[170] Complete responsibility for this breach is not taken by the state as long as the de facto state actor is not held accountable.

The importance of acknowledging private actor liability is particularly relevant in cases where MNCs are intimately involved with a host state's deprivation of human rights. By holding an MNC in a host country accountable for its state action, international law will frustrate the immunity enjoyed by both MNCs and host countries.[171] An example of an MNC allegedly colluding with a host country in the deprivation of human rights is Shell Oil in Nigeria. This case study shows why a general principle of law should hold de facto state actors liable for their international obligations.

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170. The main defense against applying this general principle of law to private actors is that they had no reason to know that such an obligation existed and, therefore, holding them accountable is in violation of another general principle of law—"no one may be condemned for breach of a law which he neither knew of nor could know of." Thirlway, *supra* note 117, at 112. However, private actors know or should know that the state is liable for wrongful acts and that state actors de jure are held accountable. The fact that a private actor has committed a wrongful act that creates liability on the part of the state does not show ignorance on the part of the private actor that it is committing a wrongful act.

171. Host countries generally are protected from ATCA claims because of the Foreign Sovereign Immunities Act, which precludes suits brought against foreign states unless the claims involve commercial activity. *See* 28 U.S.C. § 1330 (1994). Except for the ATCA and the legal apparatus of the host country, an MNC is safe from any legal repercussions for its illegal activity. Generally speaking, if a host country is colluding with an MNC in violating human rights, it will be doubtful that the host country will bring charges against the MNC.

IV. MNCs As State Actors

A. *Shell Oil in Nigeria*

Shell Oil, an MNC located in Nigeria, has been accused of violating international human rights law in a number of ways—(1) summary execution; (2) crimes against humanity; (3) torture; (4) cruel and inhuman or degrading treatment; and (5) arbitrary arrest and detention—and has been sued by the family members of two victims of the alleged human rights violations.[172] Shell Oil is not accountable for these acts in any international forum and the Nigerian government has no interest in charging Shell Oil with crimes for which it too could be held accountable. A brief history of the recent events in Nigeria elucidates the flaw inherent in international law for failing to hold private actors responsible for their activities.

As a result of a civil war in Nigeria during the 1960s and a subsequent political vacuum, the Northern elite[173] and Shell Oil were able to move into Nigeria and establish what is now one of the largest oil companies in the world.[174] The Nigerian government was instrumental in Shell Oil's business venture in this region, which resulted in Shell Nigeria, a joint venture between Shell Oil and the state-owned Nigerian National Petroleum Corporation (hereinafter NNPC).[175] Each successor government has profited from this business relationship. Today, Shell Oil pumps approximately one-half of Nigeria's nearly two million barrels per day of crude oil, accounting for about ninety percent of the country's foreign exchange.[176] The Nigerian government owns fifty-five percent of

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172. A suit has been filed against Shell Oil in the Southern District of New York. *See* Plaintiff's Demand For Jury Trial, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y. Nov. 8, 1996). The plaintiffs chose only to sue Shell Oil and not the Nigerian government. As of January 27, 1997, Shell Oil has not responded to the complaint.

173. The North and the South are divided by religion—the North is predominantly Muslim and the South is predominantly Christian. When the English left in 1960, they handed power over to a minority in the North who are referred to by some as the Northern elite. *See* Hilary Andersson, *2 Branches of Islam Clashing in Nigeria*, N.Y. TIMES, Oct. 11, 1996, at A9.

174. *See* Paul Lewis, *After Nigeria Represses, Shell Defends Its Record*, N.Y. TIMES, Feb. 13, 1996, at A1.

175. *See* Wil Haygood, *Nigeria On Trial: Writer's Hanging Latest Disaster To Shake Nation*, BOSTON GLOBE, Apr. 7, 1996, *available in* LEXIS, News Library, Bglobe File.

176. *See id.*

the corporation.[177] Shell Oil pumps 900,000 barrels of oil a day, keeping 257,000 for itself and giving the rest to its partner, the Nigerian government.[178] From this production, Shell's profits total $170 million to $190 million a year.[179]

Shell Oil first discovered oil in the southeastern region of Nigeria, Ogoni, in 1958.[180] When Shell Oil moved into Ogoni, environmental changes in this region began.[181] Shell Oil did not comply, nor was it required to comply, with environmental standards required in other countries, such as the United States or England.[182] Due to environmental problems, people in the region began to challenge the oil companies and the Nigerian government's environmental policies.[183] In October 1990, in Umuechem,[184] protestors organized peaceful demonstrations[185] against Shell's environmental destruction.[186] As a result, Shell wrote the Rivers State Police Commissioner requesting protection by the Mobil Police Force against an "impending attack" on company facilities.[187] The police responded to Shell Oil's request the next day by killing the leader of the protest, along with eighty others, and by partially or totally destroying 495 houses.[188]

As a result of this violent response to the protestors and the ongoing environmental destruction to the region, Ogoni village chiefs created and organized the Movement of the Survival of the Ogoni People (MOSOP).[189] MOSOP presented the

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177. *See id.*

178. *See* Lewis, *supra* note 174, at A6.

179. *See id.* Nick Antill, an analyst with the London securities house Barclays de Zoete Wedd, quotes these profits and concludes that these profits constitute "'nearly 10 percent of total exploration and production profits, which is significant.'" *Id.*

180. *See* Andy Rowell, *Shell Shocked*, VILLAGE VOICE, Nov. 21, 1995, at 21.

181. *See id.* Ogoni people suffered from a disproportionate amount of respiratory problems and obscure diseases. *See id.*; *but see* Lewis, *supra* note 174, at A1 (claiming that the environmental complaints of the devastation of Ogoni are exaggerated).

182. *See* Lewis, *supra* note 174, at A10.

183. *See* Rowell, *supra* note 180, at 21.

184. A southeastern village in Ogoniland.

185. The demonstrations took place at Shell sites. Peter Takirambudde, Letter to Editor, N.Y. TIMES, Feb. 17, 1996, at 22. Takirambudde is the Executive Director of Human Rights Watch/Africa. *See id.*

186. *See id.*

187. *See* Rowell, *supra* note 180, at 22.

188. *See id.*

189. *See* KEN SARO-WIWA, A MONTH AND A DAY: A DETENTION DIARY 66, 78

Ogoni Bill of Rights to the Nigerian government in 1990 citing environmental destruction and demanding economic compensation and political autonomy.[190] MOSOP emphasized that it was not a secessionist organization.[191] Ken Saro-Wiwa, the first appointed speaker, brought recognition to Ogoniland by publishing essays on the environmental damage in Ogoniland and its effect on the people of the region.[192] Saro-Wiwa also challenged the way Shell Oil and the Nigerian government did business and confronted the government for its alleged corruption in siphoning off profits and in its refusal to give compensation back to the community.[193] MOSOP protested the presence of Shell by demonstrating at oil pumps and by demanding that Shell Oil be consistent in its environmental standards followed in western locations.[194] As a result, in August 1993, Shell Oil again requested the assistance of the Mobil Police Force (locally known as "the go and kill mob"),[195] which led an attack resulting in the deaths of thirty-five Ogoni.[196] When the Ogoni continued to demonstrate against Shell Oil's presence, Shell Oil called the military police who arrived near the area of Korokoro, in Ogoni, in vehicles sup-

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(1995).

190. *See id.* at 67-70.

191. *See* M.C. van Walt van Praag, Letter to Editor, Feb. 17, 1996, N.Y. TIMES, at 22. Van Praag was the General Secretary of the Unrepresented Nations and Peoples Organization, of which MOSOP was a member. *See id; but see* Lewis, *supra* note 174, at A10 (claiming that Saro-Wiwa's true goals were autonomy and a share of the oil revenue and that the environmental claims were trumped up to get attention from the West). Also, the Nigerian government argues that MOSOP resembled secessionists during the Biafran war and feared that the Ogoni were moving toward a separatist war. *See id.* The government justifies its response to the Ogoni as putting down an insurgency before it got started. *See id.*

192. *See* SARO-WIWA, *supra* note 189, at 66; *see also* Lewis, *supra* note 174, at A1. Saro-Wiwa supported a "younger" contingency of Ogoni protestors whose position against Shell and the Nigerian government was more adamant than that of the traditional leaders. *See* SARO-WIWA, *supra* note 189, at 102. This younger contingency was later accused of supporting violent tactics, allegedly resulting in the final act of violence, the murder of the four Ogoni leaders. *See* Lewis, *supra* note 174, at A10.

193. *See* SARO-WIWA, *supra* note 189, at 131. By challenging the corruption, Saro-Wiwa set himself apart from the older MOSOP leaders who did not question the Nigerian government in this manner. *See id.* at 177-78.

194. *See id.* at 166.

195. *See* Lewis, *supra* note 174, at A10.

196. *See* Rowell, *supra* note 180, at 21; Plaintiff's Demand For Jury Trial, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, para. 51, at 10 (S.D.N.Y. Nov. 8, 1996).

plied by Shell Oil.[197] As a result of these incidents, the Internal Security Force of the Nigerian government responded to Shell's request by issuing a memo dated December 5, 1993, stating: "Shell operations still impossible unless ruthless military operations are undertaken . . . wasting targets cutting across communities and leadership cadres, especially vocal individuals."[198] Shell operations could not continue unless the Ogoni region was "pacified."[199] Within this memo, a notation requiring the financial assistance on the part of Shell was included.[200]

The following April, the Internal Security Force attacked eight Ogoni villages and burned down two villages, Leader and Tumbe.[201] Shell paid for the transportation of the police force into these Ogoni villages and underwrote bonus salaries to some of the military police who committed human rights violations.[202] During the attacks, witnesses claimed that Shell helicopters were flying over the villages and that Shell boats were used to transport the police force.[203] Saro-Wiwa's brother, Dr. Owens Wiwa, also testified at a hearing to an incident he witnessed: while he was driving, he saw a man, lying on the ground in a pool of blood, who claimed that he had been shot by a military police officer accompanied by a Shell representative.[204]

On May 21, 1994, Ken Saro-Wiwa and eight others were

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197. *See* Plaintiff's Demand For Jury Trial para. 53, at 10, *Wiwa* (No. 96 Civ 8386). It has been alleged that the military police shot a seventy-five-year-old man and two youths, during this incursion into Korokoro. *See id.* para 54.

198. Derrick Z. Jackson, *A Shell Game In Nigeria*, BOSTON GLOBE, Feb. 16, 1996, *available in* LEXIS, News Library, Bglobe File. To whom this memo was issued is unclear and, more important, it is unclear whether Shell Oil and the Nigerian government agreed on the contents of the memo before or after it was issued.

199. WOLE SOYINKA, THE OPEN SORE OF A CONTINENT 35 (1996).

200. *See* Lewis, *supra* note 174, at A10.

201. *See* Plaintiff's Demand For Jury Trial para. 55, at 10, *Wiwa* (No. 96 Civ 8386). The number of people killed during these attacks has not been established, though some reports claim the death toll was in the thousands. *See* Rowell, *supra* note 180, at 22.

202. *See* Lewis, *supra* note 174, at A1; *see also* Rowell, *supra* note 180, at 21.

203. *See* Rowell, *supra* note 180, at 21; Haygood, *supra* note 175.

204. *See* Greenpeace, *Transcript of 'A Testimony' By Dr. Owens Wiwa* (Brother of Ken Saro-Wiwa) (visited Jan. 18, 1998) <http://www.greenpeace.org/~comms/ken/owens.txt7> [hereinafter *Owens Wiwa Testimony*] (statement by Dr. Owens Wiwa, brother of executed Nigerian environmentalist, Ken Saro-Wiwa).

arrested and jailed without being charged with a crime.[205] The arrest was allegedly for ordering the murders of four Ogoni leaders[206]—Albert Badey, Edward Kobani, Samuel Orage and Theophilus Orage—who had disagreed with Saro-Wiwa's leadership of MOSOP. The government claimed that, based on this infighting, Saro-Wiwa had ordered the murders.[207] While Saro-Wiwa was in prison, his brother, Dr. Owens Wiwa, spoke with the head of Shell Oil, Brian Anderson, in an attempt to broker a release by clemency.[208] When he told Anderson that Saro-Wiwa's health was failing and that he needed medical attention, Saro-Wiwa was moved to a military hospital and received medical attention for the first time after being detained for approximately eleven months.[209] Suspecting that he could receive assistance from Anderson, Dr. Wiwa then asked Anderson if he could influence the government in giving Saro-Wiwa clemency.[210] Anderson replied that if Dr. Wiwa and Saro-Wiwa called off the campaign to discredit Shell Oil, Anderson would see what he could do.[211] Dr. Wiwa said he did not have the power to call off the campaign and, even if he did, he could not in good conscience choose between his brother and the Ogoni people.[212] Anderson denies the substance of these conversations, even though he does admit to having a conversation with Dr. Wiwa.[213]

The government defends its trial of Saro-Wiwa, arguing that Saro-Wiwa was tried in public, with representation, first by his own attorney and then by a court-appointed attorney.[214] Saro-Wiwa's lawyer, Gani Fawehimni, resigned because he felt the trial was unfair.[215] He complained that because Saro-Wiwa was held at a military barracks, Fawehimni could not speak with Saro-Wiwa privately and could only

205. *See Nigeria's Waiting Game*, N.Y. TIMES, May 6, 1996, at A14.
206. *See id.*
207. *See* Lewis, *supra* note 174, at A6.
208. *See Owens Wiwa Testimony*, *supra* note 204.
209. *See id.*
210. *See id.*
211. *See id.*
212. *See id.*
213. *See* Rowell, *supra* note 180, at 22.
214. See C.O. Awani, *Sanctions on Nigeria Would Deepen Poverty*, Letter to Editor, N.Y. TIMES, May 11, 1996, at A18. Saro-Wiwa did not accept the court-appointed attorney. *See id.*
215. *See* Haygood, *supra* note 175.

strategize publicly in the courthouse.[216] These complaints resulted in Fawehimni being arrested, tortured and held in jail on no charges, which is where he remains today.[217] Based on the bribery of two key prosecution witnesses, Saro-Wiwa and eight others were condemned to death on October 30 and 31 by a military-appointed special tribunal and, on November 10, 1995, Saro-Wiwa was hanged.[218] In February of 1996, Shell Oil admitted that it had purchased "sidearms" and "handguns," to protect Shell's facilities, on behalf of the Nigerian Police Force, which did not have sufficient funds to purchase these weapons.[219] Shell Oil defends this practice by claiming that other companies in Nigeria buy the police its guns in order to protect their facilities.[220]

B. *Shell Oil as de facto state actor under general principles of law*

Shell Oil participated in the violation of human rights in Nigeria by conspiring with the Nigerian government when it economically and politically supported the attacks on the Ogoni villages and, when it bribed witnesses for the prosecution in the trial of Saro-Wiwa.[221] By actively being involved in the internal politics of Nigeria, by paying for the miliary operations in Ogoni and by providing the weapons and vehicles used in the violation of human rights, Shell Oil accepted a state function. By accepting this role, Shell Oil functioned as a state actor. The Nigerian government looked to Shell Oil as a partner in handling the problems that arose at the Shell facilities and turned over some of the responsibility to Shell Oil. By requesting payments, weapons and vehicles for the explicit pur-

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216. *See id.*

217. *See id.*; Plaintiff's Demand For Jury Trial para. 66, at 12, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y. Nov. 8, 1996). The complaint against Shell Oil alleges that Saro-Wiwa's seventy-four-year-old mother was beaten, along with other family members, when attending Saro-Wiwa's trial. *See id.*

218. *See* Haygood, *supra* note 175.

219. *See* Matthew Yeomans, *Oil, Guns and Lies*, VILLAGE VOICE, Feb. 20, 1996, at 26.

220. *See id.*

221. Clearly, these allegations must be proven, but the facts as they are presented thus far form an argument that Shell Oil was in fact a violator of human rights. Because these allegations have not been proven in a court of law, they are, as of now, just allegations.

pose of violating human rights, the Nigerian government viewed Shell Oil as a de facto state actor. These two actors conspired as equals to deny the rights of Ogoni people. However, only one of these actors can be held liable for these acts. Shell Oil does not face any repercussions for its activities in Nigeria, even though these activities violate international law. As a de facto state actor, Shell Oil's liability is imputed to the state, but it still has an obligation not to violate human rights. Maintaining a distinction between the state de jure and de facto state actors protects illegal activity. If Shell Oil was not found to be a de facto state actor and it remained a private actor, then international law, as it stands today, could not touch it. However, Shell Oil was acting in the capacity of the state and it, therefore, should be treated as such.

V. CONCLUSION

If de facto state actors are found liable under international law, a step will be made in restructuring the current statist system. The benefit in restructuring this paradigm is that MNCs are quickly amassing enormous amounts of power in the global economy: "[W]ith the exception of a handful of nation-states, multinationals are alone in possessing the size, technology, and economic reach necessary to influence human affairs on a global basis."[222] However, based on free trade economic policies, the international community has no interest in regulating MNCs. One consequence in failing to regulate MNCs is that nation-states are effectively turning over global power to entities that are above the law. This prospect, needless to say, should be avoided. While the ATCA will not completely convert the role of the MNC in the global community, it could alter the manner in which international law chooses to handle MNCs. By holding an MNC liable for its activities based on international law, the international community can adjust to this necessary form of regulation and possibly recognize the importance of maintaining control over a potentially lawless entity.

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222. DONALDSON, *supra* note 1, at 31.