

2008

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Recommended Citation

Elise Catera, *ATCA: Closing the Gap in Corporate Liability for Environmental War Crimes*, 33 Brook. J. Int'l L. (2008).
Available at: <http://brooklynworks.brooklaw.edu/bjil/vol33/iss2/7>

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ATCA: CLOSING THE GAP IN CORPORATE LIABILITY FOR ENVIRONMENTAL WAR CRIMES

INTRODUCTION

When Israel's 2006 military bombing campaign in Lebanon wrought destruction of both the infrastructure of the country as well as the natural environment, the environmental impact of warfare was once again brought to public consciousness.¹ This kind of wanton destruction of the environment has been condemned by the international community,² and prohibitions against it are found in several treaties, including the Additional Protocol I of the Geneva Convention of 1949 ("Additional Protocol I"),³ the Convention on the Prohibition of Environmental Modification Techniques ("ENMOD"),⁴ and the Rome Statute of the International Criminal Court ("Rome Statute").⁵ However, the lack of criminal prosecution for environmental war crimes since Nuremberg⁶

1. See, e.g., Hassan M. Fattah, *Casualties of War: Lebanon's Trees, Air and Sea*, N.Y. TIMES, July 29, 2006, available at <http://www.nytimes.com/2006/07/29/world/middleeast/29environment.html?ex=1311825600&en=34075758dfbd9790&ei=5088&partner=rssnyt&emc=rss>; Richard Black, *Environmental Crisis in Lebanon*, BBC NEWS, July 31, 2006, <http://news.bbc.co.uk/2/hi/science/nature/5233358.stm>; Bassem Mroue, *Lebanon Sees Environmental Damage*, WASH. POST, Aug. 1, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/01/AR2006080100672.html>.

2. For example, the United Nations ("U.N.") General Secretary issued a message on The International Day for Preventing the Exploitation of the Environment in War and Armed Conflict expressing the U.N.'s view that countries in armed conflicts should "neither exploit[] nor heedlessly damage[] ecosystems in the pursuit of military objectives," and noting that "by and large the environmental consequences of war are overlooked by contemporary laws;" the message also declares that "[i]t is high time that we review international agreements related to war and armed conflict to ensure that they also cover deliberate and unintentional damage to the environment." Message by the Secretary-General of the U.N., Kofi Annan, *International Day for Preventing the Exploitation of the Environment in War and Armed Conflict*, Nov. 6, 2006, available at <http://www.eclac.org/cgi-bin/getProd.asp?xml=/prensa/noticias/comunicados/7/27167/P27167.xml&xsl=/prensa/tpl-i/p6f.xsl&base=/prensa/tpl-i/top-bottom.xsl>.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I].

4. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614 [hereinafter ENMOD].

5. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183 [hereinafter Rome Statute].

6. Carl E. Bruch, *All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 VT. L. REV. 695, 716 (2001).

suggests that these international agreements do not provide an effective deterrent. Furthermore, when military powerhouses such as the United States refuse to be a party to most of these conventions,⁷ it is unlikely that criminalization of these acts will succeed as a deterrent.

Civil liability for such destruction could be more effective. Some success in obtaining funds to clean up war-related environmental damage has been achieved through the United Nations Compensation Commission (“UNCC”),⁸ which adjudicated claims brought against Iraq for actions it took during the Persian Gulf War. Though this demonstrates that civil remedies pursued through international channels might be useful, the relatively insubstantial damages recovered indicate potential problems with the UNCC as a tool of recovery against states.⁹ In the case of Iraq, problems recovering had much to do with Iraq’s initial refusal to cooperate with the United Nations.¹⁰ Application of the UNCC to future civil claims may face additional challenges, namely the requirement that a state fulfilling a judgment has sufficient and accessible wealth to draw upon for such remedial measures.¹¹

Taking into consideration the difficulties that inhere when attempting to recover monetary relief from a state, it is possible that civil litigation against private entities such as corporations could achieve better results. There may be more to gain both in terms of financial compensation as well as deterrence since the cost of participating in such large scale destruction could be prohibitive from the private sector perspective.

One potential avenue of relief that allows private individuals a right to litigate for compensation is the United States Alien Tort Claims Act (“ATCA”).¹² The ATCA establishes jurisdiction for U.S. district courts to hear any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. Although said to apply to “claims in a very limited category,”¹³ the ATCA has been used with increasing frequency to bring charges against both corporations and pri-

7. See Protocol I, *supra* note 3; see Rome Statute, *supra* note 5. The United States is not a party to Protocol I or the Rome Statute.

8. Meredith DuBarry Huston, *Wartime Environmental Damages: Financing the Clean-up*, 23 U. PA. J. INT’L ECON. L. 899, 911 (2002) (citing S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (1991)).

9. *Id.* at 915.

10. *Id.* at 915–16. Compensation for the fund was to be derived from thirty percent of Iraq’s exports of petroleum and petroleum products, but Iraq refused to comply. Instead, frozen oil revenues held by other countries temporarily subsidized the fund.

11. *Id.* (citing Rosemary E. Libera, Note, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT’L & COMP. L. REV. 291, 301 (2001)).

12. 28 U.S.C.A. § 1350 (2003).

13. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

vate individuals accused of violating “the law of nations.” It has met with substantial success in actions brought against private individuals who engaged in conduct that violated “well-established, universally recognized norms of international law.”¹⁴

This is not to say that the conventions criminalizing certain levels of environmental destruction during combat would serve no purpose or should never be asserted, but only that the penalty of cleaning up the destruction could provide a crucial economic barrier to corporations that support military plans entailing great environmental damage. While some have argued that litigation is neither effective nor efficient in achieving goals that are ostensibly political in nature,¹⁵ the pressure applied to private corporations through prosecution of ATCA claims brings public awareness to this crisis, and can deter those that customarily facilitate unlawful military operations. Furthermore, regular prosecution of individuals or corporations for such activities can contribute to the international consensus that this environmental crime is one that reaches the level of universal concern, and thus subjects the perpetrators to a wider range of jurisdiction and a greater degree of accountability.

This Note will argue that the ATCA is an important tool that should be utilized to hold private entities, such as corporations, accountable for causing serious harm to the environment in the course of an armed conflict. In order to protect the environment and the health and well-being of all its inhabitants, it is necessary to inhibit the reckless destruction of the land and sea. The international community has not yet achieved the will or means to do so. Applying punitive measures against those who perpetrate environmental war crimes is necessary and the ATCA can provide such a precedent.

Part I of this Note will briefly describe the range of environmental damage arising from armed conflict throughout history to the present time. Part II will establish the existence of an international prohibition against environmental destruction during warfare as evidenced in international agreements as well as in customary international law. Part III will discuss the mechanisms in place to address the deterrence of such conduct and examine the shortcomings of these methods. Part IV presents the ATCA as a viable alternative for discouraging environmental harm. Part IV begins with a brief history of the ATCA followed by an examination of how courts have responded to ATCA claims, highlighting

14. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

15. Bill Baue, “*Win or Lose*” in *Court*, BUSINESS-ETHICS.COM, Summer 2006, available at <http://www.globalpolicy.org/intljustice/atca/2006/06winlose.pdf#search=%22alien%20tort%20claims%20act%20pushes%20corporate%20respect%22>.

potential obstacles litigants may have to overcome. Discussion in this section will include the legal argument for holding private entities such as corporations liable for environmental torts during war. Part V will discuss the application of the ATCA to military defense contractors. The Note will conclude with a policy argument for utilizing the ATCA in U.S. courts, including the need to fill in the gap in accountability for environmental war crimes so that the perpetrators, and not victims or taxpayers, will be held fiscally responsible.

I. A BRIEF HISTORY OF ENVIRONMENTAL HARM AS A BYPRODUCT OF WARFARE

The history of environmental destruction during war, intended or incidental, is millennia old and notorious. A few milestones in the history of environmental abuse include the alleged salting of the fields of Carthage in the second century by the Romans during the Punic Wars,¹⁶ the Union Army's burning of thousands of farms and killing of livestock in the Civil War,¹⁷ the atomic blast that irradiated Hiroshima and Nagasaki, the forests defoliated by Agent Orange during the Vietnam War,¹⁸ and the deliberate spilling of millions of gallons of oil into the Persian Gulf and the burning of over 500 oil fields by Iraq in the Persian Gulf War.¹⁹ More recently, the armed conflict between Israel and Lebanon gave rise to yet another wartime environmental disaster.²⁰ Fallout from the bombing campaign included an 87-mile long oil slick along the Lebanese shore.²¹ An estimated total of 35,000 tons of oil in the coastal waters threatened the fishing and tourism industries and posed a serious threat to human health from toxic substances such as benzene, a known carcinogen.²² As a result, Lebanon, a country that prioritized the maintenance of a pristine environment, faces the devastation of the entire marine ecosystem on its

16. Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEO. INT'L ENVTL. L. REV. 697, 700 (2005).

17. See Bruch, *supra* note 6, at 695 (citing BRUCE CATTAN, *THE PENGUIN BOOK OF THE AMERICAN CIVIL WAR* 240 (1960)).

18. John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War*, 15 FLA. J. INT'L L. 481, 488 (2003) (citing Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 269 (1997)).

19. *Id.* at 488.

20. See, e.g., Fattah, *supra* note 1; Black, *supra* note 1.

21. Anthee Carassava, *U.N. Pledges \$64 Million for Cleanup of Oil Spill off Lebanon*, N.Y. TIMES, Aug. 18, 2006, available at <http://www.nytimes.com/2006/08/18/world/middleeast/18spill.html>.

22. *Id.*

shores.²³ Furthermore, there is evidence that Israel, in this latest conflict, used weapons that not only produce long term health effects in humans, but contaminate the environment.²⁴ Though U.N. forces and concerned representatives of countries affected by the spillage have banded together to clean up the waters,²⁵ it is unclear how effective these measures will be in restoring the ecosystem in the affected areas and preventing death or sickness from exposure to the chemical substances in the water, or how much money will ultimately be needed to sustain such a clean up.²⁶

II. ENVIRONMENTAL DESTRUCTION DURING WAR IS DELIMITED BY INTERNATIONAL AGREEMENT AND CUSTOMARY INTERNATIONAL LAW

The international community has for centuries recognized various rules of war, otherwise known as *jus in bello*,²⁷ some of which apply indirectly to environmental destruction.²⁸ Among these rules are three relevant principles: necessity, proportionality, and humanity.²⁹ Military necessity

23. In particular, the endangered turtles that hatch on the beaches in July are threatened, as well as the beds along the shore where tuna spawn. Mroue, *supra* note 1. Mroue also points out that Lebanon has taken steps to combat the effects of pollution, unlike many of its neighbors in the Middle East. For example, Lebanon has laws that prohibit diesel minibuses and that curtail factory pollution. *Id.* This demonstrates how easily an aggressor country using military force against another can destroy in a few hours the benefits of any environmental progress made over the years by the country it attacks.

24. Dr. Doug Rokke, *Bunker Buster Bombs Containing Depleted Uranium Warheads Used By Israel Against Civilian Targets In Lebanon*, GLOBAL RESEARCH, July 26, 2006, available at <http://www.globalresearch.ca/index.php?context=viewArticle&code=ROK20061106&articleId=3748>; *Israel Detonated a Radioactive Bunker Buster Bomb in Lebanon: What Kind of Weapon Leaves Traces of Radiation & Produces Such Lethal & Circumscribed Consequences?*, GLOBAL RESEARCH, Nov. 11, 2006, available at <http://www.globalresearch.ca/index.php?context=viewArticle&code=20061111&articleId=3813>.

25. Carassava, *supra* note 21.

26. In August 2007, the Christian Science Monitor reported that the government of Lebanon had collected sixty to seventy percent of the oil spill but was unable to complete the clean up due to a lack of funding. Carol Huang, *Oil Legacy of War Mars Lebanon Coast*, THE CHRISTIAN SCIENCE MONITOR, Aug. 23, 2007, available at <http://www.csmonitor.com/2007/0823/p06s02-wome.htm>. Free-floating oil is still drifting ashore, and the oil that remains on the shore and seafloor is reentering the sea. *Id.*

27. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 686 (1900) (discussing the application of international law governing the capture of fishing vessels during wartime).

28. *See, e.g.*, *The Hague Convention II Laws and Customs of War on Land* art. 23, July 29, 1899, 32 Stat. 1803, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm> (prohibiting the employment of "poison or poisoned arms" and the destruction or seizure of "the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war").

29. Cohan, *supra* note 18, at 491 (citing Capt. William A. Wilcos, Jr., *Environmental Protection in Combat*, 17 S. ILL. U. L.J. 299, 302 (1993)). *See also* Protocol I, *supra* note

justifies applying any force required to win the complete and timely submission of the enemy without violating the laws of war.³⁰ The proportionality principle “prohibits methods of warfare likely to cause injury to civilians in excess of any concrete direct military advantage,”³¹ while the humanity principle prohibits “means of warfare that are inhumane.”³² The application of these principles to environmental destruction was asserted by members of the U.N. when the Security Council passed Resolution 687, which held Iraq liable for “any direct loss, damage, including environmental damage, and the depletion of natural resources” caused by the Iraqi invasion.³³ For example, the United States asserted that, with respect to this damage, Iraq had violated the principles of necessity and proportionality.³⁴

The international community also has several international agreements in place that delimit the range of environmental destruction tolerated during war. Some of the earlier conventions address the environment indirectly. For example, the Hague Convention of 1907 prohibits the use of “poison or poisoned weapons,” and the destruction or seizure of “the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”³⁵ These principles were applied after WWII to hold German industrialists who had over-exploited Polish forests for timber accountable.³⁶

3. Protocol I limits military conduct in many instances to that deemed “necessary.” For example, see articles 14(3)(b), 54(5), 62(1). *Id.*

30. Capt. William A. Wilcos, Jr., *Environmental Protection in Combat*, 17 S. ILL. U. L.J. 299, 302 (1993).

31. Cohan, *supra* note 18, at 494 (citing Stephanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT'L L. 165, 168 (1992)).

32. *Id.* at 495 (citing the Declaration of St. Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes in Weight, Nov. 29, 1868).

33. Lt. Col. Michael N. Schmitt, *Green War: An Assessment Of The Environmental Law Of International Armed Conflict*, 22 YALE J. INT'L L. 1, 27 (S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (1991)).

34. *Id.* at 27–28. However, there was not a consensus: “Other states referred to Protocol I and ENMOD, while a third group suggested that peacetime environmental law carried forward into periods of hostilities and applied in the case of the Gulf War.” *Id.*

35. Article 23(a) prohibits the use of “poison or poisoned weapons,” while article 23(h) deals with destruction or seizure of the enemy’s property. The Hague Convention IV Laws and Customs of War on Land, art 23(a), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention IV].

36. Mark J.T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance Over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479, 486–87 (1993).

Recognition of the seriousness of environmental harm grew when the world witnessed the devastation of Vietnam's forests by the use of the herbicide Agent Orange, and thus the international community formulated conventions that would more directly address such environmental destruction.³⁷ The Additional Protocol I to the Geneva Convention, the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, and the Rome Statute all contain language that makes it a violation of international law to exceed certain bounds of environmental destruction resulting from military combat.³⁸ In addition, the international community has sought to prosecute such violations through statutes adhering to ad hoc tribunals created to punish war crimes violations. For example, article 13(b)(5) of the Iraqi Statute contains language similar to the above-mentioned treaties.³⁹

III. INTERNATIONAL AGREEMENTS PROSCRIBING ENVIRONMENTAL DESTRUCTION LACK EFFECTIVE ENFORCEMENT MECHANISMS

The fact that neither states nor individuals have been held accountable for war-related environmental crimes since Nuremberg,⁴⁰ and that intense environmental destruction, as seen in the recent war between Israel and Lebanon, continues without fear of retribution illustrates the ineffectiveness of these treaties as a deterrent.

Several reasons have been put forth to explain why these conventions have not been successful tools in prosecuting environmental war crimes. First of all, the language addressing the limits of environmental harm in

37. Cohan, *supra* note 18, at 485. See also Caggiano, *supra* note 36 at 488 ("The nations of the world drafted [the Environmental Modification Convention] in response to the massive, albeit unsuccessful attempts by the United States to use weather modification to harass the North Vietnamese during the Vietnam war.") (citing Stockholm International Peace Research Institute (Sipri), WEAPONS OF MASS DESTRUCTION AND THE ENVIRONMENT 59 (1977)).

38. Weinstein, *supra* note 16 (citing Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614; Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391, U.N. Doc. A/32/144 (1977); Rome Statute, *supra* note 5).

39. *Id.* at 706.

40. During the Nuremberg proceedings, General Alfred Jodl was found guilty of "war crimes associated with scorched earth tactics in Northern Norway, Leningrad, and Moscow," while certain German civilian officials were tried for "ruthless exploitation of Polish forestry." Bruch, *supra* note 6 at 716 (citing the Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, pt.22, at 517 (1950) and Aaron Schwabach, *Environmental Damage Resulting From The Nato Military Action Against Yugoslavia*, 25 COLUM. J. ENVTL. L. 117, 125 (citing United Nations War Crimes Commission, Case No. 7150 496 (1948)).

both the Additional Protocol I and the Rome Statute has been described as too vague and undefined.⁴¹ Both agreements proscribe “widespread, long-term and severe” damage to the natural environment.⁴² The problem is the difficulty of articulating what widespread, long-term and severe mean.⁴³ Furthermore, the requirement that all three factors, (wide-spread, long-term, and severe) must be demonstrated, establishes a high threshold for criminal prosecution. Finally, with respect to the Rome Statute, prosecution of military actors is difficult due to two other features of the statute: it balances military concerns against environmental integrity and requires proof of intent. Article 8(2)(b)(iv) of the Rome Statute makes it a crime when

[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated.

The Rome Statute essentially tolerates environmental destruction when it is undertaken to secure a military advantage, and is not “clearly excessive,” a term itself undefined. It is also unclear whether the “anticipated” advantage is to be gauged on an objective or subjective standard. If judged on a subjective standard, this would also create problems of proof.⁴⁴ The challenges that arise from this potential subjective standard for judging military advantage are augmented by the need to prove that an accused had knowledge that the environmental destruction in question would result from the attack. In sum, it must be proven that 1) the individual responsible had knowledge that the attack would cause such damage and 2) that the perpetrator acted willingly to cause such destruction, a much higher standard than that of recklessness or negligence.⁴⁵ In addition, because the Rome Statute, which is applied through the International Criminal Court (“ICC”), cannot supersede national procedures, the

41. Weinstein, *supra* note 16, at 707; Cohan, *supra* note 18, at 502.

42. Protocol I, *supra* note 3; Rome Statute, *supra* note 5.

43. Huston, *supra* note 8, at 906. “Long-lasting” in the ENMOD Convention has been interpreted in Understanding I of the Conference of the Committee on Disarmament as constituting a period of months or a season, while the Commentary to Protocol I defines long-lasting as “matter of decades.” See ENMOD, Understanding Relating to article 1, *supra* note 4; Protocol I, *supra* note 3.

44. Mark A. Drumbl, *International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?*, 6 ILSA J. INT'L & COMP. L. 305, 319–21 (2000).

45. *Id.* at 322.

ICC is precluded from asserting jurisdiction in countries with functioning legal mechanisms that can address environmental crimes.⁴⁶

The Additional Protocol and Rome Statute share the further drawback that neither has been ratified by the United States,⁴⁷ a nation whose participation in large-scale military activities worldwide⁴⁸ makes its absence particularly notable and troubling in terms of deterring environmental damage through criminal prosecution. Though ENMOD has been ratified by the United States, and has the further advantages of more precisely defining the words “widespread, long-lasting or severe” and proscribing environmental harm without regard to military necessity or advantage, it has been held to ban only manipulation of the environment as a weapon, as opposed to destruction of the environment as a collateral effect or intentional act.⁴⁹

46. JOE SILLS, JEROME C. GLENN, ELIZABETH FLORESCU & THEODORE J. GORDON, U.S. ARMY ENVIRONMENTAL POLICY INSTITUTE, ENVIRONMENTAL CRIMES IN MILITARY ACTIONS AND THE INTERNATIONAL CRIMINAL COURT (ICC)—U.N. PERSPECTIVES (APRIL 2001), available at <http://www.acunu.org/millennium/es-icc.html>.

47. Protocol I, *supra* note 3; Rome statute, *supra* note 5.

48. For example, the United States supplied most of the weapons used by Israel in its recent bombing campaign against Lebanon. *DEMOCRACY NOW!: U.S. Arming of Israel: How U.S. Weapons Manufacturers Profit From Middle East Conflict*, Interview with Frida Berrigan, a Senior Research Associate with the Arms Trade Resource Center and at the World Policy Institute [hereinafter *U.S. Arming of Israel*], <http://www.democracynow.org/article.pl?sid=06/07/21/1432202> (last visited Dec. 29, 2007). These weapons are “part of a multimillion-dollar arms sale package approved last year that Israel is able to draw on as needed.” David S. Cloud & Helene Cooper, *U.S. Speeds Up Bomb Delivery for the Israelis*, N.Y. TIMES, July 22, 2006, available at <http://www.nytimes.com/2006/07/22/world/middleeast/22military.html?ex=1311220800&en=e256f1d8872a835d&ei=5088&partner=rssnyt&emc>.

49. Cohan, *supra* note 18, at 519 (citing Understanding Relating to Article I, Report of the Conference of the Committee on Disarmament, U.N. GAOR, 31st Sess., Supp. No. 27, at 91–92, U.N. Doc. A/31/27 (1976)).

It is the understanding of the Committee that, for the purposes of this Convention, the terms “widespread,” “long-lasting” and “severe” shall be interpreted as follows: (a) “widespread”: encompassing an area on the scale of several hundred square kilometers; (b) “long-lasting”: lasting for a period of months, or approximately a season; (c) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets. It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement.”

Id.

Given the lack of clear guidelines and the heavy burdens of proof in conventions addressing environmental war crimes, it is not surprising that international criminal tribunals such as the ICC have failed to prosecute these crimes. Ad hoc tribunals are not well equipped to prosecute war crimes either, since most of the tribunals are not directly empowered to charge individuals for environmental destruction⁵⁰ and thus must rely on the conventions cited above. For example, the prosecutor for the International Criminal Tribunal for Yugoslavia ("ICTY") failed to prosecute NATO for potential violations of articles 35 and 55 of Additional Protocol I upon recommendation of the Committee Established to Review the NATO Bombing Campaign, which had determined that the NATO bombing had not reached the threshold level of Additional Protocol I and that military necessity could have played a role in choosing targets.⁵¹

While criminal charges of environmental crimes seem to encounter insurmountable burdens of proof to prosecute, civil liability for such crimes has been established with some success through at least one notable mechanism. Iraq's liability for its "unlawful" invasion of Kuwait and the resulting loss to "foreign government, nationals and corporations," including "environmental damage and the depletion of natural resources," was declared in the Security Council's adoption of Resolution 687, and through Resolution 692, the UNCC was established to administer payments.⁵²

The last line indicates a reluctance to allow the standards defined here to apply in any other context, and thereby become an international standard.

50. Weinstein, *supra* note 16, at 704–05. Weinstein points out that none of the following are either directly charged with or have jurisdiction over crimes against the environment: the Internal Criminal Tribunal for Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Law on the Establishment of Extraordinary Chambers for Cambodia, and the Special Tribunal for Sierra Leone. *Id.*

51. Weinstein, *supra* note 16, at 704 (citing Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (Final Report) ¶¶ 14–25, available at <http://www.un.org/icty/pressreal/nato061300.htm>). The Final Report argues that prosecution of NATO for war crimes is not warranted on several grounds, namely that (1) France and the United States have not ratified Additional Protocol I; (2) application of articles 35 and 55 is "extremely stringent and their scope and contents imprecise" and that the cumulative standard contributes to this high threshold for application; and (3) that the difficulty of proving the mens rea of intentionality as well as the balancing factor of military necessity and/or advantage led the Commission to its decision not to recommend prosecution of NATO for environmental war crimes. *Id.*

52. Huston, *supra* note 8, at 911 (citing S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (1991)).

Though the UNCC can be termed successful in some respects, having awarded \$14 trillion in compensation to 1,506,458 claimants,⁵³ there were some drawbacks to this mechanism. First of all, out of the six categories of claims (A through F) established by the UNCC to compensate individuals, corporations, governments and international organizations, the category F claims for environmental damages were the lowest priority of claims.⁵⁴ The fact that ten years passed before the first award of environmental damages illustrates this well.⁵⁵ Cash flow was also a problem in distributing the awards as Iraq was not cooperative in exporting the oil that would generate revenue for the fund.⁵⁶ What is of greater concern is whether the UNCC is a viable type of mechanism to compensate for environmental losses by other violators, such as Israel, or for that matter, Hezbollah, whose rockets burned thousands of acres of Israeli forests.⁵⁷ It is especially problematic to extract the necessary funding for such clean-ups from non-state entities in terms of gaining access to their wealth.⁵⁸ What is promising about the UNCC though is that the claims brought against Iraq for environmental harms considered not justifiable by military necessity and violative of the laws of proportionality, as argued by the United States, and violative of Additional Protocol I and ENMOD, as argued by other states,⁵⁹ strengthen the argument that customary law prohibits excessive environmental destruction inflicted during war.

IV. THE ALIEN TORT CLAIMS ACT AND AN ANALYSIS OF DOCTRINES LIMITING ITS APPLICATION

The Alien Tort Claims Act (“ATCA”), enacted in 1789, states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶⁰ The ATCA was little known or employed

53. *Id.* at 917.

54. *Id.* at 912.

55. *Id.* at 913.

56. *Id.* at 915–16.

57. Dina Kraft, *Dry Forests in Northern Israel are Damaged as Hezbollah's Rocket Attacks Ignite Fires*, N.Y. TIMES, Aug. 7, 2006, available at <http://www.nytimes.com/2006/08/08/world/middleeast/08fires.html>. An estimated 9000 acres of land and almost 3000 acres of forest have been damaged by fire resulting from the firing of rockets across the Israeli-Lebanon border.

58. Huston, *supra* note 8, at 919. Huston cites Al Qaeda as an example of a terrorist organization that caused environmental damage in the September 11 attack and the difficulties in “identify[ing] and gain[ing] access to all their funding sources.” *Id.*

59. Schmitt, *supra* note 33, at 27–28.

60. 28 U.S.C.A. § 1350.

until 1978 when Paraguayan immigrants living in the United States brought suit against a former Paraguayan policeman, Filartiga, who they accused of torturing and killing their son in Paraguay years earlier.⁶¹ Filartiga established that the court had jurisdiction over claims that violated “universally accepted norms of the international law of human rights”⁶² and that “deliberate torture perpetrated under color of official authority” fell within that category.⁶³ That such torture was a violation of universally accepted norms was proven by the “numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice).”⁶⁴ The court rejected the appellee’s claim “that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it.”⁶⁵

The Second Circuit ruling in *Kadic v. Karadzic* expanded liability under the ATCA to include private actors for certain violations of international law,⁶⁶ including genocide⁶⁷ and war crimes such as “murder, rape, torture, and arbitrary detention of civilians.”⁶⁸ Private entities such as corporations have also been deemed liable for violations of international law under the ATCA.⁶⁹

However, there are ways in which courts have narrowed the scope of jurisdiction over ATCA claims. The courts may narrow the scope of

61. Anne-Marie Slaughter and David L. Bosco, *Alternative Justice*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm>, last visited Mar. 4, 2008. See also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

62. *Filartiga*, 630 F.2d at 878.

63. *Id.*

64. *Id.* at 880.

65. *Id.* at 886–87.

66. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). The court relied on the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1986) [hereinafter FOREL] to identify crimes for which individuals may be held liable under international law. *Kadic*, 70 F.3d at 240.

67. *Kadic*, 70 F.3d at 242.

68. *Id.* at 242–44.

69. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (finding that plaintiff’s allegations of the corporate defendant’s complicity in forced labor, murder, and rape, if proven, sufficiently alleged violations of international law under the ATCA); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003) (finding that plaintiffs sufficiently alleged human rights violations including torture, enslavement, war crimes, and genocide); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1074 (9th Cir. 2006) (plaintiffs alleging that an international mining company, with state assistance, committed violations against international law including “racial discrimination, environmental devastation, war crimes and crimes against humanity”).

what can determine international law⁷⁰ or narrowly construe the range of violations of international law cognizable under the ATCA.⁷¹ Furthermore, the courts will limit the application of the ATCA against private individuals when they determine that the alleged violation of international law does not apply to non-state actors.⁷² ATCA claims have also been rejected based on claims of forum non conveniens,⁷³ exhaustion requirements,⁷⁴ or domestic and foreign policy considerations.⁷⁵

Several jurisdictional bases for ATCA claims were narrowed under the Supreme Court case of *Sosa v. Alvarez-Machain*.⁷⁶ First, the Court, restricting the kinds of claims cognizable under ATCA, found that it had no jurisdiction under the ATCA to hear the appellee's claims because they did not fall within the "handful of heinous actions" that "violate[] definable, universal and obligatory norms,"⁷⁷ and hence there was no violation of "customary international law so well defined as to support the creation of a federal remedy."⁷⁸ In addition, the Court determined that international agreements upon which the claimant relied to establish that

70. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004).

71. *Id.* at 732–733.

72. *Kadic*, 70 F.3d. at 243–44 (holding that individuals are only liable for torture if acting in an official capacity).

73. *Aguinda v. Texaco*, 303 F.3d 470, 476–480 (2d Cir. 2002).

74. *Sosa*, 542 U.S. at 733 n.21.

75. See *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 47–48 (E.D.N.Y. 2005); *Sosa*, 542 U.S. at 733.

76. *Sosa*, 542 U.S. at 697, 736–37 (finding that the ATCA did not provide jurisdiction for Alvarez's arbitrary detention claim when the claimant was abducted in Mexico and brought to the U.S. for a criminal trial). The Supreme Court reversed the Ninth Circuit's holding that "[t]he unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA." *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003). A central difference in judicial opinion revolves around the question of whether The Universal Declaration of Human Rights ("UDHR") and/or the International Covenant of Civil and Political Rights ("ICCPR") can impose obligations on the United States to recognize arbitrary detention as a violation of international law. The 9th Circuit holds that they do impose such obligations in *Alvarez-Machain*, 331 F.3d at 620–21, while the Supreme Court said that the UDHR does not impose obligations on its own and that the ICCPR was not self-executing. *Sosa*, 542 U.S. at 734–35.

77. *Sosa*, 542 U.S. at 732–733 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)).

78. *Id.* at 738. The Court also held that "that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732. Those historical paradigms were said to include "offenses against ambassadors," "violations of safe conduct," and "individual actions arising out of prize captures and piracy." *Id.* at 720.

arbitrary arrest was a violation of international law did not support his claim, namely, the Universal Declaration of Human Rights (“UDHR”) and the International Covenant of Civil and Political Rights (“ICCPR”). The Court concluded that the UDHR has “moral authority” but does not impose specific legal obligations, and that the ICCPR was not held to be self-executing by the United States and therefore requires further Congressional action to enforce any of its precepts.⁷⁹ The Court also rejected the appellee’s assertion of binding customary law based on the prohibition against arbitrary detention in several state constitutions, as well as judicial rulings on both an international and national (U.S.) level. The Court maintained that the norm against arbitrary detention illustrated in state constitutions was at “a high level of generality,” and that the Court was unwilling to assert its federal judicial discretion over an arbitrary detention claim based on customary international law.⁸⁰ Finally, the Court suggested that exhaustion of international tort claims may require exhaustion in domestic courts or in other international tribunals.⁸¹

The argument that the ATCA was originally intended to cover a limited range of claims asserting violations of the law of nations has been made by several courts.⁸² However, the bar has not been set so high as to eliminate claims that do not rise to the level of *jus cogens*.⁸³ Of course

79. *Sosa*, 542 U.S at 734–35.

80. *Id.* at 736–37 n.27.

81. *Id.* at 733 n.21. The Court cites the argument in the European Commission *amicus curiae*’s brief that “basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in others such as international claims tribunals.” *Id.*

82. *Filartiga*, 630 F.2d at 887–88; *Sosa*, 542 U.S. at 719–20 (relying on An Act for the Punishment of Certain Crimes Against the United States § 8, 1 Stat. 113–114 and *id.* §28, at 118, to infer that Congress intended to restrict ATCA jurisdiction to a “relatively modest set of actions alleging violations of the law of nations” including “offenses against ambassadors,” “violations of safe conduct,” as well as “prize captures and piracy”). However, the Court in *Sosa* concedes that a consensus understanding of Congressional intent with respect to private actions subject to the jurisdictional provision of the ATCA has proven elusive. *Id.* at 718–19. See also *In re Agent Orange*, 373 F. Supp. 2d at 46–47.

83. Under article 53 of the Vienna Convention, a *jus cogens* (or peremptory) norm is: “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, article 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Court in *Sosa* does not discuss whether or not the violation must rise to the level of a *jus cogens* violation. *Sosa*, 542 U.S. 692. The court in *Unocal* asserted that “[a]lthough a *jus cogens* violation is, by definition, a violation of specific, universal, and obligatory international norms that is actionable under the ATCA, any violation of specific, universal, and obligatory international norms—*jus cogens* or not—is

the ultimate decision as to whether a given violation rises to the level of a norm that is “definable, universal and obligatory”⁸⁴ is based on what sources of international law the court is willing to accept. In *Sosa*, the Supreme Court’s cursory rejection of the internationally recognized declarations and agreements cited to support the ATCA claims was founded on insubstantial analysis compared to other jurisprudence.⁸⁵ Furthermore, the Court refused to acknowledge appropriate sources of customary international law⁸⁶ on the grounds that the norms thus embodied in various documents were too general,⁸⁷ and that courts that have held otherwise simply go further than the Supreme Court was willing to go,⁸⁸ suggesting that the Court circumscribed the limits based on nothing more than its own desire to do so.

With regard to non-state actors, courts have determined that liability under the ATCA is limited to “certain forms of conduct [that] violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”⁸⁹ Included among those violations

actionable under the ATCA.” *Unocal*, 395 F.3d 932, 945, n.15 (9th Cir. 2002) (internal quotes and citations omitted).

84. *Sosa*, 542 U.S. at 732 (citing *Tel-Oren*, 726 F.2d at 781).

85. The *Sosa* court cites one source to support its assertion that the UDHR is merely moral authority; the Court references Eleanor Roosevelt’s statement that the UDHR is “not a treaty or international agreement . . . impos[ing] legal obligations.” *Sosa*, 542 U.S. at 734–35. This is in notable contrast to the evidence cited by the *Filartiga* court that the UDHR provides much more than moral authority. The *Filartiga* court cites several U.N. issued statements regarding the U.N. Charter, which include the statement that a U.N. Declaration is “a *formal* and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated” (emphasis added) and that “insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.” *Filartiga*, 630 F.2d at 883 (citing 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962)). *Filartiga* also cites a source that states that the UDHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement’ but is rather an authoritative statement of the international community.” *Id.* at 883 (citing E. Schwelb, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)).

86. Such sources of customary law have been held to consist of “general and consistent practice of states followed by them from a sense of legal obligation,” which in turn can be established by international agreements inasmuch as they represent the practice of states. In addition, general principles of law, as practiced by states on a domestic level “may sometimes convert such a principle into a rule of customary law.” FOREL, *supra* note 66, § 102. Thus the Court’s cursory rejection of the UDHR, the ICCPR and the domestic law of states is misguided. *Sosa*, 542 U.S. at 734–35.

87. *Sosa*, 542 U.S. at 736–37 n.27.

88. *Id.* at 737 n.27.

89. *Kadic*, 70 F.3d at 239. To support its assertion that liability exists for non-state actors, the court relies on historical evidence that individuals such as pirates were prose-

are genocide, war crimes, and forced labor, while torture is an act that only makes those acting in an official capacity liable under the ATCA.⁹⁰ However, several theories exist for holding private actors liable when they are intertwined with state actors who violate international law, thus broadening the scope of liability for private actors.⁹¹ This issue is particularly relevant for holding corporate actors liable under the ATCA for violations that do not violate peremptory norms.⁹² With respect to environmental war crime, there is evidence that it has not reached that level of universal condemnation.⁹³

The exhaustion requirement that the Supreme Court in *Sosa* mentions in passing was not applicable there,⁹⁴ but has been discussed in other

cut under the law of nations (citing *United States v. Smith*, 18 U.S. (5 Wheat) 153, 161 (1820)). The Court cites the Restatement (Third) of the Foreign Relations Law of the United States (1986), which states that “[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.” FOREL, *supra* note 66, pt. II, introductory note. The court goes on to note the Restatement’s extension to other violations of “universal concern.” *Id.* at 239–40.

90. *Kadic*, 70 F.3d at 241–44 (finding that genocide and war crimes constitute violations of international law for which individuals are liable; also finding that torture is not included in this category); *Unocal*, 395 F.3d at 946–948 (finding that private actors are liable for forced labor under the ATCA).

91. Theories that expand private actors’ liability under international law include the joint-action theory, acting under color of law, and aiding and abetting. *See, e.g., Presbyterian Church*, 244 F. Supp. 2d at 328 (finding that private actors are “considered state actors if they are willful participant[s] in joint action with the State or its agents”) (citations omitted); *Kadic*, 70 F. 3d at 245 (finding that under 42 U.S.C. § 1983, “[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid”) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1078 n.5 (2006) (holding that “violations of the laws of nations have always encompassed vicarious liability”).

92. Peremptory norms are also known as jus cogens norms. *See* Vienna Convention, *supra* note 83, art. 53.

93. For example, FOREL § 404 cmt. (a) states that “[u]niversal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law.” It includes violations such as “piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . .” *Id.* It may be difficult at this stage to show that *environmental* war crimes are proscribed in widely accepted international agreements.

94. The Court made reference to the amicus brief of the European Commission, which asserted that “basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribu-

cases.⁹⁵ Though exhaustion is clearly an element of the Torture Victims Protection Act (“TVPA”) (codified under 28 U.S.C. § 1350 like the ATCA),⁹⁶ there is no clear consensus among courts that it need apply to other claims brought under the ATCA.⁹⁷ It is thus not an insurmountable barrier. Furthermore, even if a court did require exhaustion, this would be excused in cases in which the plaintiff’s efforts in the forum state would be futile.⁹⁸

Other courts have accepted defendants’ motions to dismiss ATCA claims arguing on forum non conveniens grounds.⁹⁹ The two-prong test

nals.” However, the Court did not deem it appropriate to apply in the case at hand. *Sosa*, 542 U.S. at 733 n.21.

95. See, e.g., *Sarei*, 456 F.3d at 1089–90.

96. The TVPA states that “[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.” 28 U.S.C.A. § 1350.

97. For example, the court in *Sarei* refused to require exhaustion because it found that the legislative history of the ATCA did not reflect unambiguously Congress’s intent that “international exhaustion was required . . . before an ATCA claim could be heard in a U.S. court.” *Sarei*, 456 F.3d at 1093. The *Sarei* court also points out the lack of consensus in several ATCA cases. *Id.* at 1089. It cites decisions that do not require exhaustion, see, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 544–58 (9th Cir. 2005); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467–76 (9th Cir. 1994), as well as opinions that do suggest that exhaustion might be appropriate under the ATCA, see, e.g., Judge Cudahy’s opinion in *Enahoro v. Abubakar*, 408 F. 3d 877, 889–90 (7th Cir. 2005). *Sarei*, 456 F.3d at 1089. However, the *Sarei* court concludes that because Congress has not clearly mandated exhaustion for ATCA claims, “sound judicial discretion” governs whether or not exhaustion will be required. *Id.* at 1090.

98. See *Presbyterian Church*, 244 F. Supp. 2d at 343 n.44 (finding that no precedent exists for enforcing exhaustion requirements when efforts to do so would be futile).

99. See *Aguinda*, 303 F.3d at 476–80; *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002). This has been an especially effective defense in cases involving environmental pollution. Lorelle Londis, *The Corporate Face of The Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 181–85 (2005) (citing Jeffrey B. Gracer, *Protecting Citizens of Other Countries*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK* 727–28 (Michael B. Gerrard ed., 1999)). In footnote 314, Londis cites Gerrard’s string cite of cases to illustrate the frequency of dismissal of environmental claims on forum non conveniens grounds: *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997) (dismissing toxic tort suit brought by 700 Peruvian citizens against copper company); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff’d in part, modified in part*, 809 F.2d 1295 (2d Cir. 1987), *cert. denied*, 485 U.S. 871 (1987) (dismissing action against Union Carbide for a catastrophic leak of methyl isocyanate in Bhopal, India); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (dismissing actions brought by farm workers from 23 countries alleging chemical exposure); *Sequihua v. Texaco*, 847 F. Supp. 61 (S.D. Tex. 1994) (dismissing suit Ecuadoreans alleging massive air, soil, and water contamination). *Id.* at 182 n.314.

applied by the courts¹⁰⁰ tends to favor the defendants in ATCA cases because the first prong considers the adequacy of the alternative forum recommended by the defendant, and in the interests of comity, U.S. courts are reluctant to offend the foreign state by finding it inadequate.¹⁰¹ There is clearly some overlap between finding exhaustion claims futile and the ruling under the doctrine of forum non conveniens claim that the foreign forum is inadequate. Thus a plaintiff could prevail on both motions to dismiss if it is demonstrated that no feasible alternative forum exists. With respect to the second prong of the forum non conveniens test, balancing public and private interest in litigating in the chosen forum, courts may consider the policy interest of the United States in determining public interest and could find that dismissal on this basis may “frustrate Congress’s intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations.”¹⁰² Thus, the policy interests of the United States could play a role in determining the public interest in allowing a U.S. forum for adjudication.¹⁰³

One of the main barriers to ATCA claims is the reluctance of courts to interfere with U.S. foreign policy.¹⁰⁴ Two prudential doctrines that courts draw upon in assessing whether the judiciary can assert itself in a given

100. The court “first considers whether an adequate forum exists. If so, it must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.” *Aguinda*, 303 F.3d at 476 (internal quotes and citations omitted). Private interests have been held to include access to evidence and witness amenability, while public interest factors consider the public’s interest in the controversy as well as the administrative burden placed on courts in presiding over the case and applying foreign law. *Londis*, *supra* note 99, at 182 (citing *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1164 (C.D. Cal. 2002) (internal citations omitted)).

101. *Londis*, *supra* note 99, at 185. *Londis* also points out that dismissal on these procedural grounds may also be favored because it is less controversial than prudential doctrines such as the political question. *Id.* at 185.

102. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000) (citing *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998)).

103. For example, the court in *Wiwa* views the TVPA as expressing a policy in favor of allowing U.S. federal courts jurisdiction over cases of torture. *Wiwa*, 226 F.3d at 105. Factors also cited by the court in overturning the dismissal on grounds of forum non conveniens included the fact that two plaintiffs were residents of the United States, the “very substantial expense and inconvenience” that would be imposed on the plaintiffs were the suit to be dismissed in favor of the foreign forum, and that the inconvenience to the defendants was minimal. *Id.* at 106.

104. See, e.g., *In re Agent Orange*, 373 F. Supp. 2d at 48 (finding that allowing the suit to proceed would interfere with the U.S. government’s negotiation of war reparations with Vietnam, thus “impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs”) (internal citations and quotations omitted).

ATCA case are the political question doctrine and act of state doctrine.¹⁰⁵ The political question doctrine consists of a six factor test that focuses primarily on whether a judicial decision would undermine the authority of the executive or legislative branches.¹⁰⁶ The act of state doctrine focuses more specifically on the consequences a judgment regarding a foreign state may have on U.S. foreign policy.¹⁰⁷ However, courts have held that political questions do not automatically prevent courts from determining the legality of executive action.¹⁰⁸ An implicit part of the court's determination of how much weight to give this factor is the political pressure applied to the judiciary by the executive branch.¹⁰⁹

105. The act of state and/or political question doctrines have been invoked in a number of notable ATCA cases. *See, e.g., Tel-Oren*, 726 F.2d at 796; *Kadic*, 70 F.3d at 248–49; *In re Agent Orange*, 373 F. Supp. 2d at 48; *Sarei*, 456 F.3d at 1079, 1084.

106. The six factors discussed in *Baker v. Carr* are:

- (1) the matter is constitutionally committed to a coordinate branch of government;
- (2) no “judicially discoverable and manageable standards” exist to guide the court’s analysis;
- (3) it is impossible to decide the case without making an initial policy determination that should rightfully be made by a separate branch;
- (4) deciding the case would express “a lack of respect” to a coordinate branch of government;
- (5) there is “an unusual need for unquestioning adherence to a political decision already made;” or
- (6) the potential embarrassment to the U.S. government could arise as a result of “multifarious pronouncements by various departments on one question.”

Londis, *supra* note 99, at 186 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In *Sarei*, the court addressed factors one, four, five and six. *Sarei*, 456 F.3d at 1079.

107. The act of state doctrine “prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory.” *Sarei*, 456 F.3d at 1084 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). Thus an action may be dismissed if “(1) there is an ‘official act of a foreign sovereign performed within its own territory’; and (2) ‘the relief sought or the defense interposed [would require] a court in the United States to declare invalid the [foreign sovereign’s] official act.’” *Id.* at 1084 (citing *W.S. Kirkpatrick & Co. v. Environmental Technologies Corp.*, 493 U.S. 400, 405 (1990)).

108. “[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” Londis, *supra* note 99, at 186 (citing *Baker*, 369 U.S. at 211). Courts should investigate the history of the issue in question to determine whether it is “susceptible to ‘judicial handling’ and consider ‘other possible consequences of judicial action.’” *Id.* (citing *Baker*, 369 U.S. at 211–12).

109. Londis notes that statements of interest by the State and Justice Departments have been influential in the courts’ decision to allow ATCA claims to proceed. In particular, Londis observes that the Carter Administration supported *Filartiga* and that the Clinton Administration supported plaintiffs in *Kadic* and *Unocal*; the author contrasts that with the position of the Bush Administration, which did not support plaintiffs in *Doe v. Exxon Mobil*, nor in *Sarei v. Rio Tinto*. The successful suits were ones in which the executive branch had not argued against the plaintiffs. Londis, *supra* note 99, at 188–91 (cases

V. APPLICATION OF THE ATCA AGAINST MILITARY DEFENSE
CONTRACTORS FOR ENVIRONMENTAL WAR CRIMES

In an ATCA case brought against military defense contractors, defendants would seek to invoke one or more of these barriers. The defenses they are most likely to rely on include the claim that environmental harms do not constitute the “handful of heinous crimes” cognizable under the ATCA.¹¹⁰ Further, they might allege that even if such violations are cognizable under the ATCA, they are not jus cogens violations and thus require state action; state action could then suffice to persuade judges that the suit infringes on the government’s right to determine foreign policy.¹¹¹ The problem of state action will be discussed below, where it is maintained that the defendants’ actions are clearly implicated in illegal state conduct.

As U.S. defense contractors are among the leaders in weapons manufacturing internationally,¹¹² it is likely that they could be defendants in

cited include *Filartiga*, 630 F.2d 876; *Kadic*, 70 F.3d 232; Nat’l Coalition Government of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 340 (C.D. Cal. 1997); *Doe v. Exxon Mobil Corp.* (No. 01-1357) (D.D.C. filed June 20, 2001); *Sarei, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002)). The court’s decision with respect to the political question issue in *Sarei* was overruled. *Sarei*, 456 F.3d 1069 (9th Cir. 2006). The court found that the statement of interest provided by the government did not establish that a political question precluding judicial oversight existed. *Id.* at 1083.

110. For example, the court in *Beanal* determined that the plaintiff’s allegations of violations of international law with respect to the environment relied upon treaties that merely referred to a “general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts,” and thus were not cognizable under the ATCA. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).

111. While the decision to wage war is certainly a state decision with serious political repercussions, the courts do not refuse to hear cases solely because they implicate political questions. *See, e.g., In re Agent Orange*, 373 F. Supp. 2d at 64. The court noted that even when a case “may call for an assessment of the President’s actions during wartime,” this was “no reason for a court to abstain” and “that [p]residential powers are limited even in wartime.” *Id.* at 64. Furthermore, the court declared that “[i]t is not a defense that the spraying of herbicides was on orders of the President: Authorization by the head of government does not provide *carte blanche* for a private defendant to harm individualism violation of international law.” The court noted further that “[i]n the Third Reich all power of the state was centered in Hitler; yet his orders did not serve as a defense at Nuremberg. Justiciability is not eliminated because of possible interference with executive power even in wartime.” *See also Sarei*, 456 F.3d at 1081–84 (finding that the political question raised by the defense failed to bar jurisdiction despite the statement of interest provided by the government).

112. For example, in a list of the top one-hundred world leaders in the defense industry, forty-three of the top one hundred were U.S. companies; the top ten included seven

ATCA litigation. Thus, this Note will seek to establish links between the U.S. government and these industries to demonstrate the viability of the ATCA in the context of a war-related environmental harm.

There is ample evidence that the defense industry has deep ties to the political regime in the United States.¹¹³ It is not surprising that the industry cultivates such ties given the fact that U.S. decisions to engage in military operations bring financial windfalls to companies that manufacture weapons.¹¹⁴ With so much money at stake, these corporations invest considerable sums to persuade Congress to award them lucrative defense contracts.¹¹⁵ This lobbying effort, in turn, is likely to pay off, especially in the current administration where policy makers have extensive financial ties to the arms industry.¹¹⁶ In fact, the huge contracts awarded such defense contractors as Lockheed Martin suggest that these government-

U.S. companies, including Lockheed Martin, which was ranked number one. *Defense News Top 100*, DEFENSENEWS.COM, available at <http://dfn.dnmediagroup.com/index.php?S=06top100> (last visited Mar. 18, 2008).

113. See *infra* note 116 (providing information regarding the personnel links between the government and military contractors).

114. Evidence of the financial rewards associated with U.S. military engagement include a rise in stock shares in several major weapons manufacturing corporations including Northrop Grumman (increases in stock prices following September 11 and after bombing in Afghanistan began), Raytheon, and Lockheed Martin. Frida Berrigan, *The War Profiteers: How are Weapons Manufacturers Faring in the War?*, COMMON DREAMS NEWSCENTER, Dec. 18, 2001, available at <http://www.commondreams.org/views01/1218-03.htm>.

115. For example, Lockheed Martin invested over \$9.8 million lobbying Congress in 2000. Berrigan, *supra* note 114. See also *supra*, note 117 (regarding the dollar amount of Lockheed's contract in 2000 and 2001).

116. As of May 2002, the Bush Administration had thirty-two policy makers with "significant financial ties to the arms industry" before their appointments, including Vice President Cheney and his wife Lynne, who received more than \$500,000 as a director on the board of Lockheed Martin from 1994–2001. William D. Hartung & Jonathan Reingold, *About Face: The Role of the Arms Lobby in the Bush Administration's Radical Reversal of Two Decades of U.S. Nuclear Policy*, THE GLOBAL POLICY INSTITUTE, May 2002, at 13, available at <http://www.worldpolicy.org/projects/arms/reports/AboutFace5.6.02.pdf> (see "Through the Revolving Door") (last visited Feb. 8, 2008). Other notable members of the administration at this time (May 2002) with such ties included Deputy Secretary of Defense Paul Wolfowitz, I. Lewis Libby, Vice President Cheney's Chief of Staff, Secretary of State Colin Powell, among several others. *Id.* at 20. Besides seeking influence by lobbying Congress directly, numerous weapons contractors such as Boeing, General Atomics, General Dynamics, Litton, Lockheed Martin, Northrop Grumman, Textron, Thiokol and TRW, have donated money to the corporate think-tank Center for Security Policy ("CSP"), which advocates the development of nuclear weapons and opposes arms control agreements. CSP, in turn, has "close ties to influential legislators . . . in the forefront of influencing U.S. nuclear and missile defense policies." Several of these legislators sit on the board of CSP. *Id.* at 28.

corporate interrelationships have proven very beneficial to the industry.¹¹⁷ Furthermore, the development of Pentagon policy has also been shaped by the cooperative advocacy of conservative think-tanks staffed by numerous individuals who work for defense contractors.¹¹⁸ Attempts to influence military engagement do not stop at helping to shape policy or lobbying for contracts. There is evidence that defense contractors actively engage in campaigning for military action.¹¹⁹

The links between the defense industry and the state here go beyond an overlap of personnel and philosophy of war-making. The development of military technology is a shared enterprise of the government and the contractors. The Pentagon works with the contractors to design weapons¹²⁰ and can exert control over the distribution of such technology worldwide.¹²¹

117. Lockheed Martin had contracts worth almost \$30 billion in fiscal years 2000 and 2001 alone. Hartung & Reingold, *supra* note 116, at 14.

118. The National Institute for Public Policy ("NIPP") produced a report that considerably influenced the Pentagon's Nuclear Posture Review, evidenced by the similarity of logic and language found in both documents. NIPP, in turn has board members who are directly engaged in the weapons manufacturing industry, such as Charles Kupperman, Vice President for National Missile Defense Programs at Lockheed Martin. Hartung & Reingold, *supra* note 116, at 30.

119. Lockheed's former vice-president Bruce Jackson was chair of the Coalition for the Liberation of Iraq, a group that promoted Bush's plan to invade Iraq. Jackson was also involved in securing support for the war in Eastern Europe; Jackson even provided assistance in drafting the letter of endorsement for such military intervention for these countries. *Corpwatch: Lockheed Martin*, Corpwatch.org, available at <http://www.corpwatch.org/article.php?list=type&type=9^printsafe=1>, (last visited Mar. 5, 2008).

120. For example, the Pentagon communicates its needs to contractors by "simulat[ing] the features and performances of weapon systems in computers" before the contractors begin production. Joshua A. Kutner, *Robust Weapons Simulations Hinge on Close Collaboration*, NATIONAL DEFENSE BUSINESS AND TECHNOLOGY MAGAZINE, Jan. 2001, available at http://www.nationaldefensemagazine.org/issues/2001/Jan/Robust_Weapon.htm (last visited Feb. 8, 2008). This simulations-based acquisition system ("SBA") allows "[t]he military services and contractors [to] work together to simulate all aspects of a weapon system, such as design and performance, leading up to the development of a prototype. The military customer tells the contractor what properties it wants the system to have, and the contractor incorporates those into the simulation. The contractor then can offer suggestions to improve the system." *Id.* The Joint Strike Fighter ("JSF") and the DD-21 surface combatant were products of such a collaboration. *Id.* Lockheed Martin is a manufacturer of the JSF. Lockheed Martin, JSF Program, available at <http://www.lockheedmartin.com/products/f35/JSFProgram.html> (last visited Feb. 8, 2008). Northrop Grumman was given a contract to build the DD 21 in 1998. Press Release, Northrop Grumman Ship Systems (Aug. 17, 1998), available at http://www.ss.northropgrumman.com/press/news/m_08_17_98.html (last visited Jan. 10, 2008).

121. For example, the Pentagon expressed reluctance to share the technology associated with the Joint Strike Fighter. Renae Merle, *Iraq Coverage Helps Arms Exporters*,

Furthermore, with the increasing reliance of the government on private military contractors¹²² to carry out a wide range of duties, the link between the state and the contractors has grown tighter. Contractors known for their weapons manufacturing capability are now branching out to provide other services such as training military personnel and providing interrogators for prisons.¹²³

Given the substantial links between the military contractors and the state, their aligned efforts in establishing policy,¹²⁴ developing weapons, and engaging in other war-time activities,¹²⁵ the actions of private military contractors can clearly be linked to the state for the purposes of finding liability for environmental war crimes under the ATCA.¹²⁶

The color of law rule derived from *Kadic*,¹²⁷ that a private individual or entity acts under color of law when acting “together with state officials

Corpwatch.org, Apr. 1, 2003, available at <http://www.corpwatch.org/article.php?id=7871&printsafe=1> (last visited Nov. 24, 2006). The Joint Strike Fighter is a combat jet built by Lockheed pursuant to a contract worth \$200 billion. *War Profiteer of the Month: Lockheed Martin*, Corpwatch.org, <http://www.corpwatch.org/article.php?list=type&type=9&all=1> (last visited Jan. 28, 2008).

122. During the first Gulf War in 1991, the ratio of contractors to military personnel was 1:50; in the 2003 conflict, it was 1:10. David Isenberg, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq, PMC Sector: A Marriage Between Government and the Private Sector*, AMERICAN BRITISH SECURITY INFORMATION COUNCIL, available at <http://www.basicint.org/pubs/Research/2004PMC2ii.pdf> (last visited Nov. 25, 2006).

123. For example, Northrop Grumman’s subsidiary, Vinnell Corporation obtained a forty-eight million dollar contract to train the Iraqi National Army. *Corpwatch: Northrop Grumman*, Corpwatch.org, available at <http://www.corpwatch.org/article.php?list=type&type=11&printsafe=1> (last visited Nov. 18, 2006). Also, Sytex, a subsidiary of Lockheed, plays a significant role recruiting private interrogators operating in U.S.-run prisons in Iraq and Afghanistan. See Pratap Chatterjee, *Meet the New Interrogators: Lockheed Martin*, Corpwatch.org, Nov. 4, 2005, available at <http://www.corpwatch.org/article.php?id=12757>.

124. Hartung & Reingold, *supra* note 116.

125. See *supra* notes 118 and 119.

126. Courts have found private actors can be implicated in state action under several theories including the theories of joint-action with a state, acting under color of law, and aiding and abetting state actors. See, e.g., *Presbyterian Church v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 328 (S.D.N.Y. 2003) (finding that state actors are “considered state actors if they are willful participant[s] in joint action with the State or its agents”) (citations omitted); *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (finding that under 42 U.S.C. § 1983, “[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid”) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1078 n.5 (2006) (holding that “violations of the law of nations have always encompassed vicarious liability”).

127. *Kadic*, 70 F. 3d 232.

or significant state aid”¹²⁸ is applicable here. The defense contractors work with state officials to shape policy and develop weapons.¹²⁹ They also receive significant state aid in securing contracts, given the close relationship that exists between the contractors and their representatives in the administration.¹³⁰ Secondly, the aiding and abetting theory articulated by the court in *Unocal*,¹³¹ holding liable a private entity that provides “practical assistance or encouragement which has substantial effect on the perpetration of the crime,” applies to defense contractors as well.¹³² The practical assistance is found in many instances: designing weapons, training personnel to use aircraft, and other operations.¹³³ The encouragement is found in active lobbying and policy-making efforts.¹³⁴ The perpetration of the environmental war crime is thus the result of teamwork between the state and the defense contractor.¹³⁵

CONCLUSION

The potential for massive casualties and irrevocable environmental harm in armed conflict is greater today than ever before. The salting of fields in Carthage, or the burning of crops and killing of livestock, are trivial events compared to the long term environmental disasters brought on by modern day weaponry, and the intensive assaults that they afford the military. Furthermore, there exists no criminal justice mechanism sufficient to bring rogue states to justice;¹³⁶ states are also shielded by the doctrine of foreign sovereign immunity against civil litigation.¹³⁷ When

128. *Id.* at 245.

129. *See supra* notes 116 (policy) and 120 (developing weapons).

130. Hartung & Reingold, *supra* note 116, at 30.

131. *Unocal*, 395 F.3d at 947.

132. *Id.*

133. *See* Kutner, *supra* note 20.

134. *See* Hartung & Reingold, *supra* note 116, at 30.

135. In domestic lawsuits, military contractors have resorted to the military contractor defense. *See, e.g., In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir. 1987) (finding that the defense contractor is shielded from liabilities “for injuries caused by products ordered by the government for a distinctly military use, so long as it informs the government of known hazards or the information possessed by the government regarding those hazards is equal to that possessed by the contractor.” However, when this defense was asserted in a lawsuit against Dow Chemical (producers of Agent Orange) under the ATCA, the court held that it was invalid.

136. *Supra* pages 9–13 and accompanying text explaining the failure of international mechanisms to punish those who commit environmental war crimes.

137. *See* FOREL, *supra* note 66, § 451. “Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons.” *Id.* Section 451 also discusses U.S. adherence to the “restrictive theory of im-

the same privileges of immunity are extended to corporations involved in warfare, accountability for humanitarian violations ceases.¹³⁸

States in the international community implicitly acknowledge that the victims of decisions to destroy the infrastructure and environment are entitled to compensation.¹³⁹ However, one problem is the funding of such compensation. Under the current regime of accountability, U.S. taxpayers are compelled to pay for weapons designed to safeguard their own country, and often to subsidize the weaponry of a foreign state.¹⁴⁰ The state may justify this in the interests of national security. On the other hand, the taxpayer is billed again to clean up the damage done, while corporate entities reap the profits and incur none of the liabilities.

The goal of ATCA suits is twofold: heightening public awareness of environmental war crimes and those who perpetrate them and compensating the victims of the crimes, which in this case means providing the funds to restore the environment as much as possible to its condition prior to the armed attack. The ATCA has been asserted with mixed results.¹⁴¹ When successful, it may fail to bring financial relief,¹⁴² though it

munity,” which maintains that “a state is immune from any exercise of judicial jurisdiction by another state in respect of claims arising out of governmental activities.” *Id.* at cmt. a. 28 U.S.C.A. § 1605 articulates exceptions to the immunity, stating that the actions of the foreign state must either occur in, or have a direct effect on the United States. *See* § 1605(a)(1)–(5).

138. Adding weight to this argument is the point made by Londis that nation states have “diminished power . . . in the globalized context,” while “[c]orporations are . . . immensely powerful (often more so than governments) yet highly unregulated.” Londis, *supra* note 99 at 180. Londis also points out that transnational corporations “are both public and private entities—public actors engaged in ventures with foreign governments, and private actors engaged in business for profit” such that “the distinction between public and private breaks down.” Thus, the corporation comes less and less to represent the interests of the state. “Consequently, [such corporations] may be held to the rule of international law without disrupting the relationships among nation-states.” *Id.* at 195.

139. The United Nations Compensation Commission fund is an example of such recognition. The United Nations Compensation Commission, <http://www2.unog.ch/uncc/> (last visited Mar. 4, 2008).

140. For example, Berrigan asserts that “the United States provides 20% of the Israeli military budget on an annual basis, and then about 70% of that money provided by the United States, from U.S. taxpayers, to Israel is then spent on weapons from Lockheed Martin and Boeing and Raytheon.” *U.S. Arming of Israel*, *supra* note 48 (last visited Jan. 31, 2008).

141. Of the thirty-six corporate ATCA cases brought over the past thirteen years, twenty have been dismissed (three quarters of these on substantive legal grounds and one quarter on procedural grounds). “Three have been settled out of court and 13 are ongoing.” Baue, *supra* note 15, at 12.

142. For example, Bosnian plaintiffs suing General Karadzic for human rights abuses under the ATCA were awarded \$4.5 billion but have not been able to collect that award.

may provide a sense of closure or satisfaction to the victims, as well as international attention to the crimes perpetrated against them. Other times, the plaintiffs have not won in court but have been able to negotiate settlements; this is particularly true in the context of suits against corporations.¹⁴³ That the ATCA has potential as a means of deterring corporate misfeasors is evidenced in the way it is perceived as a serious threat by some corporate advocates.¹⁴⁴ Another view of this potential is a positive one—it can be used to redress violations that as of yet have not been seriously addressed by the international community. It may not be a “weapon of mass destruction” but it certainly is a means to pierce the immunity of state-like corporations who wield their strength to destroy the environment and are never forced to pay the consequences for their actions. That the state actively encourages such behavior is not an adequate defense, especially when the representatives of the state and the corporate leaders are often of one mind.

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Jake Kreilkamp, *Suing Saddam—And Others—In U.S. Courts: The Controversy Over the Alien Tort Claims Act*, available at http://writ.news.findlaw.com/student/20030709_kreilkamp.html (last visited Feb. 11, 2008). However, it may be expected that relief against corporations, particularly U.S. corporations, would be more forthcoming than from individuals who act in disregard of the law in general.

143. Though the terms of the settlement with Unocal were not disclosed, it was believed to range in the millions of dollars. Baue, *supra* note 15.

144. See, e.g., Londis, *supra* note 99, at 143–44 (citing Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003)). “The first chapter, ‘Nightmare Scenario,’ predicts the rapid divestment of [transnational corporations] in developing countries ‘with less than perfect observance of individual and labor rights and shortcomings in the realm of political and environmental norms,’ should these ATCA suits be allowed to proliferate.” *Id.* at 143.

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