Regulating Multi-national Corporations through State-based Laws: Problems with Enforcing Human Rights Torts under the United States *Alien Tort Statute*

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Abstract

Recent UN reports have called for States to take responsibility for the extraterritorial conduct of non-state actors such as corporations. This article considers how States can respond to this obligation by using State-based domestic legislation to regulate extraterritorial conduct. The USA has a 400 year old statute which regulates its citizens extraterritorial conduct. The *Alien Torts Statute* was developed through the end of the twentieth century to render USA corporations liable for torts committed in a foreign jurisdiction which caused damage to aliens. The USA has however recently reduced the scope of this statute due to the problems caused by domestic courts passing judgment upon cases which concern international affairs.

Introduction

Human rights law arguably imposes a duty on States to take reasonable steps to prevent domestic corporations from perpetrating human rights violations in foreign jurisdictions. This duty has been supported by the United Nations Committee on Economic, Social and Cultural Rights[1] and most recently by UN Representative John Ruggie where he stated:

> The state duty to protect against non-state abuses is part of the international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.[2]

As Clapham and Jerbi explain:

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1 UN Committee on Economic Social and Cultural Rights, General Comment 12, The Right to Adequate Food (Art. 11), 12 May 1999, [20], in the context of the right to food.

> The boundaries of what is expected from business, and what a State is obliged to do under international law, cannot be neatly drawn. It must be stressed, however, that governments do still possess wide powers over – and primary responsibility for – the well-being of their citizens and for the protection of human rights.[3]

Paust has observed that how this right relates to the law of State responsibility remains an unsettled issue.[4] In order to regulate the conduct of multi-nationals some authors have called for States to impose sanctions upon corporations which engage in human rights abuses in foreign jurisdictions.[5] There are a large number of issues concerning the operation of such exterritorial regulation. However, this article focuses specifically on the potential problems arising from the operation of the US *Alien Tort Statute*. The statute is the oldest operative legislative scheme which imposes legal duties and sanctions upon individuals for torts perpetrated in a foreign jurisdiction. The judgments associated with this statute provide a guide to the problems that other extraterritorial regulations may encounter, but also expose the limitations in domestic statutory schemes and the need for international law to develop further in the area.

1. Development of the *Alien Tort Statute*

The so called '*Alien Tort Statute*' was introduced as part of the *Judiciary Act* of 1789 by the first Federal Congress. This federal cause of action provides that:

> the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[6]

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2 *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises,* Reported to the UN Human Rights Council, 9 February 2007, A/HRC/4/035 at [18]; see for similar conclusions: John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*: *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,* Reported to the UN Human Rights Council, 7 April 2008 at 27–50.

3 Andrew Clapham & Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339.

4 Jordan J Paust, 'The Complex Nature, Sources and Evidences of Customary Human Rights' (1995) 25 *Georgia Journal of International and Comparative Law* 147; see also: Jordan J Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harvard Human Rights Journal* 51.

5 Mark B Baker, 'Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise' (2001) 20 *Wisconsin International Law Journal* 89; Lance Compa & Tashia Hinchliffe-Darricarrere, 'Enforcing International Labor Rights Through Corporate Codes of Conduct' (1995) 33 *Columbia Journal of Transnational Law* 663; David Barnhizer, 'Waking from Sustainability's "Impossible Dream": The Decision Making Realities of Business and Government' (2006) 18 *Georgetown International Environmental Law Review* 595; Thomas McInerney, 'Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2006) 40 *Cornell International Law Journal* 171; Igor Nossa, 'The Scope for Effective Cross-jurisdictional Regulation of Commercial Contractual Arrangements Beyond the Traditional Employment Relationship: Recent Developments in Australia and their Implications for National and Supranational Regulatory Strategies' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell & Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation* (2006).

6 28 USC §1350.

The practical effect of the *Alien Tort Statute* is that it provides non-US citizens with a cause of action against US citizens where a corporation has committed a breach of the law of nations and where the court has general jurisdiction.[7] The plaintiff has the burden of proof to establish both a breach of the law of nations and jurisdiction.[8]

Even though the *Alien Tort Statute* enables plaintiffs to sue for a breach of the law of nations or treaties ratified by the US, federal courts have held that the *Alien Tort Statute* does not create a general right of US courts to pass judgment on defendants worldwide. For a court to entertain jurisdiction, it is essential for the defendant to be sufficiently connected with the US.[9] For example, in *Matsuda v Wada* a District Court held that it did not have diversity jurisdiction over a suit involving two Japanese citizens, even though one was a permanent resident alien.[10] In *Unkel Ltd v Tay* a court dismissed a suit between a Hong Kong corporation and an Indonesian citizen, even though the Indonesian citizen was regarded as a permanent resident alien.[11] In *Gall v Topcall* a Dutch citizen, who was residing in Pennsylvania, had an action against a foreign company, which was based in Australia, dismissed for lack of jurisdiction.[12]

2. Who May be Sued under the *Alien Tort Statute*?

The scope of who may be sued under the *Alien Tort Statute* was expanded by the US Court of Appeals for the Second Circuit in *Kadic v Karadzic*.[13] In *Kadic*, Croat and Muslim citizens of Bosnia-Herzegovina alleged that they were victims and were representing victims of atrocities including rape, torture, and summary executions perpetrated in Bosnia-Herzegovina by Bosnian-Serb governmental forces. The plaintiffs filed against Karadzic, alleging that, as he was the President of the Bosnian-Serb faction which committed the atrocities, he was liable. The Court held:

> We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.[14]

To determine what constituted the law of nations, the court did not just refer to treaties which were ratified by the US but held that 'evolving standards of international law govern who is within the [*Alien Tort Statute's*] jurisdictional grant'.[15] Not surprisingly, the Court found that murder, genocide, torture, and rape were contrary to international norms, as espoused by various conventions.[16] *Kadic* established a precedent which

7 See *Sosa v Alvarez-Machain* 542 US 692 (2004).
8 *Rio Properties Inc v Rio International Interlink* 284 F 3d 1007 (2002) at 1019.
9 *Chavez-Organista v Vanos* 208 F Supp. 2d 174 (2002) at 177.
10 *Matsuda v Wada* 128 F Supp 2d 659 (2000).
11 US Dist LEXIS 22196 (1995).
12 US Dist LEXIS 4421 (2005).
13 70 F 3d 232 (1995).
14 Id at 239.
15 Id at 241.
16 Id at 241–244.

enabled private corporations to be held liable for their involvement in human rights violations in foreign countries.[17] In 1993, the American Unocal Corporation and French company Total entered a joint venture with the Burmese Government's State Law and Order Restoration Council (SLORC) to develop the Yadana gas pipeline in Myanmar. Unocal Corporation and Total agreed that the SLORC would be responsible for clearing land and supplying labour. In 1997 it was alleged that the SLORC had engaged in forced labour, crimes against humanity, torture, violence against women, arbitrary arrest and detention, cruel, inhuman, or degrading treatment and wrongful death. Suit was filed against Unocal Corporation for its financial association with these crimes, even though the actionable conduct was perpetrated by the SLORC.

In *John Doe I v Unocal* (2002) it was found that there was sufficient evidence against Unocal Corporation to try them for aiding and abetting SLORC's conduct.[18] There was evidence of rape, murder and forced labour. One woman gave evidence that her husband attempted to escape from the forced labour and was shot at by the Burmese military. In retaliation, she and her child were thrown into a fire. Her child died from these wounds. The US Court of Appeal for the Ninth Circuit sent the case back for trial. In reaching its judgment, the court considered international treaties and customary laws, including those to which the US government had not ratified or introduced legislation to support. The court held:

> Where, as in the present case, only jus cogens violations are alleged – ie, violations of norms of international law that are binding on nations even if they do not agree to them…. it may, however, be preferable to apply international law rather than the law of any particular state, such as the state where the underlying events occurred or the forum state. The reason is that, by definition, the law of any particular state is either identical to the jus cogens norms of international law, or it is invalid.[19]

Following this decision, Unocal Corporation settled.[20] The application of *jus cogens* norms in *Doe I v Unocal* adopted an approach to norms which is considerably wider than that which is adopted under international law. Article 26 of the *Vienna Convention on the Law of Treaties* requires States to perform treaty obligations in good faith.[21] Article 53provides that *jus cogens* norms are superior to other international laws and therefore States' reservations do not limit the impact of *jus cogens* norms against that State.[22] This does not mean that a breach of a *jus cogens* norm by a State within its domestic jurisdiction

17 Donald J Kochan, 'No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Torts Statute in Human Rights and International Law Jurisprudence' (2005) 8 *Chapman Law Review* 103 at 128.

18 *John Doe I v Unocal Corp* 395 F 3d 932.

19 Id at 948.

20 EarthRights International, 'Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers', 29 April 2005.

21 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)..

22 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3; see discussion in Wolfgang Friedmann, 'The North Sea Continental Shelf Cases – A Critique' (1970) 64 *American Journal of International Law* 229-241.

can be actionable in a particular forum. In *Democratic Republic of the Congo v Rwanda,* the parties in the case accepted that the *Genocide Convention* stated laws of the *jus cogens.*[23] However, the majority held that while genocide enjoyed peremptory status, the International Court of Justice did not have jurisdiction to consider an action against a State which had not agreed to be subject to the court's jurisdiction. In effect, this meant that a breach of a *jus cogens* norm by itself could not support an action against Rwanda, in the absence of consent to jurisdiction. The court in *John Doe I v Unocal Corp* was able to go further by holding that as genocide constituted a breach of the law of nations, this created an actionable right under the *Alien Tort Act* for which US district courts would have jurisdiction under domestic US law.

3. The Law of Nations

Since the 1980s, US federal courts have expanded the range of torts which are actionable under the *Alien Tort Statute* because they are found to be breaches of the 'law of nations'.[24] In almost 200 years the *Alien Tort Statute* had been used only twice. The first case, *Bolchos v Darrel*,[25] involved a slave owner suing for the return of its slaves as a Spanish prise of war. It was held that the Treaty of France preceded the law of nations. The second case, *Adra v Clift*, concerned a child custody dispute between two aliens. One alien had forged the child's passport. It was held that wrongfully withholding a child was actionable. The fraudulent activity breached the law of nations. Human rights laws has developed considerably since the *Alien Tort Statute* was introduced in 1789. Considering that one of the only two cases to utilise the statute involved slavery, the expansion of this statute was remarkable.

The case of *Filartiga v Pena-Irala* turned the *Alien Tort Statute* from an obscure action into a practical remedy.[26] In *Filartiga,* the US Court of Appeals for the Second Circuit held that the *Alien Tort Statute* could be expanded and used to sue a person for additional torts. *Filartiga* concerned the torture and murder of a 17 year old boy in Asuncion, Paraguay by the then Inspector of Police. It was alleged that the boy was murdered due to his father's criticism of the Paraguayan government. The Filartiga family attempted to take legal action against the inspector of police in Asuncion, Paraguay without success. The inspector of police moved to the US. The family then sued in the US Federal Court under the *Alien Tort Statute.* The Court in *Filartiga* held that they 'must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today'.[27] The Court held that the international law of nations granted fundamental human rights upon all people regardless of their nationality. The right to be

23 *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v Rwanda)* [2002] ICJ Rep 126.

24 See, for example, the District Court for the Central District of California's judgment that polluting international waters provided residents of Papua New Guinea a recognisable claim: *Sarei v Rio Tinto PLC* (Sarei I), 221 F Supp 2d 1116 (2002); see generally for a discussion of the expansion of actionable torts: Jordan J Paust, 'Human Rights and Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal Transnational Law* 801.

25 3 F Cas 810 (1795).

26 630 F 2d 876 (1980) ('*Filartiga*').

27 Id at 878.

free from torture and murder was an innate human right; a breach of which was actionable under the *Alien Tort Statute*.[28]

Does I v The Gap concerned garment industry guest workers from the People's Republic of China, the Philippines, Bangladesh, and Thailand working in the Commonwealth of the Northern Mariana Islands.[29] The plaintiffs claimed that the defendant operated a workplace which involved physical abuse, violent intimidation tactics, forced labour, involuntary servitude and discrimination. The plaintiffs alleged the defendant had violated the law of nations by infringing on workers' rights of freedom of association, freedom of speech, privacy, rights to be free from workplace discrimination, corporal punishment in the workplace, the right to organise and join labour unions and to engage in concerted protected activity. The District Court for the Northern Mariana Islands dismissed the claim of servitude because the plaintiffs could not demonstrate that they were forced into servitude through physical or legal coercion but held that the other torts were actionable.[30] The claim settled against all the defendants except Levi Strauss & Co.[31] This included a settlement fund of approximately US$20 million.

The Estate of Rodriguez v Drummond Co involved the alleged 'systematic intimidation and murder of trade unionists' in Colombia at the hands of paramilitaries working as agents of the defendants.[32] The defendant companies allegedly contracted with paramilitary security forces, which perpetrated extreme violence including murder.[33] The District Court for the Northern District of Alabama, Western Division held that extrajudicial killing was actionable under the *Alien Tort Statute* as a breach of the law of nations. The rights to associate and organise were generally recognised as international principles sufficient to maintain a claim under the law of nations. The fact that the US and Colombia had ratified the relevant conventions was crucial to the decision.

Following these decisions, a number of cases were filed under the *Alien Tort Statute* against corporations including Abercrombie & Fitch, BHP, Chevron, Coca-Cola, Del Monte, Dole, Drummond Coal, ExxonMobil, The Gap, JC Penney Co, Levi Strauss, Nike, Pfizer, Rio Tinto, Shell, Siemens, Southern Peru Copper Corporation, Target, Texaco, Total, Union Carbide and Unocal.[34] The possibility for damages against multi-national companies is incredible:

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28 Richard P Claude, 'The Case of *Joelito Filartiga* in the Courts' in Richard Pierre Claude & Burns H Weston (eds), *Human Rights in the World Community: Issues and Action* (1992) at 328–339.

29 In *Does I v The Gap, Inc* (2002) No CV-01-0031, WL 1000073 (DN Mar I, 10 May 2002) the Court granted a motion for class certification.

30 Order Re: Motion to Dismiss Plaintiffs' First Amended Complaint (26 November 2001), Third Amended Complaint for Damages and Injunctive Relief, *Does I v The Gap*, Inc, No CV-01-0031, PP 159-90 (DNMI, 25 July 2002).

31 Sweatshop Watch, 'US Clothing Retailers on Saipan Settle Landmark Workers' Rights Lawsuit', Press Release, 26 September 2002.

32 *Estate of Rodriquez v Drummond Co* 256 F Supp 2d 1250 (2003).

33 Id at 27–28.

34 Kochan, n17, 128; Robert Vosper, 'Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in US Courts' *Corporate Legal Times*, October 2002 at 35.

> Getting in front of a jury with evidence of a wealthy corporate defendant's abuse of poor, weak victims is a plaintiffs' lawyer's dream come true.[35]

Damages awarded under the *Alien Torts Statute* have been impressive, including:

- *Mehinovic*: US$40 million for compensatory damages and US$100 million for punitive damages;[36]
- *Hilao, Class Plaintiffs v Marcos Estate*: US$766 million for compensatory damages and US$1.2 billion for punitive damages;[37]
- *Xuncax v Gramajo*: US$18 million for compensatory damages and US$28.75 million for punitive damages;[38]
- *Paul v Avril*: US$17 million for compensatory damages and US$24 million for punitive damages;[39] and
- *Doe v Karadzic*: US$617 million in compensatory damages, US$3.9 billion in punitive damages.[40]

4. Torture Amendment

By introducing the *Torture Victim Protection Act* ('*TVPA*') the legislature demonstrated that it supported protecting human rights under the *Alien Tort Statute*. The *TVPA* was published as a historical and statutory note to the *Alien Tort Statute*.[41] The long title of the *TVPA* explains that the statute was introduced to discharge the US's human rights obligations:

> To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Accordingly, article 2 of the *TVPA* created a civil action where an individual 'who, under actual or apparent authority, or color of law, of any foreign nation' subjects an individual to either torture or extrajudicial killing. Initially the courts accepted that the *TVPA* applied to both natural persons and corporate entities. The District Court held in *The Estate of Rodriquez v Drummond Co, Inc* and *Sinaltrainal v Coca-Cola Co* that a corporation could be an individual under the *TVPA*.[42]

35 Lance Compa, 'Pursuing International Labor Rights in US Courts' (2002) *Industrial Relations* 1 at 48.
36 *Mehinovic v Vuckovic* 198 F Supp. 2d 1322 (2002).
37 *Hilao v Estate of Ferdinand Marcos* 103 F 3d 767 (1996).
38 *Xuncax v Gramajo* 886 F Supp. 162 (1995).
39 *Paul v Avril* 901 F Supp. 330 (2001).
40 *Doe v Karadzic* (2000) No 93 Civ 878, Judgment (SDNY, 5 October 2000).
41 Codified at 28 USC §1350 (1991).
42 *Sinaltrainal v Coca-Cola Co* 256 F Supp. 2d 1345 (2003).

5. Hope for the *Alien Tort Statute*

Dale heralded the expansion of the *Alien Tort Statute* as a powerful response to corporate human rights abuse.[43] Amit predicted in his doctorial thesis:

> US judges breached the gap between the collection of human rights norms as a statement of aspirations, and as a system of legal protections. And they did not stop at the protections established by *Filartiga*. Instead, they solidified an expanding range of international human rights norms.[44]

Clark argued that the expanded coverage under the *Alien Tort Statute* provided a vehicle to hold multi-national corporations accountable for international human rights abuses.[45] Pagnattaro argued:

> Widely adopted international agreements, treaties, and conventions indicate that the law of nations encompasses core labor rights. Accordingly, this paper advocates the use of the…[the *Alien Tort Statute*] as a way of raising international labor standards…based on a number of official documents, there is demonstrable international agreement that the law of nations also protects freedom of association and collective bargaining, prohibitions on child labor, and discrimination, including gender.[46]

Even though Kochan was opposed to including human rights litigation under the *Alien Tort Statute*, he recognised that international conventions that had not been ratified by the US Government may be regarded as falling within the law of nations.[47]

6. The US Supreme Court Decision in *Sosa*

The US Supreme Court has narrowed the scope of the *Alien Tort Statute* in *Sosa v Alvarez-Machain*.[48] This case concerned an alleged unlawful detention and sponsored kidnapping by the US Drug Enforcement Agency (DEA) of a Mexican citizen from Mexico. The DEA attempted to have Alvarez-Machain extradited, but the Mexican Government failed to act. The DEA then hired private agents to perform the kidnapping. One of the hired kidnappers was Sosa. Sosa kidnapped Alvarez-Machain and handed him over to DEA officials in the US. Alvarez-Machain was prosecuted and acquitted of all charges. He then sued Sosa, inter alia, under the *Alien Tort Statute* for false imprisonment contrary to the law of nations. Sosa first had summary judgment issued against him for the

43 John Dale, *Transnational Legal Space: Corporations, States, and the Free Burma Movement*, Ph.D Dissertation, University of California (2003).

44 Roni Amit, *Judges Without Borders: International Human Rights Law in Domestic Courts*, Ph.D Dissertation, University of Washington (2004).

45 Dana L Clark, 'Boundaries in the Field of Human Rights: The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 *Harvard Human Rights Journal* 205 at 223–26.

46 Marisa Anne Pagnattaro, 'Enforcing International Labor Standards: The Potential of the Alien Torts Claims Act' (2004) 37 *Vanderbilt Journal of Transnational Law* 203.

47 Kochan, n17 at 128.

48 542 US 692 (2004).

damage sustained during the kidnapping in Mexico, but not for any damage once he entered US jurisdiction.[49] This decision was subsequently reversed on a motion from the US government.[50]

Eventually the matter came before the US Supreme Court after a lengthy legal process.[51] The Supreme Court found that the US government could not be liable for any tort where the damage was suffered in a foreign jurisdiction due to the operation of the *Federal Tort Claims Act*.[52] As for Sosa's liability under the *Alien Tort Statute*, the Supreme Court examined the *Alien Tort Statute* with reference to the intended scope of the 'law of nations' in 1789. The Supreme Court then required a cause of action to have a similar level of certainty as the causes anticipated under the 1789 statute. The Supreme Court held:

> We do not believe ... that the limited, implicit sanction to entertain the handful of international common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.[53]

Justice Scalia, with Justices Rehnquist and Thomas concurring, held that there is no 'reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms.'[54] Justice Souter found that there was 'no basis to suspect that Congress had any examples in mind beyond those corresponding to Blackstone's three primary offenses: safe conducts, infringement of the rights of ambassadors and piracy.'[55] The Supreme Court found the causes of action under the *Alien Tort Statute* were not static. The Court recognised that new causes of action could be recognised, providing that the claims were 'based on the present-day law of nations to rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th century Paradigms.'[56]

The federal courts have been left with the task of determining whether a particular international law has reached the level of universality as envisaged by the 1789 statute.[57] Generally, *Sosa* can be said to have substantially wound back the scope of *Alien Tort Statute* litigation. In relation to the scope of liability for a breach of the law of nations, the Supreme Court suggested that only States, and not corporations or individuals, may be liable for international law violations:

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49 *Alvarez-Machain v United States* 331 F 3d 604 (2003) at 610–11.

50 Id at 699.

51 Carolyn A D'Amore, '*Sosa v Alvarez-Machain* and the *Alien Torts Statute*: How Wide Has the Door to Human Rights Litigation Been Left Open?' (2006) 39 *Akron Law Review* 593.

52 *Sosa v Alvarez-Machain* 542 US 692 (2004).

53 Id at 712.

54 Id at 739.

55 Id at 724.

56 Id at 717.

57 Eugene Kontorovich, 'Implementing *Sosa v Alvarez-Machain*: What Piracy Law Reveals about the Limits of the Alien Torts Statute' (2004) 80 *Notre Dame Law Review* 111.

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the alleged perpetrator being sued, if the defendant is a private actor such as a corporation or individual.[58]

While the Supreme Court was not excluding all private defendants, they certainly demonstrated their intent to wind back the scope of the *Alien Tort Statute*.

7. Can a Corporation Still be Liable Post-*Sosa*?

Prior to the Supreme Court decision in *Sosa*, corporations were liable under the *TVPA*. After *Sosa*, corporations appear to be immune from suit for torture. The District Court for the Eastern District of New York in *Vietnam Association for Victims of Agent Orange Product Liability Litigation*[59] and the District Court for the Central District of California in *Mujica v Occidental Petroleum Corp* held that a corporation could not be held liable under the *TVPA*.[60] In *Vietnam Association for Victims of Agent Orange Product Liability Litigation v Dow Chem,* Vietnamese nationals and an organization sued the manufacturers of Agent Orange for harms allegedly inflicted during the Vietnam War.[61] The District Court for the Eastern District of New York observed international law is primarily a law for the international conduct of States, and not of their citizens.[62] Generally, personal law claims are unenforceable under the *Alien Tort Statute*.[63] Consequently, the law of nations generally does not impose obligations or grant actionable rights under the *Alien Torts Statute*.

The Court noted the express rejection by the drafters of the 1998 Rome Statute establishing the International Criminal Court to include the liability of corporations. The *TVPA* imposes liability in section 2 upon 'individuals' and makes no reference to corporations in the definition section of the Act. Even though corporations had previously been held liable under the *TVPA*, the court in *Agent Orange* held that 'common sense' indicated that only natural persons could be 'individuals'. Only individuals and not corporations could perform torture:

> The definition of 'individual' within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act.[64]

As a consequence, the plaintiffs had to identify the individuals in question and not just point to a corporation. The Court stated:

> The prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or

58 *Sosa* (2004) at 733, with Scalia J, Rehnquist CJ & Thomas J dissenting on this point.
59 *In re Agent Orange Product Liability Litigation* 373 F Supp. 2d 7 (2005).
60 *Mujica v Occidental Petroleum Corp* 381 F Supp. 2d 1164 (2005).
61 *In re Agent Orange Product Liability Litigation* 373 F Supp 2d 7 (2005) at 40.
62 Id at 158–159.
63 *United States DOC v Montana* 503 US 442 (1992).
64 *In re Agent Orange Product Liability Litigation* 373 F Supp 2d 7 (2005) at 124.

> approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the… [corporation]. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders or abets. But the evidence must establish action of the character we have already indicated, with knowledge of the essential elements…[65]

Prior to the Supreme Court decision in *Sosa*, in *John Doe I v Unocal Corporation* there was no obligation to specifically identify the individual directors or managers who actually authorised the conduct in question.[66] The decision in *Vietnam Association for Victims of Agent Orange* represents an increased burden upon any potential litigant if they wish to hold a corporation liable for human rights breaches under the *Alien Tort Statute*.

8. What Comes Within the Law of Nations post-*Sosa*?

The Supreme Court decision in *Sosa* has considerably reduced the types of conduct that are actionable under the *Alien Tort Statute*. Even widely ratified treaties may not possess a definite content comparable to those recognised in 1789. For example, Mank has argued that 'even under a broad interpretation of *Sosa*, most principles in international environmental agreements such as "sustainable development" are simply too vague to be enforceable' using the *Sosa* test.[67] Similarly Nikolic has argued that courts 'may not deem arbitrary detention a violation of the law of nations' following the *Sosa* test.[68] Skinner has observed that 'norms such as crimes against humanity (including genocide), war crimes, and forced labor' are likely to remain actionable under the *Alien Tort Statute*.[69]

Following the *Sosa* judgment, courts are now concluding that claims are not actionable where, prior to the Supreme Court judgment, the opposite decision was reached. The judgment in *Aldana v Fresh Del Monte Produce, Inc,* provides an example of how courts are reaching different conclusions on similar facts post-*Sosa*. The plaintiffs in *Aldana v Fresh Del Monte Produce* were trade union representatives on the defendant's plantation in Guatemala. The plaintiffs alleged that the defendant's entirely owned subsidiary in Guatemala hired private armed security forces to use duress during union negotiations. The security forces met with the defendant and arranged to raid the union offices. Approximately 200 armed security forces raided the union offices, held union officials hostage and threatened people with guns. The head of the security force was the local head of the Chamber of Commerce. A mayoral candidate and the municipal mayor joined with the security forces when union officials were forced at gun point to denounce the union on the radio. Union officials were ordered to leave Guatemala and Mexico or

65 Id at 129.

66 395 F 3d 932 (2002).

67 Bradford Mank, 'Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue under the *Alien Tort Statute*?' (2007) *Utah Law Review Society* 1085 at 1088.

68 Irena Nikolic, 'The Viability of Guantanamo Bay Detainees' *Alien Tort Statute* Claims Seeking Damages for Violations of the International Law Against Arbitrary Detention' (2007) 37 *Seton Hall Law Review* 893 at 894.

69 Gwynne Skinner, 'Nuremburg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in US Courts under the Alien Tort Statute' (2008) 71 *Albany Law Review* 321 at 333.

they would be murdered. The plaintiff alleged that the defendant's subsidiaries breached the law of nations by perpetrating cruel, inhuman, degrading treatment or punishment, arbitrary detention and crimes against humanity. The defendant countered by arguing that the underlying acts did not constitute a violation of the law of nations.

Chief Judge Edmondson, Circuit Judge Wilson, and Judge Restani agreed with the District Court's dismissal of the plaintiffs' non-torture claims under the *Alien Tort Statute*:

> We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment. In reaching this conclusion, we acknowledge that two district courts of this Circuit recognized such a cause of action.[70]

The two decisions referred to in *Aldana v Fresh Del Monte Produce* were *Mehinovic v Vuckovic*[71] concerning Bosnian war crimes and *Cabello v Fernandez-Larios*[72] concerning political assassination. Both of these decisions were not referred to in the Supreme Court's decision in *Sosa* when the test was altered. Based upon the judgment in *Aldana v Fresh Del Monte Produce* war crimes and political assassination may not be actionable under the *Alien Tort Statute*. The Supreme Court in *Sosa* effectively determined that the responsibility for expanding the actionable rights under the *Alien Tort Statute* largely was the responsibility of the 'people's representatives'.[73]

Therefore, in order to come within the law of nations post-*Sosa*, an international norm would almost certainly need to be ratified by the US executive or be widely accepted by the international community to constitute a customary norm. If the US legislature desired to impose obligations directly upon corporate America for corporations' extraterritorial conduct then they could clearly define what norms should be actionable. Even if the legislature passed such an amendment, this would not avert non-justiciability problems.[74]

9. Justiciability Problem

Even if a plaintiff proves that there is a prima facie case against the defendant for a breach of the law of nations, the claim may still be struck out on the grounds of non-justiciability. As most laws of nations and treaties impose legal obligations primarily upon States and then States impose those obligations on corporations,[75] it is probable that many violations by corporations will have occurred with either the sanction of, or neglect by, a State. This connection to a foreign nation can prove fatal to an action under the

70 No 01-3399, slip op at 4 (SD Fla, 5 June 2003), 8.

71 198 F Supp 2d 1322 (2002) at 1347.

72 157 F Supp 2d 1345 (2001).

73 Kochan, n17, 125.

74 For a discussion of possible reforms see: Lucien J Dhooge, 'A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations' (2007) 13 *UC Davis Journal of International Law & Policy* 119. The US administration may be unlikely to adopt such reforms: Beth Stephens, 'Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation' (2004) 17 *Harvard Human Rights Journal* 169.

75 Robert Alexy, *Theory of Constitutional Rights* (2002) at 351.

Alien Tort Statute. In *re South African Apartheid Litigants*, three groups of black South African nationals commenced proceedings against multinational corporations which had conducted business in South Africa during the apartheid era.[76] The plaintiffs claimed that the corporations had aided and abetted the South African government's violation of the law of nations and that the corporations were consequently liable under the *Alien Tort Statute*.

The District Court for the Southern District of New York held that the corporations could not be liable for aiding and abetting a national government. The court held that liability for 'aiding and abetting' violations of international law was not itself actionable under the *Alien Tort Statute*. The Court was mindful of the Supreme Court's approach in *Sosa* that 'Congress should be deferred to with respect to innovative interpretations' of the *Alien Tort Statute*.[77] In addition, the Court was:

> mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe.[78]

South African Apartheid Litigants demonstrates a significant problem for litigants. The *Alien Tort Statute* is primarily concerned with international law which primarily imposes duties upon States. Courts are however reluctant to pass judgment over the conduct of foreign States.

Where the judgment against a corporate defendant may indirectly pass judgment upon a foreign State, the court has gone even further, notably in the case of *Doe v Exxon Mobil Corporation*.[79] That case concerned retaliatory violence following individual villagers' attacks on an oil pipeline in Indonesia. The plaintiffs alleged that the Exxon Corporation hired the Indonesian military to secure the pipeline. They also alleged that the Indonesian military engaged in conduct that constituted a violation of the law of nations, including sexual violence, genocide and a systematic attack on certain segments of the population. The District Court for the District of Columbia determined that 'sexual violence' was not actionable per se as a violation of the law of nations, as 'it is not sufficiently recognised under international law and is not a specific, universal, and obligatory' norm (although claims of sexual violence may be recognisable elements of such illegal conduct as torture).[80] The Court did determine that genocide was actionable. Genocide was defined to include 'acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group.'[81] The Court also found that the 'systematic attack on certain segments of a population' was a violation of the law of nations.[82]

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76 346 F Supp. 2d 538 (2004) at 549–51.
77 *In re South African Apartheid Litigants* at 550.
78 Ibid.
79 393 F Supp 2d 20 (2005).
80 *Exxon Mobil Corporation* at 12.
81 Ibid at 13.
82 Ibid.

Similarly to *Unocal*, the plaintiffs asserted the defendants knew or ought to have known 'that the military did commit, was committing, and would continue to commit these tortuous acts'.[83] Also similarly to *Unocal*, in *Exxon* the court found the defendant oil corporation could not be held liable as there was no evidence the defendants 'participated in or influenced' the military's unlawful conduct.[84] However, the court in *Exxon* went further than *Unocal* by refusing to entertain any action that involved judging the conduct of a nation due to the principle of non-justiciability:

> Most important, determining whether defendants engaged in joint action with the Indonesian military necessarily would require judicial inquiry into precisely what the two parties agreed to do. For reasons explained above, such an inquiry cuts too close to adjudicating the actions of the Indonesian government, and for that independent reason, should be avoided on justiciability grounds.[85]

The judgment in *Exxon* effectively excludes all breaches of the law of nations actionable under the *Alien Torture Statute* where the potential liability of a multi-national corporation involves judging the conduct of a foreign government.

Conclusion

In 1879 when the *Alien Tort Statute* was first introduced, the statute was little known and little used. Over 200 years the statute was only used twice. Following *Filartiga v Pena-Irala*, the *Alien Tort Statute* was widely utilised to protect human rights. Following the decision in *Doe I v Unocal Corporation*, it even appeared that the *Alien Tort Statute* afforded a vehicle to hold corporations liable for human rights abuses in foreign States. This expansion resulted in US federal courts passing judgment on the conduct of foreign governments. In response, the US Supreme Court decision in *Sosa* has substantially reduced the ability of the *Alien Tort Statute* to protect human rights.

The decision in *Sosa* adopted an extremely conservative reading as to which torts were actionable. Even if the US legislature amended the *Alien Tort Statute*, this would not remove the non-justiciability issues. Rather than attempting to find a vehicle through which domestic laws can impose universal obligations upon corporations, States should continue to develop international regulatory models. Unlike State courts, international State-based institutions are traditionally the bodies most suited to handle disputes involving international law. The United Nations Global Compact, for example, has the support of the UN General Assembly and is acclaimed as the 'world's largest and most widely embraced corporate citizenship initiative'.[86] This article concludes that the enforcement State-based regulation of multi-national corporate conduct would likely encounter many of the problems which have limited the effectiveness of the *Alien Tort Statute*. Rather than focusing on State-based vehicles, States should further develop vehicles sourced in international law.

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83 Id at 20; *Unocal*, n18 at 1306.

84 Ibid.

85 *Exxon Mobil Corporation* at 20 & 21.

86 Surya Deva, 'Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?' (2007) 39 *George Washington International Law Review* 255 at 259; see generally UN General Assembly Resolution 62/211, 62 UN GOAR (78th plen mtg), UN Doc A/RES/62/211.