NOTES

ADJUDICATION OF INTERNATIONAL HUMAN RIGHTS CLAIMS IN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS: WHY ATCA SUITS IN U.S. COURTS ARE THE BETTER ALTERNATIVE FOR CLAIMS AGAINST AMERICAN MULTINATIONAL CORPORATIONS

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I. INTRODUCTION

Over two decades ago, in *Filartiga v. Pena-Irala*,[1] the United States Court of Appeals for the Second Circuit held that official acts of torture violated international law and created a cause of action under a two-hundred-year-old statute, the previously rarely-invoked Alien Tort Claims Act of 1789 (ATCA).[2] The ATCA essentially permits a non-citizen plaintiff to sue a non-citizen defendant for an act that occurred outside the United States, in a U.S. court.[3] The revolutionary decision invited further adjudication of international human rights claims in United States courts. The federal circuit courts indeed have progressively expanded the scope of the ATCA to encompass acts by non-state actors,[4] claims by United States citizens,[5] and more recently, claims against American corporations engaged in overseas operations.[6]

The last expansion has incited the greatest controversy, and thereby is the most relevant to a discussion of the appropriateness of international human rights claims under the ATCA. Business groups particularly have been concerned about the increasingly numerous claims brought against American multinational corporations under the statute.[7] Several business groups have convened in Washington, D.C., to discuss strategies to combat the potential ATCA litigation, ranging from proposals for legislation to submission of amicus curiae briefs in pending ATCA cases.[8] Multinational corporations fear the potential adverse consequences that ATCA suits could have on interna-

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[1] 630 F.2d 876 (2d Cir. 1980).

[2] 28 U.S.C. § 1350 (2004). Scholars also refer to the ATCA as the Alien Tort Statute (ATS). *E.g.*, GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 2 n.2 (2003).

[3] 28 U.S.C. § 1350 (2004).

[4] *E.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

[5] *E.g.*, Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001).

[6] *E.g.*, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Doe v. Gap, Inc., No. CV-01-0031, 2002 WL 1000068 (D. N. Mar. I, May 10, 2002); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

[7] HUFBAUER & MITROKOSTAS, *supra* note 2, at 1-2; *see also* Jim Lobe, *Rights-U.S.: Ashcroft Attempts to End Victims' Rights Law*, INTER PRESS SERVICE, May 15, 2003, *available at* 2003 WL 6915334 (estimating that twenty-five ATCA cases against U.S. multinational corporations have been filed since 1993); Abid Aslam, *Unocal to Be Judged Under California Law*, FIN. TIMES, Aug. 7, 2003, *available at* 2003 WL 60574912 (concurring that twenty-five ATCA suits have been brought against over one hundred multinational corporations).

[8] Paul Magnusson, *Making a Federal Case Out of Overseas Abuses*, BUS. WK., Nov. 25, 2002, at 78.

tional trade and overseas American investments.[9] One representative cautioned, "Multinationals are at risk whenever they operate outside their home market. They risk entanglement with governments that are abusing their citizens, or getting involved in situations where human rights aren't protected."[10]

In addition to the concentrated scrutiny of international business groups, ATCA suits have attracted the attention of the executive branch. On July 29, 2002, at the request of the court, the United States Department of State submitted a letter to the United States District Court for the District of Columbia in an ATCA suit alleging human rights violations committed by Exxon Mobil Corporation in Indonesia.[11] The State Department advised the district court to dismiss the suit on the basis that litigation potentially could disrupt the administration's ongoing and extensive efforts to secure Indonesia's cooperation in the war against international terrorism.[12] In May 2003, United States Attorney General John Ashcroft filed an amicus curiae brief with the Ninth Circuit Court of Appeals in a pending case by Burmese villagers against California-based Unocal Corporation.[13] The Department of Justice broadly denounced all claims under the ATCA and urged courts to dismiss all such suits because the litigation interfered with United States foreign policy and threatened to undermine the administration's war on terrorism.[14]

The increasingly vocal objections raised by international business organizations and the George W. Bush administration demonstrate the enormous potential of ATCA suits to affect the development of international human rights law, the conduct of United States foreign policy, and the stability of American international trade and investments. Recognizing the manifold

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[9] HUFBAUER & MITROKOSTAS, *supra* note 2, at 37-43.

[10] Murray Hiebert, *Unocal Case Puts Focus on Firms Engaged in Asia*, WALL ST. J. EUR., July 9, 2002, at A4 (quoting Stephen Davis, editor of *Global Proxy Watch*, a weekly newsletter on international corporate governance).

[11] Daphne Eviatar, *Profits at Gunpoint: Unocal's Pipeline in Burma Becomes a Test Case in Corporate Accountability*, THE NATION, June 30, 2003, at 16; HUFBAUER & MITROKOSTAS, *supra* note 2, at 71.

[12] Eviatar, *supra* note 11. The State Department letter specifically warned that ATCA suits could have "a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." HUFBAUER & MITROKOSTAS, *supra* note 2, at 71 (quoting letter from William H. Taft IV, Legal Advisor to the U.S. Dep't of State, to the U.S. District of Columbia District Court (July 29, 2002)).

[13] Eviatar, *supra* note 11.

[14] *Id.*

possible uses and abuses of the statute, international law scholars have promulgated extensive analyses of the advantages and disadvantages of human rights litigation under the ATCA.[15]

In the domestic sphere, the predominant issue involves the extent to which constitutional and justiciability principles counsel against facilitation of the statute. Opponents emphasize the separation of powers,[16] act of state,[17] political question,[18] and forum non conveniens doctrines,[19] in an effort to negate the judiciary's authority to decide ATCA claims. They contend that resolution of international human rights violations should be determined by the political branches[20] or the domestic courts of the states in which the violations occurred.[21]

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[15] *See, e.g.*, Cynthia R.L. Fairweather, *Obstacles to Enforcing International Human Rights Law in Domestic Courts*, 4 U.C. DAVIS J. INT'L L. & POL'Y 119 (1998) (analyzing the difficulties of litigating international human rights claims in United States courts); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) (examining the different legal systems employed in the United States and Europe to suggest that unique characteristics of the American system permit litigation of international human rights claims under the ATCA); Eric Gruzen, Comment, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*, 14 TRANSNAT'L LAW. 207 (2001) (arguing that international human rights claims should not be litigated in United States courts); Michael Dwayne Pettyjohn, Comment, *Bring Me Your Tired, Your Poor, Your Egregious Torts Yearning to See Green: The Alien Tort Statute*, 10 TULSA J. COMP. & INT'L L. 513 (2003) (offering a general overview of ATCA claims).

[16] Demian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 179-80 (2001); Brian C. Free, Comment, *Awaiting* Doe v. Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467, 480-89 (2003).

[17] Betz, *supra* note 16, at 181-82; Free, *supra* note 16, at 489-97.

[18] Betz, *supra* note 16, at 181-82; Free, *supra* note 16, at 489-97.

[19] Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien tort Claims Act*, 54 STAN. L. REV. 1359, 1361, 1385 (2002).

[20] Betz, *supra* note 16, at 186 (arguing that ATCA suits threaten to interfere with foreign policy decisions of the political branches); Free, *supra* note 16 (contending that ATCA suits raise nonjusticiable political questions).

[21] *E.g.*, Fairweather, *supra* note 15 (asserting that adjudication of international human rights in domestic courts may intrude upon the sovereignty of other nations). *But see* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 86 (1998) (urging that forum non conveniens should not apply to international human rights claims).

In the international sphere, the primary issue concerns the extent to which international law permits U.S. courts to assert jurisdiction over a case involving non-citizen parties for an act that occurred in the territory of another sovereign state. In their most basic forms, the domestic and international issues are identical: at what point does the adjudication of international human rights claims by U.S. courts interfere with the power of equivalent authorities—executive and legislative branches, other sovereign states, and international human rights tribunals?

Scholars have conducted extensive analyses of the impact of ATCA claims on the authority of the political branches[22] and on the sovereignty of affected states.[23] Despite convenient proposals for dismissal of the ATCA claims, opponents fail to offer a viable alternative for the resolution of human rights violations. Delegation of human rights protection to the political branches or to the domestic courts of other sovereign states likewise faces impediments to successful resolution.

Although the political branches could implement a diplomatic plan for the prevention of future acts and provide some reparation for past acts, each plaintiff would surrender individual compensation and closure. Moreover, because ATCA claims frequently implicate actions by the governments of the states in which the human rights violations occurred,[24] adjudication of such claims by the states' domestic courts likely would prove unsuccessful. In ATCA suits against American multinational corporations, a judgment issued by the domestic courts of another state also may be difficult to enforce in the United States.

Similarly, utilization of international human rights tribunals to afford a remedy for human rights violations may prove a weak alternative to the ATCA. The tribunals admittedly could offer a more neutral decision-maker than domestic courts. Their decisions also are more likely to enjoy acceptance by the international community, thereby affording greater legitimacy to any judgment and increasing the chances of the parties' satisfaction and compliance. However, an analysis of the principles and practices of the two most established international human rights tribunals, the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR), nevertheless indicates that the regional tribunals constitute a weak substitute to the ATCA. This Note will argue that the structure of the regional tribunals,

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[22] *E.g.*, Betz, *supra* note 16; Free, *supra* note 16.

[23] *E.g.*, Fairweather, *supra* note 15.

[24] *See infra* Part II.A.

as well as their self-imposed deference to the decisions of domestic courts, operate as a disincentive to the adjudication of human rights claims before such tribunals when a domestic alternative exists. Furthermore, the principle of subsidiarity, the margin of appreciation doctrine, and the fourth instance formula specifically promote the adjudication of human rights claims in a domestic court before the filing of a complaint before a regional tribunal. Particularly in ATCA suits against American multinational corporations, for which another domestic venue may be unavailable, adjudication of human rights claims in U.S. courts may be an appropriate and necessary exercise of the judiciary power.

In order to better familiarize the reader with the ATCA, the ECHR, and the IACHR, this Note first will provide a brief background of the development of cases under the ATCA, as well as the basic structures and procedures of the ECHR and IACHR. Second, the Note will examine the ECHR and IACHR's use of the principle of subsidiarity, the margin of appreciation doctrine, and the fourth instance formula. Finally, this Note will analyze the theories' effects on international human rights law and ultimately conclude that the deference imposed by the theories supports rather than discourages the adjudication of human rights violations in U.S. courts under the ATCA. Thus, this Note primarily will focus on the rationales against resorting to the ECHR and the IACHR in explaining why the regional tribunals offer poor alternatives to use of the ATCA in U.S. courts.[25]

II. BACKGROUND

A. Alien Tort Claims Act

Originally enacted as part of the first congressional statute on the judiciary, the Alien Tort Claims Act (ATCA) simply states, "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."[26] According to the plain language of the statute, a plaintiff asserting a claim under the ATCA must prove three elements: (1) a civil suit for a tort only; (2)

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[25] Due to space constraints, this Note will not examine the advantages and disadvantages of U.S. courts asserting jurisdiction over ATCA claims, an issue which has been discussed in other works. *See, e.g.*, Gruzen, *supra* note 15; Stephens, *supra* note 15; Fairweather, *supra* note 15; Pettyjohn, *supra* note 15.

[26] 28 U.S.C. § 1350 (2004) (corresponding to the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77).

brought by an alien plaintiff; and (3) committed in violation of the law of nations or a treaty of the United States.

The statute lacks a congressional record by which to determine legislative intent, and despite the deceptively simple language, judges and legal scholars have maintained an ongoing debate concerning the intended scope and purpose of the ATCA.[27] Some scholars contend that Congress intended the ATCA to apply only to claims arising from the law of prize, which governs the right to intercept enemy merchant vessels during wartime.[28] Other scholars propose to restrict the application of the ATCA to violations of international law recognized in 1789, primarily claims arising from the law of prize, assaults against ambassadors, and acts of piracy.[29]

For almost 200 years, however, litigants generally avoided filing claims under the statute.[30] Then, in 1979, Dr. Filartiga, a Paraguayan doctor and political activist, and his daughter, Dolly Filartiga, invoked the ATCA on behalf of Joelito Filartiga, a victim of alleged human rights abuses ordered by Americo Norberto Pena-Irala, then Inspector General of Police in Asuncion, Paraguay.[31] Neither plaintiffs nor defendant were citizens of the United States; nor did the alleged human rights violations occur in the United States.[32] The Second Circuit Court of Appeals nevertheless accepted jurisdiction, and ultimately held in favor of the plaintiffs.[33] The decision initiated the controversial use of the ATCA to permit adjudication of international human rights claims in United States courts.

Subsequent decisions indeed have further expanded the scope of the ATCA, and claims may be divided into three basic categories. In the first

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[27] *See generally* Gruzen, *supra* note 15, at 210 (describing various arguments presented by legal scholars concerning the intended scope and purpose of the ATCA).

[28] *E.g.*, Joseph Modeste Sweeney, *A Tort Only In Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 451 (1995).

[29] *E.g.*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 232-33 (1996); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 495 (1986).

[30] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (1980). According to the Second Circuit, only two decisions previously afforded jurisdiction under the ATCA. *Id.* 887 n.21. The cases are *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) and *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795). *Id.*; *see also* David P. Kunstle, Note, Kadic v. Karadzic*: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?*, 6 DUKE J. COMP. & INT'L L. 319, 326-29 (1996) (summarizing early ATCA cases).

[31] *Filartiga*, 630 F.2d at 878.

[32] *Id.*

[33] *Id.*

category, cases parallel original ATCA litigation: an alien plaintiff sues a state actor such as a foreign government or its officials for human rights violations that have occurred in the foreign state.[34] Additional litigation under the ATCA gave rise to a second category of claims, in which an alien plaintiff sues an alien non-state actor for human rights violations that have occurred in the foreign state.[35] Recent ATCA claims have led to the introduction of a third category. In this third category of ATCA clams, an alien plaintiff sues a multinational corporation for human rights violations that, typically, have been committed by the security forces of host governments but with the knowledge and complicity of the corporation.[36] This Note briefly will review selected cases within each category to provide the reader with an outline of the basic scope and uses of the ATCA.

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[34] *E.g.*, *Filartiga*, 630 F.2d 876 (Paraguayan citizens sued former Paraguayan police officer for human rights violations that occurred in Paraguay); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Israeli citizens sued Libyan Arabic Republic, Palestine Liberation Organization (PLO) and other groups for PLO attack in Israel); Tachioni v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (Zimbabwe citizens sued Zimbabwe government officials for human rights violations that occurred in Zimbabwe).

[35] *E.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (holding 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"). The second category of ATCA claims also implicated human rights violations by multinational corporations. *E.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (German plaintiff sued defendant for use of slave labor during World War II); Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001) (Indian citizens sued defendant for toxic gas explosion in India); Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003) (foreign plaintiffs sued defendant for use of slave labor during World War II).

[36] *E.g.*, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (citizens of Ecuador sued defendant for human rights and environmental abuses in Ecuador); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (Indonesian citizen sued defendant for human rights violations committed in concert with the Indonesian government); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (Nigerian citizens sued defendant for participating in human rights crimes committed by Nigerian military government); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2001) (Egyptian citizens sued defendant for purchasing or leasing plaintiffs' property, which was seized by Egyptian government); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (citizens of Papua New Guinea (PNG) sued defendant for human rights and environmental abuses committed in complicity with PNG government); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (Colombian plaintiffs sued defendant holding them jointly and severally liable for human rights crimes committed by paramilitary units); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (Colombian plaintiffs sued defendant for alleged role in human rights violations committed by paramilitary security forces).

1. Category One: State Actors

As previously mentioned, *Filartiga* represented the first successful invocation of the ATCA. Dr. Filartiga initially had attempted to prosecute Pena-Irala in Paraguay, and indeed had filed a criminal action in Paraguayan courts.[37] However, Pena-Irala allegedly threatened Dr. Filartiga's attorney with death, and the attorney subsequently was disbarred, allegedly without just cause.[38] Dolly Filartiga subsequently sued Pena-Irala under the ATCA in the United States District Court for the Eastern District of New York, seeking compensatory and punitive damages of $10 million.[39]

The district court held that the court could not review a foreign state's treatment of its own citizens and dismissed the claim for lack of subject matter jurisdiction.[40] In 1980, the United States Court of Appeals for the Second Circuit, the first appellate court to interpret the ATCA, reversed the decision of the district court. The Second Circuit held that the ATCA conferred jurisdiction to federal courts to hear claims brought by aliens against a defendant because intentional "torture perpetrated under color" of official authority violates international law.[41] The Second Circuit broadly defined the "law of nations," stating, "[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[42] The court then examined contemporary sources of customary international law and concluded that the law of nations prohibits official torture.[43]

The *Filartiga* decision represented the first time a federal circuit court held that a plaintiff could litigate international human rights violations against a foreign state actor in a domestic court, even though the alleged offenses occurred in a foreign state and neither party was an American citizen. The claim essentially had no connection to the United States, either by the act

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[37] *Filartiga*, 630 F.2d at 878.

[38] *Id.*

[39] *Id.* at 879. In July 1978, Pena-Irala visited the United States. When he exceeded the term of his visa, Dolly, who was then living in Washington, D.C., reported him to the Immigration and Naturalization Service (INS). *Id.* at 878-79. As a result of Dolly's efforts, Pena-Irala was served with a civil complaint and summons while being held at the Brooklyn Naval Yard, facing deportation.

[40] *Id.* at 878-80.

[41] *Id.* at 878

[42] *Id.* at 881.

[43] *Id.* at 884.

creating the tort or by the direct damages caused by the act. Moreover, by defining the law of nations to include "modern" customary international law and "modern" views of international human rights, the decision invited other similar claims.

The Ninth and Eleventh Circuits similarly have been receptive of human rights claims brought under the ATCA. For example, the Ninth Circuit decided *In re Estate of Ferdinand E. Marcos Human Rights Litigation*,[44] and ultimately concluded that Imee Marcos-Manotoc, the daughter of former Philippine president Ferdinand Marcos and the head of the Philippine police during the Marcos regime, could be held liable for the torture and murder of a Philippine citizen under the ATCA.[45] Similarly, in *Abebe-Jira v. Negewo*,[46] the Eleventh Circuit upheld a district court's finding that an Ethiopian defendant was liable under the ATCA for acts of torture he committed while employed by Ethiopia's military dictatorship.[47]

The United States Supreme Court has decided only one case under the ATCA. In *Argentine Republic v. Amerada Hess Shipping Corp.*,[48] the Supreme Court dismissed the Liberian corporation's claims against the Argentine Republic for destruction of an oil tanker on the high seas in violation of international law.[49] The Court held that the Foreign Sovereign Immunities Act (FSIA) provided the sole basis for obtaining jurisdiction over a foreign state, and no exception to foreign sovereign immunity applied to give the district court jurisdiction over the Argentine Republic.[50]

Thus, the federal courts themselves have offered mixed interpretations of the permissive uses of the ATCA in allowing adjudication of international human rights claims in United States courts. Moreover, the decision by the United States Supreme Court has not resolved the controversy, as plaintiffs have continued to bring ATCA suits against foreign state actors.

2. Category Two: Non-State Actors

The Second Circuit seized the opportunity to further expand the scope of the ATCA in 1995. The court extended ATCA's reach to claims against

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[44] 978 F.2d 493 (9th Cir. 1992).
[45] *Id.*
[46] 72 F.3d 844 (11th Cir. 1996).
[47] *Id.*
[48] 488 U.S. 428 (1989).
[49] *Id.*
[50] *Id.*

foreign non-state actors.[51] Croatian and Muslim citizens of Bosnia sued Radovan Karadzic, president of the self-proclaimed Bosnian Serb Republika Srpska.[52] The plaintiffs alleged that Karadzic, who commanded the Bosnian-Serb military forces, had ordered a series of atrocities against the Croatian and Muslim populations, including rape, forced prostitution, torture, and summary execution.[53] The acts allegedly comprised a campaign of genocide conducted in the course of the Bosnian civil war.[54]

According to the district court, a non-state actor could not violate the law of nations.[55] The court concluded that Karadzic was a non-state actor because neither the Bosnian-Serb military faction nor the self-proclaimed nation of Srpska constituted a recognized state; the court consequently dismissed the claim.[56] The Second Circuit again reversed.

The court held that the law of nations, as defined in the modern era, is not confined to state action; in certain circumstances, private individuals as well as nations can violate international law.[57] The court then examined established sources of customary international law and concluded that the torts of genocide and war crimes could be committed by state or non-state actors.[58] In order for a non-state actor to be liable for the tort of torture, the court held that international law generally required a finding that the actor had acted under color of state law.[59] However, if torture was conducted pursuant to a policy of "ethnic cleansing," it could be viewed as a component of genocide or war crimes, and a non-state actor could be held liable.[60] Moreover, statehood did not require official recognition by other sovereign powers.[61] In sum, the significance of *Kadic* lay in its holding that, in certain circumstances, non-state actors could violate the law of nations and that statehood did not require official recognition. The decision effectively created a second category of ATCA claims—suits by alien plaintiffs against private actors.

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[51] Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995).
[52] *Id.* at 236.
[53] *Id.* at 237.
[54] *Id.*
[55] *Id.* at 239.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 241-43.
[59] *Id.* at 243.
[60] *Id.* at 244.
[61] *Id.* at 244-45.

Despite the Second Circuit's expansive interpretations of the scope and purpose of the ATCA, other federal courts have offered mixed responses. The District of Columbia Circuit Court particularly has promulgated a restrictive interpretation of the ATCA. In *Tel-Oren v. Libyan Arab Republic*,[62] the court dismissed the claims brought by survivors of those killed by the Palestinian Liberation Organization (PLO) during an attack on a civilian bus in Israel in 1978.[63] Each judge wrote a separate and lengthy concurrence regarding the inappropriateness of suits under the ATCA, and offered various arguments for dismissal of such suits.[64]

3. Category Three: Multinational Corporations

More recently, plaintiffs have begun to assert human rights claims under the ATCA against multinational corporations with headquarters in the United States.[65] Perhaps most prominent is the pending claim against Unocal Corporation.[66] Moreover, the facts alleged are representative of the typical ATCA case against multinational corporations.[67] Therefore, this case deserves detailed treatment.

In 1991, several international companies, including Unocal and the French corporation Total S.A. (now TotalFinaElf), began negotiating plans for oil and gas exploration with the Burmese State Law and Order Restoration Council (SLORC).[68] The SLORC had imposed military law in Burma and renamed the

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[62] 726 F.2d 774 (1984).

[63] *Id.* at 775.

[64] Observing that the PLO was a non-state actor, Judge Edwards argued that, excluding certain exceptions such as piracy and slave trading, the ATCA only afforded standing in claims against state actors. *Id.* at 791-96. Judge Robb contended that the political question doctrine precluded adjudication of the claim. *Id.* at 823-27. Judge Bork presented the most restrictive interpretation, asserting that the ATCA conferred jurisdiction, but not a cause of action. *Id.* at 801-05. Moreover, Judge Bork believed that the scope of the ATCA should be confined to its original purposes of combating piracy and protecting ambassadors. *Id.* at 796.

[65] The most publicized cases have included claims against Texaco, Unocal, Exxon Mobil, The Gap, Drummond, and the bottlers of Coca-Cola. Eviatar, *supra* note 11.

[66] Doe v. Unocal Corp., 395 F.3d 232 (9th Cir. 2002).

[67] Multinational energy companies particularly are vulnerable to suits alleging overseas human rights violations. Shaw, *supra* note 19, at 1360. The resources sought by such companies often are found in developing countries. *Id.* Extraction of the resources further require extensive construction of infrastructure, as well as hard labor and dislocation of local populations. *Id.* Finally, such companies frequently utilize the military and paramilitary forces of the host government to provide security for their projects. *Id.*

[68] Doe v. Unocal Corp., 395 F.3d at 937.

nation "Myanmar" in 1988.[69] The parties subsequently entered into a joint venture with the Burmese government that would establish the Yadana gas pipeline project.[70] The pipeline would transport large quantities of natural gas and oil from the offshore Yadana field in the Andaman Sea eastward to Thailand.[71] The pipeline necessarily would pass through Tenasserim, a region dominated by ethnic groups opposed to the military rule of the SLORC.[72] Because of the risk of sabotage by the resident population of Tenasserim, SLORC agreed to clear forest, level ground, and provide labor, materials, and security for the Yadana pipeline project.[73]

The plaintiffs, villagers who resided in the Tenasserim region, alleged that SLORC, with the knowledge and acquiescence of Unocal, subjected them to forced labor.[74] The plaintiffs testified that, in furtherance of this forced labor program, SLORC committed numerous acts of murder, rape, and torture.[75] The military also forcibly relocated the villagers who had lived along the pipeline.[76] Interestingly, the plaintiffs did not claim that Unocal directly engaged in the tortuous conduct; rather, they contended that Unocal should be jointly or vicariously liable for the acts of the Myanmar military.[77]

A three-judge panel of the Ninth Circuit applied international law and concluded that an issue of fact remained as to whether Unocal had aided and abetted the Myanmar military in the conduct of human rights violations, thereby precluding summary judgment.[78] Upon a majority vote of the non-recused regular active judges of the circuit, however, an en banc court reviewed the decision of the three-judge panel.[79] The United States Department of Justice has intervened, filing an amicus curiae brief.[80] The brief not only urged the dismissal of the claim against Unocal; it contended that all pending cases under the ATCA should be dismissed because they threaten to disrupt the administration's ongoing war on terrorism.[81]

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[69] *Id.*
[70] *Id.* at 937-38.
[71] *Id.*
[72] *See id.* at 938.
[73] *See id.*
[74] *Id.* at 939-40.
[75] *Id.* at 939.
[76] *See id.* at 942-43.
[77] *See id.* at 939.
[78] *Id.* at 944-63.
[79] Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. filed Feb. 14, 2003).
[80] Eviatar, *supra* note 11.
[81] *Id.*

In a surprising turn of events, however, Unocal settled with the plaintiffs on December 13, 2004.[82] Although the amount of the settlement has not been disclosed, commentators speculate that it likely was a large amount.[83] Moreover, even though the Ninth Circuit consequently dismissed the case upon rehearing en banc,[84] the fact that Unocal decided to settle demonstrates that suits under the ATCA can result in real compensation for victims of international human rights abuses. The settlement additionally may have major implications for the behavior of other multinational corporations.[85]

B. International Human Rights Tribunals

In consideration of the manifold obstacles and substantial opposition encountered by a plaintiff in an ATCA suit, is adjudication of international human rights claims in United States courts appropriate or even advisable? If plaintiffs should be prohibited from seeking resolution of their human rights claims under the ATCA, what other avenue of relief is available to them? The international human rights tribunals generally have been recognized as legitimate mechanisms for judicial resolution of international human rights claims. The ECHR and the IACHR, as the oldest and most established regional human rights tribunals, provide a basic source of comparison in determining the effectiveness of human rights adjudication under the ATCA.

Notably, the majority of the plaintiffs in ATCA cases against U.S.-based multinational corporations are nationals of developing countries in Central and Latin America, Africa, and Asia.[86] Asia has not established a successful human rights system, and Africa only recently has developed a system.[87] The

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[82] Associated Press, *Unocal to Settle Human Rights Lawsuits* (Dec. 13, 2004), http://www.msnbc.msn.com/id/6705737.

[83] *See id.*; *see also* James P. Pinkerton, *Trial Lawyers Finding a Haven Overseas*, JEWISH WORLD REVIEW (Dec. 22, 2004), http://www.jewishworldreview.com/1204/pinkerton122204.php3?printer_friendly.

[84] Doe v. Unocal Corp., Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2005 WL 843914, at *1 (9th Cir. Apr. 13, 2005) (en banc).

[85] *See* Paul Chavez, *Tentative Unocal Deal Could Alter the Behavior of Multinationals*, ASSOCIATED PRESS (Dec. 19, 2004), http://www.mercurynews.com/mld/mercurynews/news/local/states/california/norther_california/10454866.htm.

[86] *See, e.g.*, cases cited *supra* note 36.

[87] The African Commission on Human and Peoples' Rights was established by the African Charter on Human and Peoples' Rights, art. 30, adopted June 27, 1981, 21 I.L.M. 58, 63-64 (entered into force Oct. 21, 1986), *available at* http://www.achpr.org/english/_info/charter_en.html. The African Court on Human and Peoples' Rights was established by the Protocol to the

European system, although successful, cannot accept claims outside its region.[88] The Inter-American human rights system thereby remains the only practical regional tribunal open to most plaintiffs in ATCA cases. Nevertheless, because the European system has endured the longest, and greatly influences the Inter-American system, this Note will examine both systems.

1. The European System of Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), the first regional human rights treaty to enter into force, was signed in Rome in November 1950.[89] The European Convention codified the fundamental human rights that member states agreed to protect.[90] The Convention also created the European Commission on Human Rights (European Commission) and the European Court of Human Rights (ECHR),[91] "the oldest international court in the field of the protection of human rights."[92]

The European Commission initially reviewed complaints of violations of the human rights guaranteed in the European Convention.[93] The European Commission first determined whether a complaint was admissible. Once the European Commission had decided that a complaint was admissible, the Commission then investigated the merits of the claim and prepared a summary of its recommendations, which was forwarded to the ECHR.[94]

The ECHR could only decide claims that had been referred to it by the European Commission, a state party, or an individual applicant who had first filed a complaint with the European Commission.[95] The ECHR primarily

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African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), art. 27(2) (June 9, 1998), *available at* http://www.achpr.org/english/_info/court_en.html.

[88] European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, arts. 33-34, 213 U.N.T.S. 221, 242 [hereinafter European Convention].

[89] Jean-Paul Costa, *The European Court of Human Rights and Its Recent Case Law*, 38 TEX. INT'L L.J. 455, 455 (2003).

[90] European Convention, *supra* note 88, arts. 2-18, 213 U.N.T.S. at 226-34.

[91] *Id.* art. 19, 213 U.N.T.S. at 234.

[92] Costa, *supra* note 89, at 455.

[93] European Convention, *supra* note 88, art. 24, 213 U.N.T.S. at 234.

[94] *Id.* art. 31, 213 U.N.T.S. at 240.

[95] *Id.* arts. 33, 34, 213 U.N.T.S. at 242; *see also* Posting of Edwin Rekosh, owner-piln@columbia.edu, to piln@law.columbia.edu (Nov. 4, 1998), http://www.pili.org/lists/piln/

interpreted and applied the substantive provisions of the European Convention to a particular claim in order to determine whether a violation had occurred.[96] In making that determination, the ECHR typically reviewed the written proceedings.[97] The oral proceedings consisted of arguments by the European Commission, the applicant's legal representative, and the respondent state's legal representative.[98] At the request of one of the parties, the ECHR further could hear the testimony of witnesses and experts.[99]

Moreover, although the reports of the European Commission were not binding on the ECHR, they generally had strong persuasive authority.[100] The ECHR usually accepted the findings and recommendations of the European Commission.[101] The judgments of the ECHR further were binding and obligated the member states which were parties to the case.[102] With the recent entry into force of Protocol 11, however, the European Commission and the ECHR have merged into a single entity, combining their previous functions.[103]

2. The Inter-American System of Human Rights

The Inter-American Commission on Human Rights (Inter-American Commission) developed in 1959, without a convention.[104] It applied the American Declaration on the Rights and Duties of Man (American Declaration).[105] The Americas' equivalent of the Universal Declaration of Human Rights, the American Declaration was adopted in May 1948 simultaneously with the creation of the Organization of American States (OAS).[106]

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archives/msg00239.html..

[96] European Convention, *supra* note 88, art. 45, 213 U.N.T.S. at 246.

[97] *See* DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 11, at 78 (1996) (describing the general procedure for oral argument).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] European Convention, *supra* note 88, art. 53, 213 U.N.T.S. at 248.

[103] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, art. 19, Europ. T.S. No. 155 (*entered into force* Nov. 1, 1998).

[104] Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 95 AM. SOC'Y INT'L L. PROC. 75, 75 (2001).

[105] *Id.*

[106] *Id.*

The Inter-American Commission primarily addressed "gross and systematic" violations of human rights in North, Central, and South America.[107] Because several states in the region, specifically in Central and South America, existed under military dictatorships, the Commission particularly concentrated on the delegitimization of those dictatorships.[108] Accordingly, the Commission conducted onsite investigations and issued reports on large-scale violations, such as the systematic practice of torture or forced disappearances.[109] The Commission further presented annual reports to the OAS General Assembly, which encouraged intense political debates and directed public attention to human rights violations in the region.[110]

Additionally, the Inter-American Commission's duties included the stimulation of an awareness of human rights among pan-American countries, the formulation of recommendations to governments for the adoption of progressive measures, the preparation of studies, the request of reports from governments on adopted human rights measures, and service as an advisory body on human rights for the OAS.[111]

In 1965, the OAS increased the responsibilities of the Inter-American Commission to receive both communications and individual petitions.[112] Two years later, an amendment to the OAS Charter made the Inter-American Commission a principal organ of the OAS.[113] As the responsibilities of the Inter-American Commission expanded, the OAS observed a need for a fundamental change within the Inter-American human rights system.[114]

During an OAS conference in 1948, the member states agreed that the protection of human rights "should be guaranteed by a juridical organ, in as much as no right is genuinely assured unless it is safeguarded by a competent court."[115] The states further observed that, "where internationally recognized rights are concerned, juridical protection, to be effective, should emanate from an international organ."[116]

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[107] *Id.* at 76.
[108] *Id.* at 76.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 78.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Ninth International Conference of American States, Final Act XXXI, in* INTERNATIONAL CONFERENCES OF AMERICAN STATES, SECOND SUPPLEMENT, 1942-1954, at 270 (Pan American Union ed., 1958).
[116] *Id.*

On November 22, 1969, the OAS completed the American Convention on Human Rights in San Jose, Costa Rica.[117] The American Convention entered into force on July 18, 1978.[118] The Inter-American system of human rights, which previously had relied on instruments of a declarative nature, now was based on concrete instruments and bodies: the American Convention, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights (IACHR).[119]

The American Convention describes the substantive civil and political rights that member states have agreed to guarantee to protect.[120] The enactment of the Convention introduced a dual structure. One system encompassed the countries that had not ratified the American Convention but that had recognized the American Declaration.[121] Such countries include the United States and Canada.[122] A second system had involved the countries that ratified the American Convention. These countries were protected by two mechanisms: the Inter-American Commission and the IACHR.[123] For a matter to be considered by the IACHR, a country must have ratified the American Convention and have accepted the contentious jurisdiction of the IACHR.[124]

Thus, the American Convention created the Inter-American Commission and the IACHR.[125] Composed of seven members, the Inter-American Commission investigates allegations of human rights violations.[126] The Commission primarily prepares reports on the general state of human rights in member states and investigates petitions by individuals claiming human rights violations.[127] The Inter-American Commission first determines the admissibil-

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[117] Cerna, *supra* note 104, at 79.

[118] *Id.*

[119] *Id.*; *see also* Dinah L. Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and the Inter-American Court of Human Rights*, 3 AM. U. J. INT'L L. & POL'Y 323 (1988) (describing the Inter-American human rights system).

[120] American Convention on Human Rights, *opened for signature* Nov. 22, 1969, arts. 1-25, 1144 U.N.T.S. 123, 143-51 (*entered into force* July 18, 1978) [hereinafter American Convention].

[121] Cerna, *supra* note 104, at 80.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] American Convention, *supra* note 120, arts. 33-73, 1144 U.N.T.S. at 153-61 (establishing the Inter-American Commission and the IACHR and delineating their respective compositions, functions, and procedures).

[126] *Id.*

[127] *Id.* art. 41, 1144 U.N.T.S. at 154-55 (stating the major functions of the Inter-American

ity of the petition.[128] It then may investigate the claims, prepare a summary of its recommendations, and ultimately forward the summary to the IACHR.[129]

The IACHR, composed of seven judges, interprets the rights established in the American Convention and determines whether a violation has occurred.[130] The IACHR initially considered cases primarily on an advisory basis.[131] In April 1986, the Commission forwarded three contentious cases to the IACHR, thereby establishing the IACHR's authority as a trial court.[132] The decisions of the IACHR are binding on the member states.[133]

Although twenty-six states are signatories to the American Convention, only sixteen of those have accepted the jurisdiction of the IACHR.[134] The American Convention requires member states to comply with judgments of the IACHR in cases to which the state is a party.[135] The Convention does not, however, provide a formal procedure by which to enforce the rulings of the IACHR.[136] Ultimately, the effectiveness of the American Convention and of decisions by the IACHR depends upon both the willingness of Member States to consent to the IACHR's jurisdiction and the member states' enforcement of the IACHR's decisions.[137]

III. ANALYSIS

As plaintiffs more frequently invoke the ATCA and the federal circuit courts progressively expand its scope, the controversial nature of the statute becomes increasingly evident. Nevertheless, an analysis of the structures and procedures of the regional tribunals suggests that adjudication of human rights violations under the ATCA may be appropriate and even necessary.

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[128] *Id.* art. 46, 1144 U.N.T.S. at 155.

[129] *Id.* arts. 48-51, 1144 U.N.T.S. at 156-57.

[130] *Id.* art. 63, 1144 U.N.T.S. at 159.

[131] Cerna, *supra* note 104, at 76.

[132] *Id.* at 76-77.

[133] *Id.* at 77-78.

[134] Edward D. Re, *International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Law*, 40 ST. LOUIS U. L.J. 1091, 1097 (1996).

[135] American Convention, *supra* note 120, art. 68, 1144 U.N.T.S. at 160.

[136] *Id.*

[137] Re, *supra* note 134, at 1096-97.

A. *Procedural Comparison of Regional Tribunal Claims to ATCA Claims*

1. *Backlog*

The regional tribunals each face a massive backlog in caseload and they continue to receive thousands of complaints annually. In 2001, the ECHR delivered 800 judgments,[138] as well as 8000 to 9000 decisions dismissing applications as inadmissible.[139] Despite the large number of judgments, the ECHR still faces a massive backlog; in 2001, complainants filed more than 13,000 new applications.[140] Thus, the ECHR must resolve the dual problems of stopping the increase in applications, as it simultaneously struggles to reduce the massive backlog in cases.[141] Due to the expansive caseload and substantial backlog, a complainant who files an application with the ECHR may expect to wait several years for a judgment in his case.

2. *Prolonged Adjudication*

Although the Inter-American system does not have as large of a caseload as the European system,[142] the structure of charge processing in the Inter-American system may cause delays in the adjudication of a claim. First, the American Convention requires each applicant to exhaust domestic remedies before he presents his case to the IACHR.[143] Second, before the applicant may approach the IACHR, he must present his case before the Inter-American Commission, which may take an average of three or four years to completely process a claim.[144] Then, if the Commission concludes that the case should be presented to the IACHR, the IACHR itself may take an additional four years to hear and resolve the case.[145] One scholar bemoans the system, stating, "The delay to resolve the demands of human rights abuses, the duplicity of processes, the loss of evidence, and the anguish of having to relive often

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[138] Costa, *supra* note 89, at 456.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Cerna, *supra* note 104, at 76.

[143] Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 622-23 (2000).

[144] *Id.*

[145] *Id.*

horrific events after eight or ten years contradicts the purpose of a system which seeks to emotionally and economically compensate victims."[146] Under both the ECHR and the IACHR, a complainant may have to wait several years, if not a decade, in order to receive a resolution of his claim.

Notably, however, the length of adjudication in United States courts under the ATCA may not necessarily be more expedient. For example, the plaintiffs in the *Unocal*[147] case did not receive resolution of their claims until 2005, even though they filed suit in 1996.[148] Plaintiffs in domestic and regional tribunals therefore may wait almost a decade before they receive a final decision. On the other hand, adjudication of claims under the ATCA does not impose any conditions on the filing of a suit; thus the total amount of time for a plaintiff in a United States domestic court would be approximately a decade. The ECHR and the IACHR, in contrast, require plaintiffs to attempt adjudication in a domestic court. A plaintiff consequently would have to wait approximately a decade in the ECHR and the IACHR, as well as any additional time it would have taken for the domestic court to have reached a decision that is final enough for the ECHR and IACHR to accept jurisdiction. Therefore, in consideration of the overall length of adjudication, a plaintiff may prefer to limit his claims to a suit in United States courts.

3. Compensation

Even assuming that the plaintiff obtains a hearing before a regional tribunal, he may receive little compensation for his efforts. The IACHR, for example, rarely awards more than $10,000 in financial compensation.[149] The expenses undertaken by the Commission for transportation and accommodations for witnesses and experts (estimated at tens of thousands of dollars)[150] may not justify adjudication of international human rights claims in the IACHR. On the other hand, while ATCA suits have awarded plaintiffs massive damages,[151] the plaintiffs rarely have been able to collect the awards from foreign defendants.[152] Nevertheless, the ability to collect damages from

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[146] *Id.*

[147] *See supra* notes 79-81 and accompanying text.

[148] *See supra* note 143 and accompanying text.

[149] *Id.*

[150] *Id.*

[151] For example, the plaintiffs in *Filartiga* recovered $10 million in punitive damages. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (D.C.N.Y. 1984).

[152] Lobe, *supra* note 7.

American multinational corporations with bases in the United States likely will be less difficult than collecting damages from foreign defendants. Even foreign multinational corporations have complied with the award of damages under ATCA suits.[153] Due to the greater likelihood of collecting major damages from American multinational corporations, a plaintiff may choose to bring his claim under the ATCA.

B. Regional Tribunals' Limiting Principles

The initial statistics already are daunting; the systems further enforce several major principles that emphasize deference to the decisions of domestic authorities. The theories adopted by the ECHR and the IACHR are the principle of subsidiarity, the margin of appreciation doctrine, and the fourth instance formula. Under these doctrines, a plaintiff seeking relief for international human rights violations has an incentive to seek effective domestic remedy. Adjudication of ATCA claims in U.S. courts, particularly for claims against American multinational corporations, may be appropriate and even advisable. This Part will examine the theories of deference applied by the regional tribunals, and ultimately conclude that the existence of regional tribunals should not necessarily preclude adjudication of international human rights claims in domestic courts, specifically litigation in U.S. courts under the ATCA.

1. The Principle of Subsidiarity

Under the principle of subsidiarity, the role of international authorities in the resolution of human rights claims is subordinate to the role of domestic bodies.[154] The ECHR explained its role as follows:

> [T]he machinery of protection established by the [European] Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it

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[153] Victims of the Nazi Holocaust successfully sued foreign companies and banks under the ATCA, alleging torts due to the businesses' rejection of the victims' money or insurance claims following World War II. *Id.* Swiss banks actually negotiated a settlement worth $1.2 billion. *Id.*

[154] *See generally* Costa, *supra* note 89, at 456 (defining the principle of subsidiarity).

> enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted . . . .[155]

The ECHR primarily reviews the appropriateness of the procedures utilized by domestic legal systems, rather than the substantive rights guaranteed by such systems.[156] In several cases, the ECHR has found violations of Article 2 of the European Convention, which ensures the right to life, not on the substantive issue, but rather on the procedural aspect.[157]

Thus, under the principle of subsidiarity, the regional tribunals strictly evaluate the domestic proceedings, avoiding a review of the substantive law of each state. Moreover, a domestic court in a non-democratic state is not required to provide all of the rights guaranteed in a democratic state. A plaintiff consequently would have a better chance of success in a state that offered more human rights; he therefore has an incentive to seek domestic relief in a democratic state such as the United States, instead of relief in the state in which the human rights violations occurred. This is particularly true because in third category ATCA claims, the government often committed the actual human rights violations.[158]

2. *The Margin of Appreciation Doctrine*

Under the margin of appreciation doctrine applied by the European system of human rights, member states retain a "margin of appreciation" in applying certain European Convention provisions to their particular circumstances.[159] The doctrine specifically acknowledges that "each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions."[160]

The European Convention's lack of a specific list of protected rights and freedoms is an example of the application of the margin of appreciation

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[155] Handyside v. United Kingdom, App. No. 5493/72, 1 Eur. H.R. Rep. 737, 753 (1976) (court decision) (citation omitted).

[156] Costa, *supra* note 89, at 458.

[157] *Id.* at 459.

[158] *See supra* note 36.

[159] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 (1999).

[160] *Id.* at 843-44.

doctrine.[161] The European human rights system generally emphasizes the protection of civil and political rights.[162] Scholars conclude that the sole purpose of the European Convention is to define the central, fundamental values of democracy.[163] Despite the fact that subsequent protocols to the European Convention have introduced some measure of economic, social, and cultural rights, the member states are hesitant to further expand the original list.[164] The states' reluctance demonstrates their recognition of, and respect for, the differences in wealth, culture, and history of the various member states.[165]

Essentially, the European human rights system does not impose universal responsibilities upon member states of the European Convention.[166] As a result, decisions of the ECHR do not have the same force of law as decisions of the domestic courts of the member states. Each member state instead must expressly implement the decisions of the ECHR by executing legislation codifying those decisions. Where a member state refuses to comply with the decision of the ECHR, the European Convention does not provide for enforcement.[167] Nonetheless, the ECHR may request a member state to offer an "explanation of the manner in which its internal law ensures the effective implementation" of ECHR decisions.[168]

Therefore, while the ECHR has some authority to promote the ideals of the European Convention, the Convention also grants member states a degree of latitude in the integration of human rights ideals into the states' individual legal and judicial structures.[169] Moreover, the European Convention does not obligate a particular member state to adopt the decisions of the ECHR to which the state is not a party. Thus, as a result of the margin of appreciation doctrine, national courts are not directly bound by decisions of the ECHR.

In sum, under the margin of appreciation doctrine, the regional tribunals will respect the internal cultural and moral values in individual member states. Again, the plaintiff seeking domestic relief for human rights violations would have a better likelihood of success in a stable democratic state because the

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[161] Costa, *supra* note 89, at 458.
[162] *Id.*
[163] *Id.* at 458.
[164] *Id.* at 459.
[165] *Id.*
[166] *Id.* at 460.
[167] European Convention, *supra* note 88, art. 60, 213 U.N.T.S. at 250.
[168] *Id.* art. 57, 213 U.N.T.S. at 250.
[169] *See id.*

state would be able to offer a greater range of human rights guarantees. Non-democratic states, especially those under military rule, could not provide the same measure of economic, social, and cultural rights.

3. The Fourth Instance Formula

The fourth instance formula continues the deferential treatment of domestic court decisions evident in the principle of subsidiarity and the margin of appreciation doctrine. The formula prohibits a regional tribunal from acting as a domestic appellate court in its review of the decisions of domestic courts.[170] The Vice President of the ECHR observed the difficult procedural barriers presented by an attempt at appellate review:

> [The ECHR] cannot rehear cases in the same way as a national court; it cannot examine facts, evidence, and legal issues in the same sort of detail as a national court. . . . [N]ational authorities and the judiciary are in a better position—because of their local knowledge, expertise, and the relative rapidity with which they can intervene—to make accurate assessments of facts and law and guarantee the most effective protection of individual rights.[171]

The ECHR thus dismisses claims in which a plaintiff asserts that a domestic court misinterpreted domestic law or made inappropriate findings of fact, unless the plaintiff is able to prove that the domestic proceedings clearly violated a right protected by the European Convention.[172] The fourth instance formula followed by the IACHR essentially parallels the formula promulgated by the ECHR.[173]

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[170] *See generally* Costa, *supra* note 89, at 457 (describing the ECHR's adoption of the fourth instance formula).

[171] *Id.*; *see also* Edwards v. U.K., 247 Eur. Ct. H.R. 23 (ser. A) 23 (1992) (holding that the ECHR assesses the fairness of the proceeding, and does not re-assess findings of fact and determinations of domestic law made by a domestic court).

[172] *See generally* Costa, *supra* note 89, at 457 (explaining the ECHR's application of the fourth instance formula); Diego Rodriguez Pinzon, *The "Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Complaint Procedure of the Inter-American Human Rights System*, 7 ILSA J. INT'L & COMP. L. 369, 376-80 (2001) (delineating the ECHR's formulation of the fourth instance formula).

[173] *See generally* Pinzon, *supra* note 172, at 376-77 (comparing the fourth instance formula utilized by the IACHR with the formula developed by the European system). In *Marzioni v.*

Therefore, under both the European and Inter-American systems of human rights, the fourth instance formula serves as further support for the proposition that international human rights mechanisms operate on a lesser or equivalent, but not superior, level to domestic authorities responsible for human rights protection.[174] The formula emphasizes the regional tribunals' deferential treatment of human rights determinations made by domestic bodies.

The fourth instance formula has received some criticism, however. Critics contend that the formula imposes a "double standard"[175] because the strictness or leniency with which a regional tribunal will apply the formula depends upon the nature of a state's government.[176] The Inter-American human rights system in particular, due to the various stages of democracy achieved by its member states, generally has subjected judiciary decisions issued in democratic member states to lesser scrutiny than the decisions issued in authoritarian member states.[177]

On one hand under the fourth instance formula, the regional tribunals acknowledge the procedural and practical limitations preventing full appellate review of domestic decisions. On the other hand, the IACHR generally subjects the decisions of domestic courts in authoritarian states to a heightened level of scrutiny. Assuming that the plaintiff seeks efficient resolution of his human rights claims, he consequently has an incentive to avoid adjudicating his claims in a non-democratic state. Otherwise, he risks becoming a victim of the decade-long review process of the IACHR.

Argentina, the IACHR stated:

> The Commission's task is to ensure the observance of the obligations undertaken by the States parties to the [American] Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.

Case 11.673, Inter-Am. C.H.R. 76, OEA/ser. L./V./II.95, doc. 7 rev. (1986).

[174] *See generally* Pinzon, *supra* note 172, at 379-80 (asserting that the fourth instance formula derives from the international law principle that international human rights authorities are complementary or subsidiary to domestic human rights bodies).

[175] *Id.* at 373.

[176] *See id.* at 380.

[177] *See id.* (explaining that "[i]n a hemisphere where states with difficult levels of democratic development exist . . . the commission must use its mechanisms in a creative and effective way to induce progress in the general human rights situation").

C. Comparison of the Regional and Domestic Systems

The examination of the principle of subsidiarity, margin of appreciation doctrine, and fourth instance formula have particular relevance to this analysis. As previously noted, the Inter-American human rights system offers the primary regional tribunal available to plaintiffs in ATCA suits against American multinational corporations. The procedural rules of the inter-American system require a plaintiff to exhaust domestic remedies prior to filing a claim with the Inter-American Commission. The double standard imposed by the fourth instance formula especially affords a plaintiff an incentive to adjudicate the human rights claims in a domestic court of the state with the most stable system of democratic government.

Otherwise, if the plaintiff loses and must appeal to the IACHR, the plaintiff then may become a victim of the Inter-American system's lengthy review process. The plaintiff further may rationalize that adjudication in a democratic state, with relatively consistent protection of human rights, likely will result in a more efficient and favorable judgment on the merits, as well as appeal to a U.S. appellate court.

Although review by the Inter-American Commission could be beneficial to the plaintiff because he would be permitted two hearings—one before a domestic tribunal and one before a regional tribunal—the process is duplicative, and in view of the general length of time it takes for the IACHR to receive and hear a case, adjudication before a U.S. court would be more efficient.

Thus, under the fourth instance formula adopted by the ECHR and the IACHR, and the double standard imposed by the IACHR in particular, adjudication of human rights claims in U.S. courts under the ATCA may offer a more attractive option to foreign plaintiffs asserting claims against American multinational corporations.

IV. CONCLUSION

For almost two hundred years, the ATCA lay dormant; however, within a period of approximately two decades, federal circuit courts have issued revolutionary decisions that have expanded and developed the statute's protection of human rights. Currently, three major types of ATCA claims are available to victims of human rights abuses. In the first category, an alien plaintiff may sue a foreign state actor such as a foreign government or its officials for human rights violations committed in that foreign state. In the second category, an alien plaintiff may sue a foreign non-state actor such as an

individual or a corporation for human rights violations committed in a foreign state. In the third category, an alien plaintiff may sue a multinational corporation for human rights violations committed by a foreign host government, of which the multinational corporation had knowledge.

The third category has stimulated the most controversy as legal scholars heatedly debate the appropriateness of adjudication of international human rights violations in U.S. courts under the ATCA. Defendants in the third category increasingly are American multinational corporations, and continued litigation under the ATCA may have serious consequences for American trade and investment. International business groups particularly have been concerned about potential liability for overseas operations. The Bush administration, likewise, has demonstrated concern about the effect of ATCA litigation on U.S. foreign policy, should the litigation result in public criticism of foreign states with which the United States has delicate relations.

In consideration of the continuing debate over the appropriateness of adjudicating international human rights claims in U.S. courts under the ATCA, this Note examined international human rights tribunals, in order to construct a source of comparison for the determination of the most effective judicial remedy for victims of human rights violations. The ECHR and the IACHR constitute the oldest and most established regional human rights tribunals, and this Note therefore analyzed of the structure, procedure, and principles of the two tribunals. First, the massive backlog and incoming caseload currently faced by those tribunals may encourage plaintiffs to seek relief in domestic courts. Second, the lengthy processing of claims, which require analysis by the commission and the courts, provide another incentive for plaintiffs to seek domestic remedies. The European Convention and the American Convention indeed require a prospective complainant to exhaust domestic remedies before filing a claim with the respective commissions. Based on the above factors alone, the plaintiff must seek domestic relief; he initially may turn to the domestic courts of the state in which the alleged acts occurred.

However, further analysis of the principles adopted by the European and Inter-American systems of human rights, specifically the principle of subsidiarity, the margin of appreciation doctrine, and the fourth instance formula, indicate that the plaintiff has an incentive to seek domestic relief in a state with a stable democratic system of government. First, under the principle of subsidiarity, the regional tribunals restrict the review of human rights claims to an evaluation of the domestic proceedings. The tribunals severely avoid review of the substantive law adopted by the state. Thus, the domestic court in a non-democratic state is not required to provide all of the

substantive rights guaranteed in a democratic state. A plaintiff has a better chance of success in a state that offers more human rights; he therefore has an incentive to seek domestic relief in a democratic state such as the United States, instead of in the state in which the human rights violations occurred. This is particularly true because in third category ATCA claims, the state government often committed the actual human rights violations.

Second, the margin of appreciation doctrine supports the deferential treatment of domestic decisions introduced by the principle of subsidiarity. This doctrine emphasizes respect for the internal cultural and moral values in individual member states. For example, the European Convention protects fundamental civil and political rights, but generally permits the member states to determine economic, social, and cultural rights. Again, a plaintiff seeking domestic relief for human rights violations is more likely to succeed in a stable democratic state because it can offer a greater range of human rights guarantees. Non-democratic states, especially those under military rule, do not provide the same measure of economic, social, and cultural rights and under the margin of appreciation doctrine an international tribunal will not impose a higher measure.

Finally, the fourth instance formula, particularly the double standard imposed by the IACHR, offers further support for the adjudication of human rights violations in U.S. courts under the ATCA. Under the fourth instance formula, the regional tribunals acknowledge the procedural and practical limitations that prevent full appellate review of domestic decisions. On the other hand, the IACHR generally subjects the decisions of domestic courts in authoritarian states to a more heightened level of scrutiny. Assuming that the plaintiff seeks efficient resolution of his human rights claims, he consequently has an incentive to avoid adjudicating his claims in a non-democratic state. Otherwise, if the plaintiff loses his case and must appeal to the IAHCR, he risks becoming a victim of the decade-long review process of that court. In contrast, a plaintiff before a U.S. court may appeal to a U.S. appellate court, likely resulting in a more efficient resolution of his case.

Therefore, the principle of subsidiarity, margin of appreciation doctrine, and fourth instance formula adopted by the ECHR and the IACHR provide victims of human rights violations an incentive to adjudicate their claims in U.S. courts. Because of the lack of a more efficient or available alternative, adjudication of human rights violations in U.S. courts under the ATCA is an appropriate and even necessary use of judicial power.