WITHIN REACH: A NEW STRATEGY FOR REGULATING AMERICAN CORPORATIONS THAT COMMIT HUMAN RIGHTS ABUSES ABROAD

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I. INTRODUCTION

The modern U.S. corporation has a global reach. This is hardly a new phenomenon: the extractive industries have mined foreign territory for oil and metals for over a hundred years, and the outsourcing of garment manufacturing and other industrial processes has been a common trend since the 1980s.[1] In recent years, however, a more conscious public and better organized activists have shone a spotlight on the overseas practices of such powerful, multinational corporations ("MNCs"). MNCs that profit from sweatshop conditions in developing countries, or that make use of unscrupulous armed forces to protect their mining sites and pipelines, are being called to account: frequently, on American soil, where their assets and brand reputations can best be reached.

The primary vehicle for such suits against MNCs in the United States has been the Alien Tort Statute ("ATS"), a 1789 statute which grants U.S. district courts original jurisdiction over civil actions "by an alien for a tort... committed in violation of the law of nations."[2] Recently, however, plaintiffs recognizing the limits of the ATS have supplemented their actions with U.S. state common law claims. Plaintiffs allege torts such as assault and battery, wrongful death, false imprisonment, forced labor, and intentional infliction of emotional distress.[3]

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[1] Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 657 (1990). *See also* John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/35 ¶2 (Feb. 2007) [hereinafter Ruggie Report 2007] (noting the expansion of global markets in the 1990s as a result of trade agreements, bilateral investment treaties, and domestic liberalization and privatization).

[2] 28 U.S.C. § 1350 (2000).

[3] Claims have also been made under state statutes, such as California's Business & Professions Code § 17200 (prohibiting business practices that are "unlawful," "unfair," and "fraudulent"). *See, e.g.*, State

State common law claims have significant potential for regulating the conduct of American corporations overseas; not least because they reach a broader scope of conduct than the ATS, which creates a cause of action for only a narrow set of internationally-proscribed wrongs.[4] Harms such as cruel, inhumane, and degrading treatment, assault and battery, and environmental damage have been held to fall outside the scope of the ATS.[5] When the host nation lacks the enforcement mechanisms or political will to sanction the conduct that occurred and the ATS mechanism is unavailable in U.S. courts, the application of U.S. state tort law can provide a valuable stop-gap to remedy the wrong.

At the same time, however, cases applying U.S. state tort law to harms that arise overseas must be carefully considered. The decision to apply American law over the laws of the foreign nation raises important questions about international comity. Moreover, a court's assertion that a U.S. state has a "compelling interest" in applying its law to an overseas wrong (the necessary finding to justify applying that state's law in a choice of law analysis) involves a policy

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Court Compl., Doe v. Unocal Corp., Nos. BC 237980 and BC 237679 (Cal. Super. Ct. 2003), *available at* http://www.earthrights.org/files/Legal%20Docs/Unocal/statecomplaint2003.pdf (asserting, *inter alia*, § 17200 claim for "fraudulent and deceptive practices," including the knowing use of forced labor and the making of material misrepresentations and omissions in the sale of securities). This Note focuses on the application of state common law.

[4] This is particularly true in the wake of the Supreme Court's 2005 decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *see infra* at 8.

[5] *See, e.g.*, Villeda-Aldana v. Del-Monte Fresh Produce, 416 F.3d 1242, 1246 (11th Cir. 2005) (finding that claims brought by Guatemalan labor unionists for arbitrary detention and cruel and inhumane treatment did not amount to violations of the law of nations creating jurisdiction under the ATS); Mujica v. Occidental Petroleum Corp., 381 F.Supp.2d 1164, 1183 (C.D. Cal. 2005) (declining to recognize claims for cruel, inhumane, and degrading treatment as grounds for an ATS claim); Beanal v. Freeport-McMoran Inc., 197 F.3d 161, 169 (5th Cir. 1999) (affirming dismissal of ATS claims for environmental harm since plaintiffs had failed to show articulable environmental standards to support a claim under international law).

judgment which may be better left to Congress, raising both judicial competence and federalism concerns.[6]

This Note examines the bases for and ramifications of applying U.S. state common law to overseas harms, focusing particularly on cases which have arisen in the human rights context, alleging physical or environmental harms carried out by U.S. corporate actors. Part II presents the context in which these issues can arise, focusing on two case studies, and looks at the difficulties of regulating MNC conduct under current liability regimes. Part III examines the legal basis for adjudicating such claims in U.S. courts (the forum non conveniens analysis), and notes that many corporate abuse cases present a compelling fact pattern where dismissal for forum non conveniens is inappropriate. Part IV discusses the choice of law analysis, and considers the policy implications of applying U.S. law to harms that take place abroad. Identifying four principal concerns which underpin choice of law determinations—international comity, judicial competence, foreign affairs doctrine, and defendants' due process rights—I argue that these concerns are minimal for a subset of state common law claims which turn on fundamental norms such as intentional torts. Distinguishing such fundamental tort law claims (such as claims involving battery, false imprisonment, or conversion) from more nuanced policy-based claims which do warrant deference to the host nation, I argue that for a substantial sphere of harms, state common law claims are an appropriate and valuable tool for plaintiffs seeking redress from U.S. corporate actors engaging in harmful conduct overseas.

[6] Federalism concerns touch on the theory of Congress's "dormant foreign affairs power," which holds that the Constitution contains a general preemption of state interference in foreign affairs. *See* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 342 (1999); *see also infra* at 22.

II. STATE LAW CLAIMS AS A STRATEGY TO REACH MULTINATIONAL CONDUCT

A. Two Case Studies: *Unocal* and *Exxon Mobil*

The past decade has seen an increasing number of lawsuits alleging human rights abuses by U.S. corporations acting overseas. One of the most publicized arose when Burmese villagers brought suit against California-based energy company Unocal, alleging gross human rights violations by military forces hired to protect Unocal's gas pipeline in the Tenasserin region of Burma.[7] Unocal began construction of the pipeline in 1993 as part of a controversial agreement with the much-criticized Burmese military junta, the SLORC.[8] The contract provided significant funds to the ostracized government, granting the SLORC a fifteen percent stake in the venture, substantial tax revenues, and a lucrative contract for the government to provide protective services to Unocal.[9] As part of the agreement, the SLORC undertook to clear the pipeline route, provide security along it, and supply labor and materials for the project.[10]

In 1997, Burmese villagers brought suit in the Central District of California alleging that, in executing their task,

[7] Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003), *parties' joint motion to dismiss granted*, 403 F.3d 708 (2005). The state common law claims were remanded to state court. Doe v. Unocal Corp., Nos. BC 237980 and BC 237679 (Cal. Super. Ct. 2003) (unpublished opinion; some filings available at http://www.earthrights.org/site_blurbs/doe_v._unocal_case_history.html).

[8] State Court Compl. ¶ 48, Doe v. Unocal Corp., Nos. BC 237980 and BC 237679 (Cal. Super. Ct. 2003), *available at* http://www.earthrights.org/files/Legal%20Docs/Unocal/statecomplaint2003.pdf.

[9] The Myanmar Gas and Oil Enterprise ("MOGE"), a state-owned company, has a fifteen percent interest in the Yadana investment group. TOTAL FINA ELF, YADANA: AN INDUSTRIAL DEVELOPMENT PROJECT IN MYANMAR 6, *available at* http://burma.total.com/en/publications/yadana_project.pdf (last visited Nov. 8, 2007) [hereinafter TOTAL REPORT].

[10] State Court Compl. ¶¶ 45-51, Doe v. Unocal Corp., Nos. BC 237980 and BC 237679 (Cal. Super. Ct. 2003).

the SLORC carried out a program of widespread violence and intimidation, razing villages, destroying property, and forcing area farmers to work without compensation to clear tracks of forest for the pipeline.[11] Plaintiffs alleged that SLORC officials raped women and girls in the region, and subjected non-compliant villagers to assault, torture, and even death.[12]

The Unocal case illustrates the significant impact that the choice of forum and applicable law can have on plaintiffs' efforts to seek redress. Plaintiffs raised serious concerns about the independence of the Burmese judiciary, which is hand-selected by the SLORC and whose judges can be removed from office at any time.[13] Moreover, Plaintiffs established that their harms were likely not redressable under Burmese law.[14] Burma's Towns and Villages Act permitted companies engaged in a joint venture with the government to demand uncompensated labor from villagers surrounding Unocal's gas pipeline. California law, by contrast, condemned such conduct as unjust enrichment and slave labor prohibited by California's Constitution Art. 1 § 6. The court held that California was the appropriate forum to adjudicate the case, and that California law should apply.[15] The case, discussed in detail below, eventually settled for an undisclosed amount in 2005.[16]

In June 2001, Indonesian villagers brought similar allegations against ExxonMobil for acts of murder, torture, sexual assault, false imprisonment, and other wrongs carried out by Indonesian military forces hired by ExxonMobil to

[11] *Id.* ¶¶ 56-58.

[12] *Id.* ¶ 65.

[13] Doe v. Unocal Corp., Nos. BC 237980 and BC 237679, slip op. at 7 (Cal. Super. Ct. July 30, 2003) (denying defendant's motion to apply Bermuda or Burmese law).

[14] *Id.* at 9.

[15] *Id.* at 7.

[16] Doe I v. Unocal Corp., 403 F.3d 708, 708 (9th Cir. 2005); *see also* Earth Rights Int'l, *Doe v. Unocal Settled; Unocal to Compensate Villagers*, (Jan. 30, 2006), *available at* http://www.earthrights.org/site_blurbs/doe_v._unocal_case_history.html.

protect its gas production facilities in Indonesia.[17] The harms occurred in Aceh, a region of Indonesia that witnessed widespread repression and abuses during an extended period of military occupation from 1989 to 1998.[18] Plaintiffs alleged that an army unit specifically designated for ExxonMobil security took part in the abuses.[19] Plaintiffs further alleged that ExxonMobil paid, trained, equipped, and had the ability to control the unit, warranting both direct and vicarious liability.[20] As in *Unocal*, the court found that Plaintiffs did not have access to an independent legal system in Indonesia to raise their complaints, and risked reprisal if they brought suit in Indonesia.[21] The court found that the District of Columbia was an appropriate forum for the case,[22] and that D.C. and Delaware law should apply.[23] The case is ongoing as of January 2008.

Numerous similar cases have been brought in U.S. courts in recent years, raising common law claims against U.S. corporate actors. Further examples include cases arising from: the shooting of peaceful protesters and destruction of two villages by security forces hired to protect Chevron's oil production activities in the Niger Delta;[24] intimidation, death threats, and arbitrary detention by security forces employed by Freeport-McMoran to protect its mining operations in

[17] Complaint at ¶¶ 1-3, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357 (LFO)).

[18] HUMAN RIGHTS WATCH, INDONESIA: THE WAR IN ACEH (2001), *available at* http://www.hrw.org/reports/2001/aceh/indacheh0801.pdf. The military occupation was a response to the Free Aceh Movement, a liberation front which remains active in the region today. The region's troubles continued after the fall of President Suharto in 1998, although the 2004 tsunami disaster helped trigger a peace agreement between the Free Aceh Movement and the Indonesian government in 2005.

[19] Complaint ¶ 26, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357 (LFO)).

[20] *Id.* ¶¶ 39-42, 46.

[21] Doe v. Exxon Mobil Corp., 393 F. Supp. 2d at 29.

[22] *Id.*

[23] Doe v. Exxon Mobil Corp., 2006 WL 516744, at *2 (D.D.C. 2006).

[24] Bowoto v. Chevron Corp., No. C 99-2506, SI, 2006 WL 2455761 (N.D. Cal. Aug. 22, 2006).

Irian Jaya, Indonesia;[25] the extrajudicial killings, torture, and detention of protestors by military troops hired to protect Shell's oil pipeline in Nigeria;[26] destruction of property, arbitrary detention, and the wrongful deaths of seventeen citizens during an aerial attack by security forces hired to protect Occidental's oil production facility and pipeline in Colombia;[27] forced labor by Malian children who worked cocoa bean farms used by Nestlé in the Côte d'Ivoire;[28] severe environmental damage and contamination from Texaco oil development in Ecuador;[29] and severe environmental harms resulting from Rio Tinto's mining activities in Papua New Guinea.[30]

B. Current Strategies for Regulating U.S. Multinationals

In recent years, members of the international community have become increasingly aware of the power wielded by multinational corporations, and the potential for abuse. At the international level, institutions including the United Nations, World Bank, Organization for Economic Co-operative Development, and International Labor Organization have passed draft norms and voluntary principles to guide MNC behavior.[31] Domestically, the

[25] Alomang v. Freeport-McMoran Inc., No. 96-2139, 1996 WL 601431 (E.D. La. Oct. 17, 1996) (asserting claims for extra judicial killing, torture, surveillance, threat of death, and severe physical pain and suffering).

[26] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

[27] Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134 (C.D. Cal. 2005).

[28] Complaint, Doe v. Nestlé, No. CV 05-5133 SVW (C.D. Cal. 2006) (asserting claims under the ATS and TVPA, and further claims for forced labor under the U.S. and California Constitutions, breach of contract, unjust enrichment, and unfair business practices).

[29] Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

[30] Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) (considering claims for negligence, public nuisance, private nuisance, strict liability, equitable relief, and medical monitoring), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

[31] *See* UNITED NATIONS GLOBAL COMPACT, THE TEN PRINCIPLES, http://www.unglobalcompact.org (last visited Feb. 27, 2008); ORG. FOR

United States and United Kingdom have drafted The Voluntary Principles on Security and Human Rights, calling for human rights protections to be written into contracts with security forces overseas.[32]

To some degree, these initiatives show states' increasing willingness to regulate the conduct of their corporate citizens, regardless of where that conduct occurs.[33] Such initiatives, however, have remained voluntary. In response to a questionnaire survey addressed to states by the UN Special Representative on Human Rights and Transnational

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ECON. COOPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), *available at* http://www.oecd.org/daf/investment/guidelines; INT'L LABOR ORG., ILO FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998), *available at* http://www.ilo.org/declaration (follow "text of the declaration"); *see also* U.N. Econ. and Soc. Council, Sub-Comm. for the Promotion and Prot. of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12 (Aug. 13, 2003) (recognizing specific obligations including workers' rights, environmental protection, the right to equal opportunities, and the right to security of person). For an overview of efforts by non-governmental and inter-governmental organizations, see Ruggie Report 2007, *supra* note 1, ¶¶ 45-62.

[32] BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2000), *available at* http://www.state.gov/g/drl/rls/2931.htm. Congress has considered legislation that would require U.S.-based multinationals employing more than twenty persons overseas to make full public disclosure of issues such as "worker rights practices and labor standards, working conditions [and] environmental performance" (the bill was dropped after sponsoring Congresswoman Cynthia McKinney lost her seat in 2002). *See* Corporate Code of Conduct Act, H.R. 5377, 109th Cong. (2d Sess. 2006), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h109-5377.

[33] The impetus on the national level comes not only from human rights groups advocating moral concerns, but also from domestic labor interests who wish to elevate the standard of care in foreign countries as a way to stem the tide of American companies looking overseas for low-cost labor. The New York State Bar Association's International Law Practicum identifies the recent boom in cases against MNCs as partially the product of "domestic labor organizations seeking to halt the flow of jobs overseas." Aaron J. Schindel & Jeremy Mittman, *Workers Abroad, Trouble at Home: Multinational Employers Face Growing Liability for Labor Violations of Overseas Suppliers*, 19 INT'L L. PRACTICUM 40 (2006).

Corporations, the large majority did not have policies or tools designed to address corporate human rights challenges, and instead relied on soft law instruments such as the OECD Guidelines and the UN Global Compact.[34] Very few explicitly consider human rights criteria in their export credit and investment promotion policies or in bilateral trade and investment treaties, though these are areas in which the government is most strategically placed to effect change.[35]

The voluntary nature of the national and international programs undermines their potential to influence corporate behavior. Although the increasing pressure of media attention leaves many companies eager to appear compliant with voluntary norms,[36] concerns about image alone may not

[34] Ruggie Report 2007, *supra* note 1, ¶ 17.

[35] *Id.* Some treaty bodies have encouraged states to take further steps to prevent corporate violations abroad, including the Committee on Social, Cultural and Economic Rights ("CESCR") which has stated that states should take steps to "prevent their own citizens and companies" from violating rights in other countries. Ruggie Report 2007 ¶ 15 n.9 (citing CESCR, General Comment No. 15 ¶ 33).

[36] The "shame game" is a growing part of the international movement to curb conduct by MNCs. Since 2002, Oxfam has waged a campaign for "No Dirty Gold," including full page ads in leading newspapers near Valentine's Day. *See* No Dirty Gold, http://www.nodirtygold.org. The International Labor Rights Fund has run campaigns against the use of sweatshop labor to produce lines of clothing sold in Wal-Mart, The Gap, and other popular stores. *See* ILRF News Archives, *available at* http://www.laborrights.org/creating-a-sweatfree-world/news-archives (including recent publications in Forbes Magazine, Time Magazine, ABC News, and other outlets). Evidence suggests that these shame campaigns can be very effective: in a survey of the top two thousand public and private sector organizations conducted by a leading insurance company, companies regarded damage to their reputation as their biggest corporate risk. SUSTAINABILITY, THE CHANGING LANDSCAPE OF LIABILITY: A DIRECTOR'S GUIDE TO CORPORATE ENVIRONMENTAL, SOCIAL AND ECONOMIC LIABILITY 17 (2004), *available at* http://www.sustainability.com [hereinafter SUSTAINABILITY]. The 2002 California Supreme Court decision *Kasky v. Nike*, which found Nike in violation of California Business and Professions Code § 17200 when it misrepresented its achievements in labor practices, shows that voluntary norms may serve as a useful tool for enforcement in their own right. Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. denied as improvidently granted*, 538 U.S. 959 (2003).

be sufficient to prompt compliant behavior, particularly in sectors such as the extractive industries which rely far less upon brand-image for commercial success.[37]

C. The Limits of the ATS

For the past twenty years, activists seeking to redress human rights abuses have found some success in the U.S. court system through the Alien Tort Statute, the 1789 statute which grants jurisdiction in district court and creates a limited cause of action for alien plaintiffs for torts committed "in violation of the law of nations."[38] Although plaintiffs have not won on the merits in any of the more than thirty-six cases that have been brought under the ATS, at least three cases have settled, sending a clear signal that the litigation should be taken seriously.[39] Litigation is perhaps the most promising of the potential tools for effecting change, since it utilizes the private initiative of plaintiffs, and has the additional benefit of compensating victims as well as promoting deterrence.[40]

While the ATS has proved a successful mechanism to reach some gross human rights violations, however, several factors undermine its value as a tool to reach the conduct of corporations. Following the Supreme Court's 2004 decision

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[37] Increased media attention has prompted some self-regulatory efforts by the extractive industries. *See, e.g., The Voluntary Principles on Security & Human Rights* (participants include Amerada Hess, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoran, Occidental Petroleum, Rio Tinto, Shell and Statoil), *available at* http://www.voluntaryprinciples.org/files/voluntary_principles.pdf. Companies' increased concern about these issues is also evidenced by the number of private consulting practices which have sprung up to help companies structure their overseas labor practices in a way that prioritizes social responsibility. *See* SUSTAINABILITY, *supra* note 36.

[38] Alien Tort Statute, 28 U.S.C. § 1350 (2000).

[39] John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 ¶62 (Feb. 2006) [hereinafter "Ruggie Report 2006"].

[40] Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L. J. 399, 408-09 (2002).

in *Sosa v. Alvarez-Machain*, the ATS creates a cause of action for only a limited set of violations of the law of nations which have "definite content," and are "specific," "obligatory," and "universal."[41] These norms, which have been held to include torture, genocide, and crimes against humanity, typically do not extend to the "lesser" violations which corporate defendants are most likely to carry out. In *Villeda-Aldana v. Del-Monte Fresh Produce*, for example, the Eleventh Circuit dismissed claims brought under the ATS by Guatemalan labor unionists for arbitrary detention, physical pain and suffering, and cruel and inhumane treatment when private security forces hired by Del Monte allegedly kidnapped and detained union leaders.[42] In *Flores v. Southern Peru Copper*, the Southern District of New York dismissed plaintiffs' claims for violations of the right to life, health, and sustainable development, when Peruvian villagers alleged that the American defendants' mining operations caused their asthma and lung disease.[43] Similarly, in *Exxon Mobil*, the D.C. District Court dismissed plaintiffs' claims for sexual violence carried out by Exxon Mobil security forces because such acts did not amount to a violation of the law of nations.[44]

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[41] Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). The Court warned against expanding the scope of actions under the ATS, noting that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727.

[42] Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1246 (11th Cir. 2005). The Court allowed only a single claim for torture to go forward, but at the fact-finding stage the company's harm was held to not meet the standards of torture. *Id.* at 1253.

[43] Flores v. Southern Peru Copper, 253 F. Supp. 2d 510, 519 (S.D.N.Y. 2002), *aff'd*, 343 F.3d 140 (2d Cir. 2003).

[44] Exxon Mobil, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (No. 01-1357 (LFO)). *See also* Beanal v. Freeport-McMoRan, Inc., 197 F.3d 161, 169 (5th Cir. 1999) (affirming dismissal of plaintiffs claims for environmental torts as falling outside the limited causes of action recognized by the Alien Tort Statute); Mujica v. Occidental Petroleum, 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005) (plaintiffs' allegation that defendant's actions caused plaintiffs to fear for their lives and flee their homes did not meet international standard for "cruel, inhuman and degrading treatment" to warrant an ATS claim). *But see* Sarei v. Rio Tinto, 487 F.3d 1193 (9th Cir.

The application of the ATS to corporations is further limited by the argument, upheld by some courts, that violations of the law of nations can only be perpetrated by "state actors."[45] In *Exxon Mobil*, for example, the court dismissed claims against the oil company for complicity in genocide, torture, and extrajudicial killing, because those violations of the law of nations could "only be done under color of law."[46] Although some courts have held that corporations may commit at least some violations of the law of nations (such as genocide and war crimes),[47] the debate and uncertainty limit the power of the ATS to reach corporate conduct.

Some courts (including the court in *Exxon Mobil*) have also questioned whether aiding and abetting liability is available under the ATS, although the majority view now accepts that aiding and abetting liability provides viable grounds for an ATS cause of action.[48]

2007) (holding that "racially discriminatory environmental harms" and violations of the U.N. Convention on the Law of the Sea are actionable under the ATS against mining company which allegedly released toxic pollutants at its site in Papua New Guinea), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007) (decision pending).

[45] *See, e.g.*, *Exxon Mobil*, 393 F. Supp. 2d at 26 (noting "the accepted principle that most violations of international law can be committed only by states").

[46] *Id.* at 25-27.

[47] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 335 (S.D.N.Y. 2005) (finding that Canadian energy company Talisman could be liable under the ATS for complicity in genocide, crimes against humanity, and other violations of international law).

[48] Compare the minority decisions in *Exxon Mobil*, 393 F. Supp. 2d at 24 (defendants cannot be held liable under the ATS on a theory of aiding and abetting liability) and In re South African Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (aiding and abetting liability not available under the ATS) with the more common view in *Talisman*, 374 F. Supp. 2d at 331 (ATS permits aiding and abetting liability); Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1148 (C.D. Cal. 2002), (aiding and abetting liability is valid cause of action under ATS); In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 52-59 (E.D.N.Y. 2005) (aiding and abetting liability is available under the ATS).

D. State tort law claims

Given the restrictions of the ATS, the use of state common law provides a valuable alternative avenue for plaintiffs seeking redress from corporate defendants whose conduct would otherwise go unsanctioned. If plaintiffs can overcome dismissal for forum non conveniens ("FNC") and show that U.S. law should apply under the choice of law rules of the forum, state common law claims may allow plaintiffs to reach a far broader scope of conduct than claims brought under the ATS.

While no suit involving state law claims has yet survived to reach judgment on the merits, several cases are currently pending before U.S. district and state courts.[49] In these and other recent cases, the alleged tort law violations include assault and battery, wrongful death, negligent hiring and supervision, unjust enrichment, public nuisance, private nuisance, and claims for medical monitoring.[50] In the following Parts, I analyze the validity of these claims, and discuss the policy implications of their application.

III. HUMAN RIGHTS CLAIMS IN U.S. COURTS

The U.S. legal system allows plaintiffs to bring a lawsuit in a forum of their choice, provided (1) the forum has personal jurisdiction over the defendant and subject matter jurisdiction over the case, and (2) the forum is "convenient." After the Supreme Court's decision in *Piper v. Reyno*, the

[49] *See, e.g.*, Sarei, 487 F.3d 1193 (considering claims for negligence, public nuisance, private nuisance, strict liability, equitable relief, and medical monitoring); Complaint, Doe v. Nestlé, No. CV 05-5133 SVW (C.D. Cal. 2006) (asserting claims for assault and battery, wrongful death, negligence, and unjust enrichment); Complaint, John Roe I et al. v. Bridgestone Corp., No. 05-8168 (C.D. Cal. Nov. 17, 2005), *available at* http://www.stopfirestone.org/ Firestone_Complaint.pdf (asserting claims under California Constitution Art 1 § 6, recklessness, negligence, negligent hiring and supervision and unfair business practices under California Business and Professions Code § 17200).

[50] *See supra* cases cited at notes 24-30.

ordinary presumption in favor of the plaintiff's choice of forum receives less deference when the plaintiff is a foreign citizen.[51] Nevertheless, in cases involving overseas abuses by U.S. corporate actors, there is often a compelling argument for adjudication in the United States.

A. Inadequate Alternative Forum

Defendants seeking dismissal for forum non conveniens must show that an alternative forum is available and adequate to provide a practical remedy for the plaintiff's alleged harm.[52] Human rights cases often present a compelling instance where fair adjudication in the foreign forum is *not* available, because of corruption, bias, or even the risk of retaliation. This issue is particularly relevant when the harm alleged in the case was carried out by government forces, as was the case in *Unocal* and *Exxon Mobil*. Even when the government is not directly implicated in the harm, however, the exceptional influence of MNCs may prevent plaintiffs from receiving a fair trial in their domestic courts. Moreover, the tortfeasors may present an undue threat for plaintiffs if plaintiffs were forced to litigate at home. In *Mujica v. Occidental Petroleum,* the Central District of California held that Colombia was "inadequate" for purposes of a forum non conveniens analysis when the plaintiffs faced a "significant possibility" of retaliation in Colombia.[53] Similarly, in *Presbyterian Church of Sudan v. Talisman*, the court refused to dismiss for forum non conveniens because, in part, "the victim would be endangered by merely returning to his home country" in Sudan.[54] In *Exxon Mobil*, the court similarly found that

[51] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

[52] *See id.* at 249, 255 n.22 (courts may consider whether remedies in the alternative forum are "clearly unsatisfactory," as when "the alternative forum does not permit litigation of the subject matter in dispute").

[53] Mujica v. Occidental Petroleum, 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005).

[54] Presbyterian Church of Sudan v. Talisman, 374 F. Supp. 2d 331 (S.D.N.Y. 2005).

Indonesia was an unavailable forum because plaintiffs faced certain retribution and punishment from the military authorities.[55]

Moreover, structural problems and lack of resources may make the court system of the host nation inadequate to handle the claim. The United Nations Special Representative on Human Rights and Transnational Corporations has noted that in a survey of recent human rights abuses reported to the UN, twenty-five out of twenty-seven of the host nations in which the atrocities took place fell below average on the World Bank's "rule of law" index, which gauges (among other factors) the effectiveness and predictability of the judiciary.[56] These figures show why human rights cases so often present compelling grounds for retaining the matter in U.S. courts.

International comity of course mandates that courts exercise discretion when passing judgment on the adequacy of a foreign forum. When Indian plaintiffs argued that Indian courts were ill-suited to handle claims arising from the massive environmental disaster at Bhopal in the early 1980s, for example, the Second Circuit refused to find India an "inadequate alternative forum" even when the Indian government itself asserted that the Indian courts were not a viable forum for adjudication.[57] Moreover, under *Piper*, a forum is not unavailable or inadequate simply because the law of the alternative forum is less favorable to plaintiffs.[58] In the case where corruption or government involvement jeopardizes the plaintiff's safety and its ability to access the courts, however, U.S. courts may justifiably resist dismissal on the grounds that the alternative forum is unavailable.

B. Balance of Public and Private Interests

When the alternative forum is adequate and available to adjudicate the claim, U.S. courts weigh the "private"

[55] Doe v. Exxon Mobil, 393 F. Supp. 2d 20, 29 (D.D.C. 2005).

[56] *See* Ruggie Report 2006, *supra* note 39, ¶¶ 25-27.

[57] In re Union Carbide, 809 F.2d 196, 206 (2d Cir. 1987).

[58] Piper v. Reyno, 454 U.S. 235, 249 (1981).

interests of the parties along with the "public" interests of the available fora in adjudicating the case (the *"Gilbert* test").[59] The analysis has three goals: to prevent abuse of venue when the plaintiff's choice of forum causes hardship to the defendant,[60] to conserve the judicial resources of a disinterested forum, and to balance the competing interests of states when both states have a connection to the harm.[61]

Applying this analysis, numerous U.S. courts in human rights cases have found themselves to be an appropriate forum, despite the fact that key evidence and witnesses were located abroad. In *Mujica, Bowoto v. Chevron, Exxon Mobil* and *Unocal*, the courts each found that the U.S. interest in adjudicating harms carried out by American corporations outweighed pragmatic considerations which might have otherwise weighed in favor of dismissal for FNC. In *Mujica*, the Central District of California noted that the fact defendants were American weighed heavily in favor of using the United States as a forum, since "it would be easier for a United States court to enforce a potential judgment against them... [and, more generally] because the Defendants are American corporations and the Colombian Air Force unit allegedly involved may have received American military aid."[62] In *Bowoto*, involving harms in Nigeria, the court similarly considered California's interest in regulating the conduct of corporations headquartered within the state.[63] In *Unocal*, the state court found that California had a

[59] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (identifying "private factors" such as "access to sources of proof; availability of compulsory process for attendance of . . . witnesses; possibility of view of premises . . . [and] enforceability of a judgment"; and "public factors" such as the burden of imposing jury duty, the interest of adjudicating a case near the community affected, and adjudicating the case in a forum that is familiar with the laws governing the case).

[60] Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 388 (1947).

[61] BORN & RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 348 (Wolters Kluwer, 4th ed. 2007).

[62] *Mujica*, 381 F. Supp. 2d at 1152.

[63] Transcript of Oral Argument at 12, Bowoto v. Chevron Corp., No. C 99-2506 (N.D. Cal. Apr. 7, 2000).

compelling interest in adjudicating the harm in part because the "nature of the relationship between Unocal and its subsidiaries involved actions taken in California."[64]

As these courts recognized, the "private interest" prong of the *Gilbert* forum non conveniens analysis bears little weight when the parties seeking dismissal are U.S. residents. A U.S. defendant presumably has easy access to U.S. litigators, and is in a position to effectively manage litigation within its home state. Although evidence relating to the suit may be located overseas, parties will have to collect that evidence regardless of where the suit is heard. Hearing the suit in the United States instead of the foreign forum simply requires parties to transport or communicate the collected evidence back to the United States, which should not constitute a substantial burden in the era of modern global telecommunications.

In light of the defendant's proximity to the forum, courts conducting a FNC analysis in suits with U.S. defendants can justifiably focus on the "public interest" questions of judicial efficiency and international comity which underpin the FNC doctrine. Judicial efficiency concerns may weigh in favor of dismissal, since the foreign host nation typically has the best access to evidence and potential witnesses, including witnesses who may need to be subpoenaed. Moreover, adjudication of the claim usually requires analysis of the law of the host nation where the harm occurred, a practice which U.S. courts wish to avoid. This is an important consideration, and brings together the FNC analysis and choice of law analysis discussed below. At the same time, however, these concerns are arguably minor in comparison to the United States' compelling interest in adjudicating these claims.

In many cases, the United States will indeed have a compelling interest in adjudicating human rights claims involving U.S. corporate defendants. For one, the United States has a significant interest in regulating unlawful

[64] Doe v. Unocal Corp., Nos. BC 237980 and BC 237679 (Cal. Super. Ct. 2003).

activity which originates within its borders. In many instances, plaintiffs allege that the policy decision which led to plaintiffs' harm was made at defendant's headquarters in the forum state, making the forum state a "locus actus" with a compelling interest in stopping such tortious conduct within its borders.[65] Moreover, the United States has a powerful interest in regulating the conduct of its corporate citizens, regardless of where their conduct occurs. This interest is moral: as Justice Doggett of the Texas Supreme Court has noted, "a wrong does not fade away because its immediate consequences are first felt far away rather than close to home."[66] It is also political, since corporations are seen as representatives of their home state, and states thus have a compelling interest in favor of monitoring the activities of their corporate citizens.

A number of courts have found that, by creating jurisdiction for certain torts carried out against aliens, the ATS contains an implicit sanction in favor of adjudicating wrongs that take place overseas.[67] This interpretation of the

[65] *See, e.g.*, State Court Compl. ¶ 52, Doe v. Unocal Corp., Nos. BC 237980 and BC 237679 ("[P]laintiffs . . . allege that numerous acts in furtherance of the conspiracy and/or joint venture were and continue to be taken in California, such as the provision of funds . . . , numerous decisions relating to the assignment of personnel, technology, and expertise to the project, monitoring, advising, and auditing the activities of the project by all of the joint venturers, [and] decisions relating to employer/labor relations on the project.").

[66] Chemical v. Castro Alfaro, 786 S.W.2d 674, 689 (Tex. 1990) (overturning FNC dismissal of suit brought by Costa Rican farmers harmed while handling pesticide on U.S. company's Costa Rican farms).

[67] *See, e.g.*, Bowoto v. Chevron Corp., No. C 99-2506, 11 (N.D. Cal. Apr. 7, 2000) (noting a "conflict . . . between assertion of jurisdiction under the [ATS], which allows an alien to sue in the United States for things that occurred overseas, with the concept of forum non conveniens"). *But see* Mujica v. Occidental Petroleum, 381 F. Supp. 2d 1134, 1142 (C.D. Cal. 2005) (holding that a court may consider FNC dismissal in ATS cases); In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 500 (9th Cir. 1992) ("[T]he doctrine of forum non conveniens [is] available in [ATS] cases as in any other."). Similar debate surrounds the Torture Victim Protection Act, which also gives U.S. courts jurisdiction over harms committed overseas. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226

ATS is a stretch, since the concern of balancing the interests of a competing foreign forum was unlikely to arise at the time the ATS was drafted. Moreover, the ATS originally applied only to limited actions (such as piracy, assaults on safe passage, and attacks on ambassadors),[68] which by their nature were likely to take place on U.S. soil or in unchartered waters, and thus were unlikely to implicate competing fora seeking to adjudicate the claim.

Even without reference to the ATS, however, there are strong arguments for recognizing a U.S. forum's interest in adjudicating claims involving its own citizens, particularly when the other elements of the FNC analysis (defendants' convenience and judicial efficiency) do not weigh heavily against hearing the case in the United States. Particularly when the neutrality and safety of the foreign forum is in doubt, a U.S. state's interest in adjudicating claims against its corporate citizens provides compelling grounds for finding the United States an appropriate forum to hear the case.

IV. ESTABLISHING APPLICABLE LAW

Much as corporate abuse cases provide a compelling case for adjudication in the United States, in many instances they also provide a compelling case for adjudication using U.S. state common law.

The application of U.S. state common law to overseas harms should be viewed in light of four central policy concerns: international comity, judicial competence, the foreign affairs doctrine, and defendants' due process rights. These goals expand upon the policy articulated by the Supreme Court in the domestic choice-of-law case *Philips Petroleum v. Shutts* (holding that the application of a state's

F.3d 88, 106 (2d Cir. 2000) (holding that the TVPA has not "nullified, or even significantly diminished, the doctrine of forum non conveniens").

[68] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) (identifying a "sphere" of rules for violations which had "serious consequences in international affairs", and stating "it was this narrow set of violations of the law of nations . . . that was probably on minds of the men who drafted the ATS with its reference to tort").

laws to extraterritorial conduct must be considered in light of the due process clause and the full faith and credit clause of the Constitution),[69] and incorporate concerns that Congress and the federal government should be the principal determiners of U.S. policy relating to conduct and relations overseas. They also develop upon policies articulated in the choice of law provisions of the Restatement (Second) Conflict of Laws, which stresses among other factors "the needs of interstate systems" and the protection of justified expectations.[70] Evaluated by category, a good number of human rights cases present instances where these concerns are minimized, either because the U.S. state's common law approximates foreign law, or because the claim turns on such a fundamental theory of recovery—such as intentional tort norms—that a judge can comfortably assert an overriding U.S. interest in upholding the claim.

A. A Taxonomy of Choice of Law Cases

In determining which of two states' laws should apply in a tort suit, most U.S. jurisdictions carry out the two-part choice of law analysis articulated in the Restatement (Second) Conflict of Laws, asking (1) whether there is a conflict between the law of the forum and the law of another interested state; and (2) if there is such a conflict, which of the states has the greater interest in regulating the conduct in question.[71] These baseline principles create a clear

[69] Philips Petroleum v. Shutts, 472 U.S. 797 (1985) (assessing the constitutionality of applying Kansas law to a nationwide class action which arose from transactions in many different states).

[70] RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971) ("[T]he factors relevant to the choice of the applicable rule of law include[:] (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.").

[71] RESTATEMENT (SECOND) CONFLICT OF LAWS § 145. *See, e.g.*, S. A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co., 641 F.2d 746, 749

taxonomy of when U.S. tort law should apply. If no conflict exists, the court will apply the law of the forum, since that law approximates the policy goals of both fora while allowing the court the convenience of applying a familiar set of laws.[72] If a conflict does exist, the court's decision will turn on a "comparative interest" analysis which asks which state has "the most significant relationship to the occurrence."[73]

B. No Conflict Cases

When the law of the U.S. forum approximates the law of the foreign state, both the case law and relevant policy concerns suggest that U.S. law should apply.[74] There is no

(9th Cir. 1981) ("Under [California conflict of law principles,] California law will be applied unless foreign law conflicts with California law . . . . Where significant interests conflict, the court must assess the 'comparative impairment' of each state's policies."); Fu v. Fu, 733 A.2d 1133, 1138 (N.J. 1999) ("The first prong of the governmental-interest analysis requires a determination that an actual conflict exists. . . . The second prong of the governmental-interest analysis requires the Court to determine which state has the most significant relationship to the occurrence . . . [and] identify the governmental policies underlying the law of each state . . . ."); Sutherland v. Kennington Truck Service, Ltd., 562 N.W.2d 466, 471 (Mich. 1997) ("[W]e will apply Michigan law unless a 'rational reason' to do otherwise exists. In determining whether such a reason exists, we undertake a two-step analysis: [1][we determine] if any foreign state has an interest in having its law applied. . . [2] if a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests").

[72] *See supra* cases cited at note 71.

[73] RESTATEMENT (SECOND) CONFLICT OF LAWS § 145.

[74] *See, e.g.* Philips Petroleum, 472 U.S. at 816 (applying Kansas law to a nationwide class action suit would not violate the Due Process Clause or Full Faith and Credit Clause of the Constitution if Kansas law was found to not conflict with any other applicable law); Wyatt v. Syrian Arab Republic, 398 F. Supp. 2d 131, 139-40 (D.D.C. 2005) (applying Texas and Tennessee law to a suit brought by two U.S. citizens kidnapped in Turkey because there was no showing that D.C. or Turkish law would lead to disparate results); Bano v. Union Carbide Corp., 2003 WL 1344884 at *3 (S.D.N.Y.) (New York law applies in cases in which the harm occurs abroad, and where there is no conflict with the law of the foreign

affront to international comity because the court is not prioritizing the law of one state over another, but instead simply uses forum law to approximate policies which are common to both states. The straightforward nature of the analysis means that a judge can avoid a policy determination about the rival states' competing interests in the case, avoiding separation of powers or foreign affairs doctrine concerns. Moreover, there are no concerns about unfairly penalizing defendants under legal standards which they did not expect to govern their conduct. As the Supreme Court noted in *Phillips Petroleum Co. v. Shutts* (involving domestic conflict of laws), "there can be no injury in applying [the law of one state] if it is not in conflict with that of any other jurisdiction connected to this suit."[75]

Courts addressing human rights claims have followed the "no conflict" methodology advocated by the Second Restatement, and comfortably applied forum law on those issues where it approximated the law of the foreign forum. In *Bowoto* v. *Chevron*, for example, the California District Court determined that there was no conflict between Nigerian and California law on the tort of assault and battery or negligence, and applied California law to those claims.[76]

A good number of state common law cases involving human rights claims are likely to fall into the category that presents "no conflict," at least for traditional personal harms such as wrongful death, assault and battery, or property harms such as conversion. Such norms are likely to exist in

jurisdiction.), *aff'd in part, rev'd in part*, Bano v. Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004).

[75] Shutts, 472 U.S. at 816.

[76] Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455761 (N.D. Cal. 2006) (granting, in part, the defendants' motion to dismiss and determining the applicable law). By contrast, the court held that Californian and Nigerian law did conflict on the claim of intentional infliction of emotional distress, since Nigeria did not recognize the cause of action. Finding that both Nigeria and California had a strong interest in regulating such conduct by an American corporation on Nigerian soil, the California court called a tie, and applied the law of the forum (California) by default. *Id.*

even sparse legal systems, and it is reasonable to allow U.S. courts to approximate those goals while applying familiar state tort law.

1. "No Conflict" When Foreign Law is Indeterminate or Inadequately Plead

The case law is also clear that forum law should govern the case when the foreign law is indeterminate or inadequately plead. In *Unocal*, for example, a compelling factor in favor of selecting California law was that Burmese law was "radically indeterminate."[77] In that case, the law was built on a complex combination of English and Indian law that had not been codified; there were no appellate decisions from Burmese courts available since 1976; and there were only five reported tort cases, none of which addressed the claims at issue in the case.[78]

Although the *Unocal* case provided a somewhat extreme example, the challenges of adequately determining foreign law have also proved compelling factors in favor of U.S. adjudication in other cases. In *Wyatt v. Syrian Arab Republic* (a case involving the kidnapping of two U.S. citizens in Turkey), for example, the court concluded that there was no conflict between Turkish and Tennessee law because Syria had failed to properly show how Turkish law differed from the law of Tennessee.[79]

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[77] Doe v. Unocal, No. BC 237980 and BC 237679, at 8 (Cal. Super. Ct. 2003).

[78] For an interesting account of Judge Chaney's interpretation of the state of Burmese law in *Unocal* by plaintiffs' expert on Burmese law, *see* Andrew Huxley, *Case Note: Comparative Law Aspects of the* Doe v. Unocal *Choice of Law Hearing*, 1 J. COMP. L. 219 (2007), *available at* http://www.thejcl.com/pdfs/huxley.pdf.

[79] *Wyatt*, 398 F. Supp. 2d at 139 ("Syria addresses the choice of law analysis with a flat and analytically empty assertion that Turkish law 'would be the correct choice-of-law for any tort claims that may exist along the lines alleged by the plaintiffs' . . . . Syria has shown no way in which Turkish law and the law of the District of Columbia, Texas, or Tennessee differ . . . . Accordingly, the law of the United States forum, rather than the law of Turkey or Syria, will apply to the plaintiff's claims.").

C. Conflict Cases

Cases where the laws of the United States and the foreign forum conflict present a more complex scenario, as courts are called to decide whether U.S. state policies should trump the laws of a foreign state seeking to regulate conduct within its own borders. The decision to apply American law over the laws of the foreign nation raises important questions about international comity. Moreover, a court's assertion that a U.S. state has a "compelling interest" in applying its law to an overseas wrong involves a policy judgment which arguably raises both judicial competence and federalism concerns.

Although these serious issues weigh against the application of state law in some cases, the majority of state tort law claims involve norms that are so fundamental to our value system that a U.S. court would be justified in applying them to a U.S. actor acting overseas. Tort norms remedying intentional harms to the person, liberty, and property are so embedded in our national system that a U.S. state invariably has a "compelling interest" in ensuring that the norms are upheld by corporate actors subject to jurisdiction in that state.

1. International Comity Concerns

As noted, the choice of law analysis requires courts to compare the interests of both states in adjudicating the harm. While a foreign state has an important interest in setting its own liability standards for conduct within its territory, this interest must be balanced against the interest of the United States in preventing its citizens from perpetrating the most base of harms.

A significant number of courts in human rights cases have found that the United States' interest in adjudicating the wrong outweighs the fact that the nexus of the harm occurs overseas. In *Exxon Mobil*, for example, the court emphasized that the United States has an interest in applying its law to its own corporations, and consequently held that D.C. and Delaware law should govern claims

brought against the U.S. company, even if the state common law conflicted with Indonesian law.[80] The court noted that "the United States has an overriding interest in applying its own laws to defendants, all of whom are U.S. companies," and concluded, "ultimately, the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries."[81]

In the *Unocal* decision, the court was similarly swayed by the belief that California has a substantial interest in regulating the conduct of businesses incorporated within its borders.[82] As noted, its decision to apply California law was partially motivated by a finding that Burmese law on the issue was "radically indeterminate,"[83] but the court was also driven by explicit policy concerns.[84] Even if Burmese law had been readily determinable, the court held that the Burmese Town and Villages Act (authorizing uncompensated labor) was unenforceable because the Act violated California's public policy. The court noted that a "public policy exception applies" when foreign law is "so offensive to our public policy as to be 'prejudicial to recognized standards of morality and to the general interests of the citizens.'"[85]

In the case of fundamental tort norms such as harm to the person, U.S. states have a strong interest indeed in enforcing such norms. Morally, we wish to see a certain

[80] Doe v. Exxon Mobil Corp, 2006 WL 516744, at *2 (D.D.C. 2006).

[81] *Id.* In particular, the *Exxon Mobil* court was swayed by the U.S. mechanism of punitive damages, noting that U.S. state common law was "particularly appropriate to apply if the question is whether to sanction U.S. companies." *Id.*

[82] Doe v. Unocal, No. BC 237980 and BC 237679, at 5, 6 (Cal. Super. Ct. 2003).

[83] *Id.* at 8. The defendants had failed to present an expert on Burmese law, and there were no appellate decisions from Burmese courts available since 1976, and only five total reported tort cases, none of which were on point.

[84] *Unocal*, No. BC 237980 and BC 237679, at 10 (citing Wong v. Tenneco, Inc., 39 Cal. 3d 126, 135 (1985)).

[85] *Id.*

standard of conduct from companies flying under the United States flag. This expectation is also justified as a quid pro quo: for the benefits of citizenship, corporations should assume certain obligations, including the responsibility to conduct their business in a responsible way.

Numerous courts adjudicating domestic conflict-of-laws cases have recognized the interest of a forum state in enforcing certain standards of conduct among its citizens, regardless of where their conduct occurs. This is particularly true of damages cases in which the forum state has applied its own, stricter, damages rule instead of the rule of the host state where the harm arose. In *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, for example, the District of Columbia court held that "under the interest analysis approach to choice of laws . . . foreign jurisdictions have no interest in applying their law to damages issues if it would result in less protection to their nationals in a suit against a United States corporation."[86] In that case, the court applied D.C. law to a case brought by Vietnamese orphans against an American airplane manufacturer when the orphans' flight crashed in Vietnam en route to the United States. In finding that "[t]he United States and the District of Columbia have a significant interest in applying their law," the court emphasized the fact that the flight was organized by Americans, employed American equipment, and that the decision to use the airplane was made by government officials in Washington.[87]

In a similar case, the Central District of California noted that "damages limitations are intended to protect defendants from large verdicts" and as such, can be characterized as

[86] Friends For All Children, Inc. v. Lockheed Aircraft Corp., 587 F.Supp. 180, 191 (D.D.C. 1984)

[87] 587 F.Supp. at 191, *citing* Friends For All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 609-10 (C.A.D.C. 1983) (finding that the United States, rather than Vietnam, was the appropriate forum for adjudication because of the "strong national interest in the litigation and in seeing that justice is done").

"primarily local."[88] The theory is that damages rules, for one, are primarily concerned with deterrence, and the state of the defendant's citizenship or residence thus has a trumping interest in applying its own damages laws. The same may arguably be said for substantive law principles which involve fundamental norms such as intentional torts or straightforward negligence claims.

Of course, the forum state's interest is all the greater if some part of the harm arose from actions in the United States. As noted, in some cases decisions leading to the harm may be made at corporate headquarters, even if the decision is as innocuous as failing to monitor (or consciously turning a blind eye to) suspected misdeeds by sub-contractors at a company's overseas facilities. In many corporate abuse cases, the main charge is aiding and abetting liability of just this type, and U.S. states have a significant interest in regulating such activity.

The problem of multinational conduct must be addressed with some degree of political realism, recognizing that MNCs often span many jurisdictions, with operations in different countries across the globe. In many instances, decision-makers in a boardroom in California make policy judgments whose effects are felt thousands of miles away, often by disenfranchised or disadvantaged communities with no political voice.[89] In such instances, it is easy for corporate decision-makers to avoid internalizing the effects of their

[88] Marsh v. Burrell, 805 F.Supp. 1493, 1498 (N.D. Cal. 1992) (applying California law to an action brought by Dutch and British plaintiffs against a Californian defendant for assault and battery, arising from an incident in the Netherlands, when application of Dutch law would limit plaintiffs' damages award).

[89] *See* Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L. J. 399, 402 (2002) (describing a "seeming anomaly in the international system [when] the 'home' state where the parent company is based lacks the territorial jurisdiction to regulate the activities of subsidiaries located abroad, while the 'host' states in which the subsidiaries are located lack jurisdiction over the parent company where many of the crucial decisions are made. In these circumstances, the MNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order.").

conduct altogether, absent the threat of regulation. Moreover, the absence of regulation abroad may have been a motivating factor for pursuing operations overseas, where MNCs often gain significant political influence through lucrative collaborations with the government.[90] Accepting such an imbalance in regulation perpetuates structural inequalities between developing countries and developed countries–where such conduct is unacceptable–and provides a strong argument in favor of allowing adjudication of at least fundamental tort norms in the United States.[91]

While certain circumstances warrant deferring to the authority of foreign states to regulate conduct within their borders, courts must recognize the true costs of allowing such deference. Certain values can be characterized as so fundamental to notions of justice that a foreign state's failure to recognize policies based on those values should not prevent a U.S. court from taking steps to remedy the harm.

2. Foreign Affairs Doctrine and Judicial Competence

One argument frequently raised against the application of state common law to overseas harms turns on the foreign affairs doctrine ("FAD"), which holds that Congress and the federal government should be the principal determiners of U.S. policy relating to conduct and relations overseas.[92] In *Mujica v. Occidental Petroleum*, involving the aerial bombing of a Colombian village by security forces hired to protect Occidental's petroleum plant, the court dismissed plaintiffs'

[90] For example, when Unocal entered into an agreement with the Burmese SLORC to develop the Yadana pipeline, it awarded the government a 15% stake in the venture, which was estimated to bring in a revenue stream of approx. $150m per year for thirty years. See Total Report, *supra* note 9 at 5.

[91] Anderson, *supra* note 89 at 403.

[92] Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 344 (1999).

state law claims on FAD grounds.[93] The court found that California had a weak interest in adjudicating the claims of foreign plaintiffs and held that plaintiffs' claims were preempted because the case would "interfere with several . . . foreign policy goals."[94]

Defendants argued that FAD prevents the application of U.S. state law to overseas harms based on the Supreme Court's decision in *American Ins. Ass'n. v. Garamendi*, which struck down a California statute requiring insurers doing business in California to disclose the details of any and all insurance policies issued in Europe between 1920 and 1945.[95] In *Garamendi*, the court held that the California statute was implicitly preempted by the federal government's policy on repayment of insurance proceeds to Holocaust victims. Significantly, the court found "preemption" despite the absence of any Congressional action on the issue, thereby suggesting that executive action alone can preempt contrary actions by the states. In a similar decision, *Crosby v. Nat'l Foreign Trade Council*, the Supreme Court struck down a Massachusetts law imposing restrictions upon trade with Burma, finding that the statute was preempted because it interfered with a Congressional scheme having the president control foreign trade policy with Burma.[96]

There are, however, strong grounds to distinguish between *Garamendi* and cases in which a court seeks to apply traditional state common law to harms that take place

[93] Mujica, 381 F. Supp. 2d at 1187-88 (recognizing that plaintiffs' tort law claims involved an area of traditional state competence, but holding that the application of California tort law was nonetheless preempted because California did not have a strong interest in adjudicating the harms).

[94] *Id.*

[95] Am. Ins. Ass'n v. Garamendi, 539 U.S. 401, 409 (1999).

[96] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366, 379-80 (2000) (finding that a Massachusetts law imposing restrictions upon trade with Burma was preempted on the grounds that it interfered with the congressional scheme to have the President control foreign trade policy with Burma, and also because the state law imposed sanctions above and beyond those mandated by Congress).

overseas.[97] Indeed, the district court in *Exxon Mobil* explicitly rejected *Mujica*, finding that the state common law claims at issue were not preempted by federal foreign policy. Distinguishing the state common law claims from the statute at issue in *Garamendi*, the court noted, "[h]ere . . . no state government has passed any statute in conflict with U.S. foreign policy. The *Garamendi* analysis is simply not applicable here, because there is no encroachment by any state on to the federal field of foreign affairs."[98]

Unlike the statutes at issue in *Garamendi* or *Crosby*, state tort law causes of action draw on principles of general applicability, rather than specific state statutes drawn with an eye to impacting foreign affairs. The cases in question involve adjudication of a specific case using generally cognizable legal norms; an activity which is indisputably different from prescriptive action by a state legislature.

Moreover, in the majority of corporate abuse cases, neither the federal government nor Congress has articulated a state policy which could be said to "preempt" contrary action by a state court.[99] The cases involve specific disputes between private parties, and thus have at most only an indirect effect on foreign policy. Whereas the state action in *Garamendi* and *Crosby* impacted express executive agreements and (in *Crosby*) federal legislation, few if any of

[97] For a thorough critique of the *Mujica* decision presenting these arguments in more detail, see Sinan Kalayoglu, *Correcting* Mujica*: The Proper Application of the Foreign Affairs Doctrine in International Human Rights Law*, 24 WIS. INT'L L.J. 1045 (2007) (arguing that *Mujica* was wrongly decided); *see also* Celeste Pozo, *Foreign Affairs Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 VAL. U. L. REV. 591, 617 (2006) (noting that the *Mujica* court "incorrectly dismissed the remaining state law tort claims pursuant to the foreign affairs doctrine" and, by contrast, the *Exxon Mobil* court "rightly concluded that the *Garamendi* analysis was not applicable [and that] [a]bsent any federal law or treaty prohibiting such actions . . . the state law claims were permitted to go forward").

[98] Doe v. Exxon Mobil Corp., 2006 WL 516744, at *3 (D.D.C. 2006).

[99] *See* Kalayoglu, *supra* note 97, at 1062 ("[I]n *Mujica* the executive branch did not articulate a clear foreign policy interest associated with Plaintiffs' state law claims).

the private corporate abuse cases could be said to directly implicate an executive agreement or federal statute.

The State Department in recent cases has drafted statements of interest claiming that pursuit of the litigation will have an adverse impact on the foreign policy of the United States.[100] While such statements may provide arguments in favor of dismissal under the political question doctrine, it is a stretch to frame such statements as executive action preempting activity by the states in the *Garamendi* vein.

Finally, it is important to recognize that state common law cases involve an area of law traditionally entrusted to the states. In *Garamendi*, Justice Souter noted that federal policy should not automatically preempt a state's activities in its sphere of "traditional competence," but instead should be subject to a balancing test between the severity of the conflict and the "strength or the traditional importance of the state concern asserted."[101] Traditional tort doctrines such as assault and battery, wrongful death, or negligence present just such an example of traditional state competency.

Viewed in light of the relevant policy concerns—international comity, judicial competence, FAD, and fairness to the defendants—the enforcement of U.S. state tort law norms against intentional harms to persons, liberty, or property present such a fundamental part of U.S. policy that an American court should not feel concerned enforcing such norms against corporations that are subject to jurisdiction within the state. Even if U.S. courts owe deference to foreign states' internal policy decisions, they are nevertheless

[100] *See, e.g.*, Doe v. Exxon Mobil Corp., 2006 WL 516744, Docket No. 38 (letter from U.S. Dept. of State Legal Adviser William H. Taft, IV dated August 1, 2002) (stating "adjudication of this lawsuit at this time would in fact risk a serious adverse impact on significant interests of the United States"); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1169 ("On December 30, 2004, the State Department filed a Supplemental Statement of Interest indicating that it now opposes the pursuit of the instant litigation since it would severely impact this country's diplomatic relationship with Colombia.").

[101] 539 U.S. at 420.

justified in holding that such fundamental policies cannot, and should not, be waived.

D. Conflict Cases Involving Nuanced Policy Analysis

While there is a strong case for the enforcement of certain fundamental norms regardless of conflicting policy in the foreign state where the harm occurred, there are more troubling implications where the applicable norms import a nuanced policy analysis that would be better left to the host state. For example, in a negligence analysis, the application of substantive environmental or labor standards to a foreign setting creates a far greater issue of international comity. The same may be said for enforcing at least one intentional tort law norm which has proved controversial only within the United States—tort recovery for emotional harm.

From an international comity perspective, it is imperative to recognize the interest that a foreign state has in regulating the conduct of multinationals within its borders, even if the standards it applies are manifestly lower than those in the United States. There is a difference between enforcing basic tort norms and importing U.S. substantive standards wholesale into a foreign setting, where the foreign government may have adopted its own standards pursuant to a legitimate policy goal. In particular, reduced standards of liability may be part of a deliberate strategy to attract foreign investment from corporations wishing to avoid the stricter regimes of American law. We can, perhaps, question the desirability of such rules, but there is no doubt that a foreign country should enjoy some deference from American courts when it makes such a judgment call.[102]

[102] For an articulate analysis of the interests a foreign forum may have in developing its own standards about acceptable levels of risk within its borders, see Harrison v. Wyeth Laboratories, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd w.o. opinion*, 676 F.2d 685 (3d Cir. 1982) ("the impropriety of [judging the safety of an oral contraceptive pill by American standards] . . . would be even more clearly seen if the foreign country was, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. Most significantly, our two societies must deal with entirely

In cases involving more nuanced policy interests, courts should also be mindful of the fact that Congress has traditionally been reluctant to prescribe conduct extraterritorially, and courts retain strict rules of construction about when to give statutes extraterritorial effect. Although U.S. corporations acting overseas are now subject to legislation such as the Civil Rights Act and Age Discrimination in Employment Act with respect to American employees,[103] it may be telling that in relation to human rights cases, Congress has not passed legislation seeking to regulate MNC conduct overseas. The Alien Tort Statute only regulates the most offensive of abuses, and its grounding in the law of nations (rather than American law) means that it does not purport to impose *American* principles on overseas conduct at all.

Looked at realistically, imposing U.S. negligence standards extraterritorially risks placing U.S.-based multinationals at a considerable disadvantage compared with companies from other nations which do not impose such liability. While the U.S. consumer market may accommodate price increases which result from the costs of liability, international consumer markets may not be in such a strong position to absorb an increased liability premium. Imposing higher standards forces a liability premium on American goods which other companies escape and which the foreign market may not welcome, placing U.S. companies at a disadvantage in competitive markets.

While arguably disadvantaging companies on the front end, the imposition of U.S. standards would risk further disadvantage to American companies *after* harm occurs,

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different and highly complex problems of population growth and control. Faced with different needs, problems and resources in our example India may . . . give different weight to various factors than would our society, and more easily conclude that any risks associated with the use of a particular oral contraceptive are far outweighed by its overall benefits to India and its people.").

[103] *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 623(h), 630(f) (as amended 1984); Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in sections of 42 U.S.C.).

when the potential of higher liability standards and favorable damages awards may encourage plaintiffs to pursue U.S. defendants over other bad actors.[104] Although these "costs" may be a worthwhile side-effect to the worthy pursuit of ensuring good conduct by our companies overseas, such decisions turn on a difficult normative decision that may be better left to the legislature.

For these reasons, in a subset of cases courts must exercise particular caution when choosing whether to apply U.S. law to an overseas harm. Nevertheless, the class of cases presenting either (i) no conflict between the competing states or (ii) conflict involving a fundamental U.S. tort norm, creates a sphere of state law claims where applying U.S. state common law should not present a major concern.

IV. CONCLUSION

In a world where the threat of litigation can move markets, spark shareholder resolutions, and shape corporate behavior before a suit is even filed, American courts must exercise caution in determining access to U.S. courts and the application of U.S. law. Concern that MNCs are being granted free reign in host nations must be balanced against measured deference to the host nation's right to make its own policy decisions about the scope of conduct permitted within its borders. Moreover, U.S. courts must be cautious about acting in the absence of clear signals from state or federal legislators about the appropriate oversight of U.S.-affiliated companies acting overseas.

At the same time, however, there are numerous instances where U.S. courts are wholly justified in asserting jurisdiction over, and applying U.S. tort law standards to, wrongs perpetrated by U.S.-affiliated corporations acting abroad. U.S. courts have a long tradition of granting

[104] For a review of these and other arguments against imposing high standards of tort liability on U.S. companies acting abroad, see Douglas J. Besharov & Peter Reuter, *Tort Laws Hobble U.S. Business Abroad*, WALL ST. J., Oct. 28, 1985, at 22.

jurisdiction to foreign plaintiffs when alternative fora are inadequate or unavailable, and in human rights cases, this may frequently be the case. In cases where there is no conflict between the foreign law and U.S. law (or foreign law is indeterminate), long-established precedent justifies applying U.S. law as a practical substitute. Finally, in cases where foreign law and U.S. law conflict, but the U.S. law represents a fundamental tort norm such as with intentional torts, the overwhelming interest of the United States in prohibiting such conduct should outweigh rival foreign interests in leaving such conduct unsanctioned.

Viewed in terms of the key policy factors underpinning a choice of law analysis—international comity, judicial competence, foreign affairs power, and fairness to the defendant—claims where such fundamental U.S. tort norms "conflict" do not present a troubling scenario. Such norms are sufficiently important that if a foreign forum deviates from them, courts should feel comfortable asserting a compelling U.S. interest in dismissing that deviation as an unjustifiable aberration, rather than a nuanced policy analysis which merits deference and respect.

The cases examined in this Note illustrate that a substantial part of corporate abuse cases turn on such fundamental intentional torts as battery, wrongful death, false imprisonment, forced labor, and conversion. In these cases and others like them, use of a U.S. forum and U.S. state common law to reach otherwise unsanctionable conduct is a viable and appropriate tool.