2004

Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks Liable for Human Rights Abuses

Elizabeth T. Reichard

Follow this and additional works at: http://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/jil/vol36/iss1/10

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
CATCHING THE MONEY TRAIN: USING THE ALIEN TORT CLAIMS ACT TO HOLD PRIVATE BANKS LIABLE FOR HUMAN RIGHTS ABUSES

Elizabeth T. Reichard

I. Introduction

Twenty-six years ago, the South African government killed one thousand black children in what became known as the Soweto Uprising. Hector Peterson, age 13, was the first to die in the 1976 massacre. On the anniversary of Peterson's death, June 26, 2002, victims' family members filed a $50 billion lawsuit ("South African case") in a U.S. federal court against Union Bank of Switzerland ("UBS"), Credit Suisse ("CS"), Citigroup and 100 other corporations. Using the Alien Tort Claims Act ("ATCA" or "the Act"), plaintiffs assert that the defendant corporations, through the loans that they made to South Africa, enabled the South African government to commit similar human rights atrocities between 1985 and 1993. At a time when the South African government struggled financially because corporations withdrew their investments and the UN imposed trade sanctions, UBS, CS and Citigroup sustained the racist South African regime through loans to the government. Plaintiffs argue that injuries, such as torture and death squad attacks, would not have occurred had the apartheid government not been financially backed by defendant banks. Plaintiffs assert that but for the loans, the apartheid government would not have

---

1 B.A., College of the Holy Cross (1999); J.D. Case Western Reserve School of Law (2004). I would like to thank Prof. Hiram Chodosh, Michael Motolynski, and Adam Fuller for their insight and feedback on this Note. I would also like to thank my brother, Bill Reichard, for helping me identify and develop my topic. Finally, my parents, William and Patricia Reichard, merit special thanks for their support of my work with the Journal of International Law.


2 Id.


4 Alien Tort Claims Act, 28 U.S.C.A. § 1350 (2002) ("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.").

retained power during that period, and therefore the subsequent acts of torture and murder by death squads would not have occurred.\textsuperscript{6}

The South African case raises three questions regarding lender liability. First, do private banks have a legal duty not to loan money to governments that then use the capital to fund human rights violations? Second, if so, is there an adequate enforcement mechanism to hold them civilly liable for violating that duty? Finally, what goals should be accomplished through an efficient lender liability regime?

With regard to the first question, there is historically a presumption that lenders have no duty to ensure that their loans to governments are not used to promulgate human rights abuses.\textsuperscript{7} The U.S. Military Tribunal ("USMT") at Nuremberg established this presumption in its decision against Dresdner Bank Chairman, Karl Rasche.\textsuperscript{8} In that case, Rasche was charged with loaning money to the SS with full knowledge that it would be used to fund projects that used concentration camp inmates as laborers.\textsuperscript{9} The USMT held that lenders, like Rasche, are not partners or joint actors in the crimes committed by lendees, and therefore cannot be held liable for violations of international law.\textsuperscript{10}

The presumption against liability, as compelling as it is, may not withstand the scrutiny of U.S. tort law. In recent ATCA cases, federal courts have adopted international human rights norms that impose a negative human rights duty upon the private sector.\textsuperscript{11} The Ninth Circuit case, Doe v. Unocal, was the first instance where a court held a corporation to its negative duty not to commit crimes such as genocide, war crimes and slave trading.\textsuperscript{12} If the Ninth's Circuit's decision survives further judicial scrutiny, tort law will impose a negative duty upon corporations. Regardless of whether a corporation's involvement in an abuse is attenuated, liability will attach provided that it can be shown that the corporation provided "knowing practical assistance or encouragement that substantially affected the perpetration of the crime."\textsuperscript{13}


\textsuperscript{7} Ramasastry, \textit{supra} note 5.

\textsuperscript{8} Id.

\textsuperscript{9} Id.

\textsuperscript{10} Id.

\textsuperscript{11} Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (holding that individuals have a duty not to commit crimes of genocide and war crimes); Doe v. Unocal, 2002 WL 31063976 (9th Cir. 2002) (holding that corporations have a duty not to impose slave labor upon any person).

\textsuperscript{12} Doe v. Unocal, 2002 WL 31063976, at 9 (9th Cir. Sept. 18, 2002).

\textsuperscript{13} Id. at 10.
With respect to the second question about enforcement mechanisms, the ATCA currently is the only means by which victims of human rights abuses can seek civil restitution. The Act grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." Since 1980, federal courts have interpreted the ATCA so as to allow victims to bring forth suits against states, state actors, individuals and corporations for their violations of the law of nations.

Although the ATCA is the only civil mechanism available to the plaintiffs in the South African case, it is by no means an effective and reliable mechanism for holding lenders liable. Further, under current ATCA common law analysis, it remains unclear as to whether federal courts will extend liability to lenders as it has done to states and private actors. If the Second Circuit opts to extend this liability to lenders, it may stimulate backlash within the lender community and ultimately may result in injury to the cause of human rights.

What goals then should be accomplished in establishing a liability regime that acknowledges a lender's negative duty and provides an effective enforcement mechanism? This note posits three goals for establishing an effective lender liability regime. First, liability is needed to empower victims. As previously mentioned, the ATCA is the operable mechanism that victims can use to seek justice from those that violated their human rights. Second, liability is needed to promote human rights broadly. In other words, liability should be established to deter violations of human rights by making lenders accountable for their transactions. Third, the liability regime should provide clear standards of liability so that banks can engage in transactions without fear of impending liability.

This note demonstrates that lenders have a negative duty to ensure that human rights violations are not committed by lendees. The ATCA is the only effective means by which victims can hold lenders liable for breaching that duty. The liability regime outlined under the ATCA, however, is too ill defined to empower victims, adequately promote human rights, and establish bright line rules for banks lending money to governments and corporations.

Section II initiates the analysis by defining different levels of human rights duties. In particular, Section II focuses on the negative human rights duty imposed upon the private sector. This duty, though established by bodies of international law, is enforceable in the U.S. because federal courts adopted it in their interpretation of the ATCA. It is important to understand

---


the breadth of negative human rights duties because it is under this concept that liability may attach to lenders’ human rights duties.

Section III begins by describing the different levels of proximity between a corporate transaction and an alleged violation of international law. This is important because the extent to which a corporation is proximate to a violation determines whether the corporation is liable. Section III then describes the development of ATCA liability. Over the past twenty years, liability has expanded from attaching only to state actors to attaching to the private sector. This section gives an overview of that progression and synthesizes the current analysis for making private actors liable under the ATCA.

Section IV applies the ATCA analysis to the South African case. In doing so, this Section posits that it is possible for a court to find the defending banks liable under the ATCA, but procedural hurdles might ultimately interfere with making them accountable. This section then considers the consequences of attaching liability in this case.

In light of some of the consequences resulting from ATCA liability, Section V presents two alternatives to ATCA lender liability – codification of the common law standard and the creation of an international lending agreement that will provide banks with clearer guidelines for conducting lawful transactions.

II. Human Rights Duties

Integral to the debate over lender liability is the question of whether a bank has a legal duty to ensure that its loans are not used to facilitate human rights violations. This question is controversial because it would seem as if a bank’s role in human rights abuses is too tenuous. For the purpose of this Note, the analysis of a bank’s duty will be discussed within the broader context of corporate responsibility principles. Private banks, such as UBS, CS and Citigroup, are corporate entities with public shareholder ownership and thus are subject to this broad corporate responsibility discourse.

A. Positive and Negative Duties Defined

In human rights discourse, there are two types of “duties” that are correlative to human “rights” – positive duties and negative duties. Positive duties are active duties that require the “provision of essential...
services." Action is necessary to fulfill these duties. International law bestows positive duties upon governments alone, requiring them to "protect, promote and fulfill" the human rights of their citizens. Neither international law nor U.S. law imposes such duties upon individuals. In the United States, for example, it is a well-established principle of criminal and tort law that individuals do not have a duty to actively "protect" those in peril.

Negative duties, on the other hand, are passive duties that simply require the duty holder to "respect" the human rights of others. A duty holder fulfills his/her/its duty by not infringing upon the rights of others. Negative duties are universally imposed upon both public (i.e. governments) and private actors (i.e. individuals and corporations). Banks, as corporations, are subject to these negative duties insofar as their business transactions should not interfere with individuals' human rights.

B. Private Human Rights Obligation

Using these definitions, how far then does a lender's duty extend? Under a traditional concept of human rights, international law imposes a positive duty on governments alone. Individuals are not subject to this positive duty. Governments, however, are obliged not only to act in concert with human rights law, but also to ensure that private actors working within their state uphold human rights law. Presumably, governments do this by setting legal standards by which corporations and individuals should act. That said, many governments are so weak or corrupt that they "fail . . . to recognize their own primary responsibility to respect international human rights law." In forgetting their own responsibility, they fail to impose and enforce standards for the private sector.

The failure of many governments to recognize their positive human rights obligation has given rise to the imposition of a negative human rights duty upon the private sector. Under a more modern concept of human rights law, both international law and U.S. tort law impose this negative

---

17 Id.
18 Id.
20 Jungk, supra note 16.
22 Jungk, supra note 16, at 5.
23 Id. at 5-6.
human rights duty upon individuals. The American Law Institute asserts that a corporation "is obliged," or has a duty, "to the same extent as a natural person, to act within the boundaries set by law."\textsuperscript{24} Since corporations are considered individuals for juridic purposes, they too are subject to this negative duty.\textsuperscript{25}

International human rights law, while typically applicable only to governments, imposes a negative duty upon legal persons "not to violate fundamental or peremptory norms . . . sometimes referred to as jus cogens norms."\textsuperscript{26} This negative duty is built upon the premise that with every right granted to an individual there is a corresponding duty for another individual.\textsuperscript{27} The Universal Declaration of Human Rights ("Universal Declaration"),\textsuperscript{28} the International Covenant on Civil and Political Rights ("ICCPR"),\textsuperscript{29} and the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")\textsuperscript{30} are three such bodies of law that implicitly and explicitly allocate a negative duty by identifying rights that must be protected under jus cogens standards.

The Universal Declaration, for example, establishes rights that are accompanied by corresponding duties. It grants the rights to be free from slavery,\textsuperscript{31} torture and cruel or degrading treatment.\textsuperscript{32} It then allocates various duties. Article 29 asserts that "[e]veryone has duties to the community."\textsuperscript{33} Article 30 asserts that these duties do not permit any "[s]tate, group or person" to interpret the Declaration in a manner that allows it "to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth" in the Declaration.\textsuperscript{34} In other words, it is the duty of legal persons not to infringe upon the

\begin{enumerate}
\item \textsuperscript{24} American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 2.04 (b)(1) (1994).
\item \textsuperscript{26} Ramasaty, \textit{supra} note 21, at 100.
\item \textsuperscript{27} Jungk, \textit{supra} note 16, at 5.
\item \textsuperscript{31} Universal Declaration of Human Rights, \textit{supra} note 28, at art. 4.
\item \textsuperscript{32} Id. at art. 5.
\item \textsuperscript{33} Id. at art. 29 (emphasis added).
\item \textsuperscript{34} Id. at art. 30 (emphasis added).
\end{enumerate}
declared rights of individuals (e.g. the rights to be free from slavery, torture and cruel or degrading treatment).

Similarly, the ICCPR grants individuals the human rights to be free from summary execution, torture, slavery and forced labor, and arbitrary detention. Each of these rights gives rise to a corresponding duty. Article 5 explicitly allocates that corresponding duty by barring any "State group or person" from "engag[ing] in any activity or perform[ing] any act" that destroys "any of the rights" enumerated in the ICCPR.

The Genocide Convention is yet another international agreement that imposes a negative duty upon individuals. The Convention establishes genocide as a crime under international law that must be prevented and punished by the contracting parties. "Persons committing genocide," whether they are "constitutionally responsible rulers, public officials or private individuals" are punishable for violating the rights of all people to be free from genocide.

Like international legal instruments, intergovernmental agreements extend a human rights obligation to legal persons, specifically Multinational Corporations ("MNCs"). The most significant of the intergovernmental agreements are the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the Wolfsberg Anti-Money Laundering Principles for Private Banking. The OECD Guidelines, for example, assert that MNCs should "[r]espect the human

35 ICCPR, supra note 29, at art. 6.
36 Id. at art. 7.
37 Id. at art. 8.
38 Id. at art. 9.
39 Id. at art. 5.
40 Genocide Convention, supra note 30, at art. 1.
41 Id.
42 Id. at art. 4 (emphasis added).
right of those affected by their activities consistent with the host
government's obligations and commitments.\textsuperscript{47}

Unfortunately, while there exists this broad base of international law
and intergovernmental agreements that impose duties upon the individuals
and the private sector, these laws and agreements lack any force. A
"remedial gap" exists between the actual instruments and the potential
enforcement mechanisms applicable to MNCs, or banks.\textsuperscript{48} For example,
the International Criminal Court, which was established to enforce
international criminal law, provides jurisdiction over natural persons, not
legal persons (i.e. MNCs, including banks). Similarly, international
intergovernmental agreements are also unenforceable. As pieces of "soft
law," they are voluntary and unbinding.\textsuperscript{49} At most, they create an
expectation that MNCs are aware of their human rights duty and will
uphold that duty in their transactions.

U.S. tort law attempts to fill the gap between duty and enforcement
that exists in international law and intergovernmental agreements. Through
the ATCA, U.S. tort law imposes a negative human rights duty upon the
private sector and establishes an enforcement mechanism by which victims
of human rights abuses can bring a cause of action against those who
violate the "law of nations," or international law. U.S. courts, in their
application of the ATCA, have adopted the duties that correspond to the
rights enumerated in the Universal Declaration,\textsuperscript{50} the ICCPR,\textsuperscript{51} and the
Genocide Convention.\textsuperscript{52} For example, in 2002 the Ninth Circuit held in
\textit{Doe v. Unocal} that corporations can be held individually liable for
breaching their duty not to commit genocide, war crimes or slave trading.\textsuperscript{53}
Even if the corporation's involvement is removed from the alleged
violation, the duty remains if it can be shown that the corporation provided
"knowing practical assistance or encouragement that [ ] substantial[ly]
effect[ed] the perpetration of the crime."\textsuperscript{54}

\textsuperscript{48} \textit{Developments in the Law}, supra note 14, at 2033.
\textsuperscript{50} \textit{Universal Declaration of Human Rights}, supra note 28.
\textsuperscript{51} ICCPR, supra note 29.
\textsuperscript{52} Genocide Convention, supra note 30.
\textsuperscript{53} Doe\textit{ v. Unocal}, 2002 WL 31063976, at *9 (9th Cir. Sept. 18, 2002).
\textsuperscript{54} \textit{Id.} at 10.
III. Liability under the Alien Tort Claims Act

If a negative duty to uphold human rights exists for banks, then a level of proximity to the violation must also be identified so as to bar for when liability attaches.

A. Moving towards liability

The world economy is facing dramatic changes spawned by the "advances in communication and transport," the growth of multinational corporations, and the ease at which capital can move across borders. The strength of these corporations enables them to exist in one country, conduct business with many others, and involve themselves in transactions without regard to their human rights duties under international law. Victims of these breached duties are often helpless in holding corporations to their human rights duties.

The international community has developed ethical and human rights standards for corporations operating in our increasingly integrated world. These standards, however, are not supported by a civil enforcement system. A criminal enforcement mechanism exists via the International Criminal Court ("ICC"), which creates some relief for victims of human rights; however, even the ICC is incapable of punishing legal persons for violations of human rights. Further, the victims themselves do not have access to an international legal system by which they can bring forth a civil action. As a result, corporate violations go mostly unpunished.

It is for this reason that victims are increasingly filing suits under the ATCA in U.S. federal courts. The ATCA allows a non-U.S. citizen to bring a civil case against a non-citizen or citizen for certain violations of international law known as the "law of nations." While the parameters of what constitutes a violation of international law under the ATCA are vague, it remains the only practicable tool available to victims.

56 Id.
57 See infra Section II for a discussion regarding these ethical standards.
B. Origins of the ATCA

The ATCA was passed during the first session of Congress in 1789 as part of the First Judiciary Act. It "authorized civil lawsuits for money damages by those injured by violations of international law." Specifically, it granted "district courts... original jurisdiction of any civil action by an alien for a tort, committed in violation of the law of nations or a treaty of the United States." No legislative history exists to explain why the ATCA was adopted or what type of torts it was intended to address. Academics, however, proffer a number of theories as to why it was enacted. Some suggest that it was created in response to a number of scandals involving foreign diplomats. Federal courts had not been granted jurisdiction over such tort cases. These cases thus were relegated to state courts, thereby limiting the federal government’s capacity to control foreign relations. Still others posit that the ATCA was enacted because the Framers were concerned that non-citizens may be denied justice if a tort was committed against them by a U.S. citizen at home or abroad. Regardless of which theory about the legislative history is true, one thing is clear: the ATCA on its face grants federal courts jurisdiction to adjudicate cases involving tortious conduct that violates the "law of nations."

C. Reviving the ATCA

The ATCA remained dormant for almost 200 years. In 1980, however, the Second Circuit gave it new life and significance in Filartiga v. Pena-Irala. When the ATCA was enacted, the concept of "international human rights" did not exist. The Filartiga Court not only recognized "international human rights" as part of U.S. common law, but also used the ATCA as a means of holding those who violate those rights liable.

59 Stephens, supra note 55, at 210-211.
61 Kieserman, supra note 58, at 891-893.
62 Id. at 891.
63 Id. at 891-892.
64 Id. at 892.
65 Filartiga v. Pena-Irala, 630 F.2d. 876, 878 (2d Cir. 1980).
Filartiga v. Pena-Irala was brought before the Second Circuit by the sister and father of Joelito Filartiga. The Filartigas alleged that Americo Norberto Pena-Irala, the former Inspector General of Police in Asuncion, Paraguay, kidnapped, tortured and murdered Joelito Filartiga as revenge for his father's opposition to the ruling government. Pena-Irala moved to dismiss the case on the grounds that U.S. federal courts did not have sufficient subject matter jurisdiction to adjudicate a tort in violation of international law. The Court rejected this argument, explaining that the "law of nations," as referred to in the ATCA, is synonymous with international law. The Court went on to say that the Founders adopted the "law of nations" as part of federal common law, and codified it when it granted federal courts original jurisdiction over torts committed in violation of the "law of nations."

In addition to reaffirming the federal court's jurisdiction over torts in violation of the "law of nations," the Filartiga Court clarified what constitutes the "law of nations" under the ATCA. The "law of nations" today is not what it was in 1789 when the ATCA was adopted; rather, it is a body of law that evolves over time. Each time an ATCA case arises, the reviewing court must consider what the status of the "law of nations" is at that time. It will make this determination based on whether "the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords." A court will make this determination by consulting the works of jurists, national practices and/or judicial decisions.

In Filartiga, the court held that "torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties." The court did not expand the list of tortious conduct that violates the "law of nations." It did, however, authorize courts to refine and elaborate the definition on a case by case basis.

---

67 Filartiga, 630 F.2d. at 878.
68 Id.
69 Id. at 879.
70 Id. at 885.
71 Id. at 878.
72 Id. at 881, accord Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 789 (D.C. Cir. 1984).
73 See Filartiga, 630 F.2d. at 888.
74 Id. at 888.
75 Id. at 880.
76 Id. at 878.
77 See id. at 885.
D. Aftermath of Filartiga

The Filartiga decision was groundbreaking because it granted federal courts subject matter jurisdiction over violations of the "law of nations," but limited in enforcement by the ATCA interpretation adopted by the Second Circuit. It was limited because the court (1) only named torture as a violation of the law of nations, (2) said that liability for torture only arises when committed under the "color of official authority," and (3) created liability only in cases where the actual perpetrator of the tort is sued. Over the past twenty-two years, U.S. federal courts have refined and elaborated the Filartiga definition of the law of nations by expanding the human rights violations that can be adjudicated and the categories of defendants that can be sued. The following cases exemplify how the ATCA analysis has developed.

Tel-Oren v. Libyan Arab Republic was one of the first cases to emerge after Filartiga. The plaintiffs in Tel-Oren were survivors and relatives of victims killed by the Palestinian Liberation Organization ("PLO") in a terrorist rampage occurring in March of 1978. Plaintiffs alleged that the PLO with the support of the Libyan Arab Republic was responsible for the hostage taking, torture and murder of over a hundred civilians. Judges Edwards, Bork, and Robb of the D.C. Circuit unanimously held that ATCA liability did not attach to the Tel-Oren defendants; they disagreed, however, on the proper interpretation of the statute. Judge Edwards' concurring opinion has been the most influential of the three on ATCA interpretations. His analysis clarified the definition of the law of nations, defining it as a body of law that includes "a handful of heinous actions—each of which violates definable, universal and obligatory norms." He also reiterated the state action requirement defined in Filartiga. While he admitted that acts of torture violate the law of nations, the acts committed in this case did not give rise to ATCA liability because they were committed by non-state actors.

Judge Edwards' Tel-Oren opinion was given great weight in Forti v. Suarez-Mason. The Forti court adopted Judge Edwards' definition of the law of nations—norms that are "universal, definable, and obligatory

---

78 Id. at 878.
79 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
80 Id. at 776.
81 Id. at 775-776.
82 Id. at 781 (emphasis added).
83 Id. at 791.
84 Id. at 795.
international. In Forti, the Northern District of California adjudicated a disappearance case against an Argentine General. The General allegedly ordered the kidnapping of the five Forti brothers and their mother. The brothers were ultimately released, but the mother was never seen again. In its decision, the court broadened the Filartiga doctrine first by expanding the list of potential ATCA defendants to include those who ordered the crimes. It then clarified Judge Edwards definition of the law of nations, holding that in order to prove that international norms are "universal, definable, and obligatory," the plaintiff must show that there is a "general recognition among states that a specific [sic] practice is prohibited." Using this definition, the Forti court held that disappearances are among the "universal, definable, and obligatory" norms prohibited under the law of nations. The court reached this conclusion after consulting UN General Assembly resolutions defining disappearance, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and U.S. law.

The Filartiga doctrine was expanded more significantly in 1995 by the Second Circuit in Kadic v. Karadzic. The Kadic decision was groundbreaking because it expanded the categories of potential defendants to include private (non-state) actors who acted alone or jointly with a state. Prior to Kadic, courts required "state action" in order for liability to attach and was only ever imposed upon individuals acting in some state capacity.

In Kadic, plaintiffs alleged that Karadzic, the leader of the Bosnian Serbs, a de facto state, was individually and jointly responsible for genocide, war crimes, crimes against humanity, torture, and summary execution. The Second Circuit held that genocide, war crimes and crimes against humanity should be added to the list of torts adjudicable under the ATCA. The court also expanded the categories of defendants by allowing the ATCA to apply to private actors, as well as public actors, if the "international law definition of the offense indicates that the prohibition binds private parties as well as public actors." Genocide is one such crime that does not require state action. The Genocide Convention

86 Id. at 709, citing Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).
87 Id. at 707.
88 Id. at 709.
89 Id. at 709-710.
90 See id. at 710.
92 Id. at 709.
93 Id. at 710.
94 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).
95 Id. at 237.
96 Stephens, supra note 55, at 215.
prohibits all genocide, be it committed by a public or private actor.\textsuperscript{97} Torture, on the other hand, requires state action because the Convention Against Torture prohibits acts of torture committed by or with the consent of the a state official or someone acting in an “official capacity.”\textsuperscript{98} Restrictions are not placed on the individual; however, private parties may still be liable for acts such as torture if they commit these acts jointly with the state\textsuperscript{99} or in furtherance of crimes such as war crimes or genocide.\textsuperscript{100} Because the Court considered the Bosnian Serbs a de facto government, the defendant was found jointly liable for the torture committed on behalf of the state.\textsuperscript{101}

By permitting civil actions against individuals, the \textit{Kadic} Court paved the way for lawsuits against corporations, including banks.\textsuperscript{102} In the last seven years, a number of cases drawing upon the \textit{Kadic} rule have been filed by victims of human rights abuses.\textsuperscript{103} For the most part, these cases have been unsuccessful.

In the fall of 2002, however, the precedent against holding corporate actors liable began to shift with the Ninth Circuit’s \textit{Doe v. Unocal} decision.\textsuperscript{104} The Ninth Circuit, in its decision, opened the door to civil liability for corporations when it held that Unocal, a California based oil company, “may be liable” for aiding and abetting the Myanmar military in acts of forced labor, murder and rape.\textsuperscript{105} The court remanded the case, ordering the fact finder to determine if the evidence showed that Unocal, in its joint venture with the Mynar government, aided and abetted the military when it committed acts of forced labor, murder and rape as a means to protect a Unocal oil pipeline.\textsuperscript{106} While the case remains subject to further judicial scrutiny, the rule contemplated by the court in its 2002 decision may be the opening that the plaintiffs in the South Africa case need in order establish liability.

\begin{footnotes}
\item[97] Genocide Convention, \textit{supra} note 30, at art. 4.
\item[99] Stephens, \textit{supra} note 55, at 216.
\item[100] \textit{Kadic v. Karadzic}, 70 F.3d 232, 243-244 (2d Cir. 1995).
\item[101] \textit{Id.} at 244-245.
\item[103] \textit{See Unocal}, 2002 WL 31063976; \textit{In re Holocaust Victim Assets Litigation}, No. CV-96-4849; Wiwa, 226 F.3d 88.
\item[104] \textit{See Unocal}, 2002 WL 31063976.
\item[105] \textit{Id.} at 15.
\item[106] \textit{Id.} at 24.
\end{footnotes}
The Ninth Circuit held that liability will ensue for aiding and abetting the Myanmar military if it can be shown that Unocal offered "knowing practical assistance or encouragement which ha[d] a substantial effect on the perpetration of the crime."[107] "Active participation" in the crimes committed is not necessary under this test,[108] nor is knowledge of the "precise crime that the principle intends to commit."[109] All that is required is "actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist in the perpetration of a crime."[110]

In addition to establishing the aiding and abetting standard, the Unocal Court adopted the Second Circuit’s holding that private entities may be liable for committing crimes that require state action if those crimes are committed in pursuit of crimes that do not require state action.[111] In other words, Unocal may be individually liable for murder, rape, and torture—crimes that require state action in order to attach liability—if it can be shown that Unocal committed those acts in furtherance of forced labor, a crime that does not require state action.[112]

E. Modern ATCA Analysis for private actors cap P and C in these subheadings

Each of the aforementioned cases establishes and applies different tests that courts consider when applying the ATCA. By consolidating these tests, the analysis for corporate liability, or more specifically lender liability, emerges.

The threshold question that must be addressed is whether the alleged tort is a violation of the law of nations. If not, then federal courts do not have subject matter jurisdiction over the matter. As the Forti Court explained, the law of nations includes “universal, definable, and obligatory” international norms.[113] A norm is “universal, definable, and obligatory” if there is a “general recognition among states that a specific [sic] practice is prohibited.”[114] Some of the torts forbidden under the law of nations are

---

[107] Id. at 13
[108] Id. at 10.
[109] Id. at 17.
[110] Id. at 17.
[111] Id. at 15.
[112] Id.
torture, slave or forced labor, genocide, war crimes, rape, summary execution, disappearance and crimes against humanity. These torts are not exclusive however. As the Second Circuit held in *Filartiga*, international law evolves over time. As new rights are acknowledged, courts can impose new duties.

If it is determined that the alleged tort is a violation of the law of nations, then the next question that must be asked is whether the "tort requires the private party to engage in state action for ATCA liability to attach, and if so, whether the private party in fact engaged in state action." If state action is required, then the involvement must be either directly proximate or indirectly proximate under the *Unocal* aiding and abetting standard. It is under this part of the analysis that matters of proximity arise.

A private bank may be held civilly liable in three different situations. First, liability may arise if the bank directly or indirectly commits a crime that does not require state actions. (i.e. genocide, war crimes, or slavery). Second, if state action is required—as it is for crimes of torture, rape and murder—then a bank may be liable under the *Unocal* standard if it aids and abets a state actor in its commission of the violation. Third, even if state action is required and none is involved in the alleged crime, a corporation can still be liable if it committed the crime in pursuit of those crimes not requiring state action. For example, a bank would be liable if it aided and abetted in acts of torture that were committed in the process of committing genocide.

IV. Assessing private lender liability under the ATCA

The uncertain future of the *Unocal* precedent makes it difficult to determine whether a private bank might be held liable for financing human rights violations. In making its determination as to whether liability should attach, the Second Circuit should consider the proximity of the loans to the human rights violations, the reasoning behind the *Unocal* standard, procedural hurdles and the effects that liability will have on human rights and the private banking industry.

116 See infra Section IV for a more extensive discussion regarding proximity.
118 Kadic v. Karadzic, 70 F.3d at 243-244 (2nd Cir. 1995).
A. Proximity of Loans to Human Rights Violations

The South African case may very well turn on the issue of proximity. Here, the court must determine how proximate a loan must be to a human rights violation in order for liability to attach and to what extent a bank must be a joint actor in the alleged violations. The Danish Centre for Human Rights identified three levels by which a corporation, or in this case a bank, can be connected to a human rights abuse—directly, indirectly and not connected at all. The Second Circuit in the South African case is likely to consider these different levels when determining whether a lender can be held accountable for financing human rights violations.

1. Direct Proximity

UBS, CS and Citicorp will probably urge the Ninth Circuit to adopt a standard that requires private banks to be in direct proximity to the abuse committed. A private bank is directly proximate to a human rights violation committed by a state when it “knowingly assist[s] . . . in violating customary international law.” Direct proximity exists if the bank aids in the commission of human rights abuses by “participat[ing] through assistance.” In other words, it assists in the commission of the human rights violation by “agree[ing] in advance to a common scheme to participate in an unlawful act.”

If the Second Circuit adopts this analysis, it is unlikely that the defendants in the South African case will be held liable. There, the allegations appear insufficient to create a direct relationship between the human rights abuse and the lender. Direct proximity implies that the bank actually takes part in the human rights abuse. In this case, it would have to be shown that UBS, CS and Citicorp financed a specific project—one that the banks knew was designed to perpetrate a crime. For example, the banks would be directly proximate to the human rights abuses if they knowingly financed the training soldiers whose purpose was to torture those engaged in peaceful protest of the government. Essentially, knowledge is required, creating a subjective standard.

---

119 Please note that this discussion of civil law employs terms typically used in criminal law discourse. Here, terms and phrases such as “knowingly,” “aiding and abetting,” “conspiracy” and “accomplice” are used because the torts alleged are quasi criminal. Like U.S. courts and international bodies, I use these terms and phrases when assessing tort claims under the Alien Tort Claims Act and claims made under international law.

120 Jungk, supra note 16, at 10.

121 Ramasatry, supra note 21, at 102.

122 Id.

123 Sebok, supra note 19.
2. Indirect Proximity

The plaintiffs in the South African case will urge the court to adopt a standard of indirect proximity. Indirect proximity is more difficult to define than direct proximity. Generally, a private bank is indirectly proximate to a state's commission of a human rights violation when it does not directly perpetrate the crime, but benefits (1) from its joint venture with the government and (2) from the violation committed in connection with the joint venture. This is an objective standard because it looks to benefit, not knowledge. The lender may be aware that the government promulgates human rights abuses, but the connection between the loan and the abuses is tenuous.

Indirect proximity has caused U.S. courts the most difficulty in determining when and if liability should attach to a corporation that does not directly commit a tortious act. The mere fact that a corporation benefits from its joint venture with the government and the violations committed in connection to the venture are not enough to give rise to liability. An aiding and abetting standard in tort may be what is needed in order to make this determination. The D.C. Circuit developed the concept of aiding and abetting as a means of attaching liability to the indirect tortfeasor in Halberstram v. Welch. The Halberstram court held that an individual indirectly proximate to a tort may be liable for aiding and abetting if:

(1) the party whom the defendant aids ... perform[s] a wrongful act that causes an injury; (2) the defendant [is] generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant ... knowingly and substantially assist[s] the principal violation.

The key to the Halberstram test is the level at which the assistance rendered is "substantial enough." What is "substantial enough" depends on various factors, including "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind."

---

124 Ramasatry, supra note 21, at 102.
125 Id.
126 See Doe v. Unocal, 2002 WL 31063976, at 23 (9th Cir. Sept. 18, 2002).
128 Id. at 477 (emphasis added).
129 Id. at 478.
130 Id.
“Aiding and abetting” analysis may open the door to victims wanting to hold lenders responsible for funding human rights abuses. While a court has yet to hold a lender, or even a corporation, liable for their indirect proximity to violation of the law of nations, the Ninth Circuit’s 2002 Doe v. Unocal decision established an aiding and abetting standard that, if reaffirmed, may be used by victims of human rights abuses.131 To reiterate the Unocal test, the court held that a corporation whose actions are indirectly proximate to alleged crimes can be held tortiously liable if the corporation provides “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”132 This pushes the lenders to know more about the purposes of the loan and to actively inquire about the consequences of the loan, which becomes a more burdensome compliance step. Similar to the Halberstam test, this test turns on the extent to which the assistance was “substantial.” So far, no fact finder has had the opportunity to apply this standard to a set of facts, thus leaving the meaning of “substantial” ambiguous.

Anita Ramastastry, a Professor at the University of Washington School of Law, suggests that factors similar to those outlined in Halberstam v. Welch should control in ATCA cases when assessing what indirect actions are “substantial enough” for liability.133 She refined the list, asserting that liability should be imposed upon corporations depending upon how substantial:

[i]the time or duration of investment and partnership; the type of financing that is provided . . . to the government; the nature of the business relationship (e.g., highly integrated joint venture with [corporation] having substantial control versus limited business dealings in the absence of a partnership); and whether the [corporation] continues to do business with the government once it knows that there may be human right abuses associated with the investment.134

By focusing on these factors when presenting their case, the plaintiffs in the South African case might persuade the court that the loans made, while indirectly proximate to the violations, were “substantial enough” to assist in the violation.

132 Id. at 10 (emphasis added).
133 Ramasatry, supra note 21, at 102-103.
134 Id.
3. No Connection

If neither direct nor indirect proximity is found, then there is no connection to the violation. When there is no connection or proximity between the loan and the violation, liability is never imposed. This level of proximity often arises when a bank or corporation is located in a country where the government commits human rights violations, but the bank or corporation in no way facilitates those acts. In the context of the lender liability, no connection or proximity would be found in instances where a bank makes a loan to an oppressive government, and that money is used specifically to fund a legally permissible project (e.g. education or health care projects).

4. Standard for the South African Case

The standard of proximity adopted by the Second Circuit in the South African case will most likely determine whether or not liability is imposed. Defendants will argue for a direct proximity standard whereas the plaintiffs will argue for an indirect proximity standard. In pushing for an indirect proximity standard, plaintiffs have the burden of proving much more than but for causation. They must prove that UBS, CS and Citibank aided and abetted the South African government, and in doing so, their assistance was substantial in the actual perpetration of the crimes.

B. Applying the 2002 Unocal standard to the South African Case

If the Ninth Circuit maintains the Unocal aiding and abetting test, the Plaintiffs in the South African may have a strong case against UBS, CS and Citibank. To reiterate the analysis outlined above, plaintiffs first must show that the banks provided “knowing practical assistance or encouragement” to the South African government. Recall that they do not need to know the precise crime that will be committed; they only need to know that a crime “probably [will] be committed.” Next, they need to prove that the assistance or encouragement provided had a “substantial effect on the perpetration of the crime.” A “substantial effect” is found if the alleged crimes “probably would not have occurred in the same way” without the assistance or encouragement.

135 Jungk, supra note 16 at 10.
137 Id. at 17.
138 Id. at 13.
139 Id. at 12, citing Prosecutor v. Tadic, ICTY-94-2, para. 688 (May 7, 1997).
It may be possible for the plaintiffs to prove "knowing practical assistance [or] encouragement." The abusive practices of the South African police and the government's struggles with financial instability were well known during the 1980's and 90's. Plaintiffs may use these facts to prove that the banks knew that crimes "probably [would be] committed" with the loaned money.

By focusing on the factors laid out above by Anita Ramasatry, plaintiffs also may be able to show that the loans had a "substantial effect on the perpetration of the crime[s]." They will bolster their argument regarding the "substantial" connection if they can also show approximately how much money South African policing efforts cost and to what extent the government relied on outside loans for the daily functioning of the government. Such evidence would prove with sufficiency that the alleged crimes probably would not have occurred, in the same manner or to the same extent, had the money not been loaned to the government.

Clearly, the Unocal aiding and abetting standard, if reaffirmed, is flexible and seemingly applies to the South African case. Still, the test was established to apply to corporations broadly, not lenders narrowly. To date, a bank has never been held criminally or civilly liable for practically assisting a country or private actor in human rights violations. In fact, there is a presumption against holding lenders liable dating back to the Nuremberg trials. The U.S. Military Tribunal at Nuremberg held that a lender is not a "partner" or a joint actor in crimes committed by the lendee and therefore should not be held criminally liable for violating international law.

The Unocal aiding and abetting standard is the key to overcoming that presumption against lender liability. In order overcome that presumption, plaintiffs must prove more than but for causation; they must prove that the banks involvement reached the level of aiding and abetting. In doing so, they should also argue using the factors established by Ramasatry to prove that the involvement was substantial and the Filartiga precedent that urges courts to recognize the evolving nature of the law of nations. There, the argument would be that the law of nations has evolved in such a way as to

140 Id. at 13.
141 Id. at 17.
142 Ramasatry, supra note 21, at 102-103 (2002) (including the duration of the partnership, the nature of the venture and whether the relationship continued after the corporation became aware that abuses were connected to the investment).
144 Ramasastry, supra note 5 (referring to the case against Karl Rasche).
145 Id. (Litigation in the 1990s against Swiss banks for looting the assets of Jews during the Holocaust potentially could have shifted the Nuremberg precedent. These cases could have had the most precedential value in the South African case because they implicated a lender. Unfortunately, these cases settled before trial.).
give rise to causes of action against lenders as well as corporations and individuals.

C. Procedural Hurdles for Plaintiff

If Unocal survives judicial scrutiny, the precedent will create a sound legal foundation for holding financial institutions liable. Still, a number of procedural hurdles must also be overcome in order for victims' to obtain remuneration. Subject matter jurisdiction, personal jurisdiction, and forum non conveniens must first be established in order to bring forth any cause of action.

1. Subject Matter Jurisdiction

While the ATCA explicitly grants federal district courts "original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations," subject matter jurisdiction remains a hurdle for ATCA litigants. First, subject matter jurisdiction may interfere with a victim's ability to bring a cause of action if the crimes alleged are not violations of the law of nations. Federal district courts have tremendous discretion over what constitutes a cause of action under the ATCA. Federal judges' ability to interpret how the law of nations has developed imposes an "awesome duty" upon them. No matter how much the meaning of the law of nations has developed over the past two decades, federal judges still have the power to determine what is and is not a violation of the law of nations. So far, courts have held that crimes such as torture, genocide, war crimes, forced labor, disappearances and summary execution constitute violations of the law of nations. Courts have also held that crimes involving cultural genocide, environmental abuses, and restrictions on freedom of speech are not violations of the law of nations. These holdings show the tremendous discretion that federal courts have in determining what gives rise to a cause of action under the ATCA. If litigants bring forth a case against a lender alleging a tort not yet deemed a

147 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984).
part of that law of nations (e.g. trafficking of human persons), they have the burden of proving and persuading federal courts that international law has evolved in such a manner as to make it actionable under the ATCA.

The state action requirement presents a further problem for plaintiffs seeking to establish subject matter jurisdiction. Because the act of making a loan does not directly violate the law of nations, state action almost always will be required when seeking to hold a lender liable for financing human right violations. Except in instances where a private actor committed genocide, war crimes or slavery, plaintiffs do not have a cause of action against a lender that aided and abetted a private actor, rather than a state actor, that committed of crimes such as rape, torture and murder. For example, a case would be dismissed for lack of subject matter jurisdiction if a bank loaned money to private mining company that tortured those who trespassed onto the premises of the mining operation. Subject matter jurisdiction may exist, however, if the loan was made to a government owned mining company because the bank arguably acted on behalf of the state. In both instances, the crimes committed are the same, but the judicial imposition of a state action requirement limits the plaintiffs' ability to seek remuneration from a bank loaning money to a private actor.

2. Personal Jurisdiction

Establishing personal jurisdiction may also interfere with victims' claims. In order to bring forth any claim in U.S. courts, personal jurisdiction over the defendant must be established. In federal cases, personal jurisdiction can be exercised over a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." In the South African case, for example, UBS, CS and Citigroup will be subject to jurisdiction in the Southern District of New York if it can be established that state courts of general jurisdiction in New York would also have personal jurisdiction over them.

State courts of general jurisdiction provide two grounds upon which personal jurisdiction can be asserted—specific and general. Specific personal jurisdiction over a defendant exists when the lawsuit arises out of the defendant's in-state activities. ATCA claimants are unlikely to bring forth cases using specific personal jurisdiction because the torts claimed in these cases usually are committed abroad. General personal jurisdiction, on the other hand, is more likely to arise in an ATCA context. Here, courts do

---

150 See Developments in the Law, supra note 14, at 2037.
151 FED. R. CIV. P. 4(k)(1)(a).
152 Stephens, supra note 55, at 221.
153 Id. at 221.
not take into account where the alleged activities took place; rather, they look at whether the MNC is present in the forum state.\textsuperscript{154}

In the state of New York, where the South African case will be adjudicated, the Second Circuit explained that the presence requirement is satisfied if the foreign corporation is "doing business" in the state.\textsuperscript{155} To find personal jurisdiction over a defendant MNC who is "doing business," it must be engaged in "continuous, permanent, and substantial activity."\textsuperscript{156} "Doing business" is not sufficient enough to trigger personal jurisdiction if it conducted business only "occasionally or casually."\textsuperscript{157}

The "doing business" standard may present a problem in ATCA cases. While the standard does not interfere with the plaintiff's cause of action in the South African case, as UBS, CS and Citicorp all have sizeable offices in New York, it will be a problem for victims whose abuses were funded by lenders "doing business" outside of the United States. The standard limits the number of cases that can be brought under the ATCA because the only defendants that can be named are those that "do business" in the United States. Because the ATCA is essentially the only venue by which victims of human rights abuses can seek remuneration, stripping victims of their capacity to bring a cause of action on the grounds that the lender does not "do business" in the United States interferes with their ability to bring about justice.

3. Forum Non Conveniens

Once subject matter and personal jurisdiction have been established, plaintiffs face the hurdle of forum non conveniens ("FNC"). Section 1.05 of the Uniform Interstate and International Procedure Act defines FNC as follows: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."\textsuperscript{158} Accordingly, FNC is a discretionary device allowing courts to dismiss cases where subject matter and personal jurisdiction are established.

\textsuperscript{154} Id. at 222.
\textsuperscript{156} Id. at 98, citing Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., 918 F. 2d 1039, 1043 (2d Cir. 1990).
\textsuperscript{157} Id. at 95, citing Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267 (1917).
\textsuperscript{158} UNIF. INTERST. & INTERN'L P. ACT §1.05, 13 U.L.A. 377 (1968) (Withdrawn from recommendation for enactment by the National Conference of Commissioners on Uniform State Laws in 1977, 13 U.L.A. 127 (1977))
The Second Circuit in *Wiwa v. Royal Dutch Petroleum Company* synthesized the FNC standard into a two-step test. When determining whether to dismiss a case on the basis of FNC, courts first determine whether an "adequate alternative forum exists." The alternative forum need not provide the same benefits that exist in U.S. courts; it should, however, treat the parties fairly and not allow the plaintiffs to be "deprived of all remedies." If an adequate alternative forum exists, courts must then conduct a balancing test, weighing the interests that the parties have in the different fora alongside various public interest factors. Public policy factors which are often considered include: access to proof and testimony; the residence of plaintiffs; fairness to parties; administrative difficulties; and conflicts in laws. In an ATCA case, courts will also consider the burden on the victims to bring forth a suit in an alternate state and will place the burden of proof upon the defendant to "establish that an adequate alternative forum exists" and the "pertinent factors 'tilt[ ] strongly' in favor of the alternate forum.

In an ATCA case, a lender will inevitably claim FNC in order to escape liability in U.S. courts. When considering an FNC claim, the court will consider the previously mentioned factors. Where the alleged violation occurred and what alternative forum is requested will determine how much weight the court gives to various public policy factors. If, for example, the alternative forum exists in a country where the violations occurred and the victims of those violations are still in danger of human rights abuses, the court will give less weight to the defendant’s claim. However, if the alternative forum is in a country where human rights abuses no longer threaten the victims and provides a legal system that is considered fair, the court will give greater weight to the claim.

D. Positive and Negative Effects of Liability

The purposes for imposing liability upon banks for aiding and abetting human rights violations are to (1) provide legal recourse for victims of human rights abuses, (2) promote human rights, and (3) establish guidelines for banks making loans to countries and corporations with questionable human rights records. ACTA liability for banks will provide legal recourse

---

159 *Wiwa*, 226 F.3d at 100.
160 *Id.*
162 *Wiwa*, 226 F.3d at 100.
164 *Wiwa*, 226 F.3d at 100.
165 *Id.* at 106.
for victims and, to some extent, will promote human rights. It will not, however, provide banks with guidelines by which they should act, and in this way, may injure the cause of human rights.

If the South African case is successful, the ATCA will provide legal recourse for victims by providing them with a civil cause of action against those that aided and abetted the alleged violations. This is important because criminal prosecution against legal persons, or corporations, is not available on an international level and is infrequently available on a national level. Criminal prosecution is not always available on a national level because governments are reluctant, for political reasons, to exercise universal jurisdiction over these criminal cases. For example, governments may find it in their best interest to provide amnesty, rather than pursue prosecution, in order to establish a faster peace in the region. For example, in South Africa, the Truth and Reconciliation Commission granted amnesty, thus barring criminal prosecution, to those that admitted involvement in the crimes committed under the apartheid regime. Because governments are reluctant to prosecute corporate actors and the International Criminal Court bars actions against corporations, the ATCA is a necessary alternative for victims seeking empowerment under the law.

In addition to providing civil recourse, the South African case will promote to some extent human rights by subjecting the lending community to countless lawsuits with outrageous damage awards or settlements. Fear of lawsuits, like the $50 billion South African case, may cause banks to reconsider their human rights policies and cease business relations with those known to be in violation of human rights standards. In other words, the threat of liability would serve as "an indirect sanction on governments participating in human rights violations."

---

166 Engström, supra note 49, at 32 (Even with the creation of the International Criminal Court, political matters may interfere with prosecution of these cases.).

167 See Michael P. Scharf, The Amnesty Exception to the Jurisdiction for the International Criminal Court, 32 CORNELL INT'L L.J. 507, 508-509 (1999) (arguing that by providing amnesty, governments ignore their responsibility to prosecute criminals; governments, however, can offer amnesty because of the unbinding nature of international law).

168 Promotion of National Unity and Reconciliation Act, 1995 (3) SA 34 para. 3 §1(b) (S. Afr.)("The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by . . . facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act.").

169 See Developments in the Law, supra note 14, at 2041-2042 (explaining that in ATCA cases brought forward by Holocaust victims, Swiss banks settled for $1.25 billion and the German government and corporations settled for $5 billion.).

170 Engström, supra note 49, at 32.

171 Id.
While ATCA liability will provide legal recourse and promote human rights, it will not provide banks with clear guidelines for their lending practices. The ATCA, after all, relies on a "vague and evolving standard, which defines neither the bounds of acceptable action nor inaction." Federal courts, under the Filartiga precedent, have the capacity to re-interpret the human rights norms under the law of nations as standards evolve. This power to re-interpret the law of nations leaves banks susceptible to future costly causes of action. Lenders can make policy based upon what they currently know is in violation of the law of nations, but they do not have the power to predict how U.S. federal courts will interpret that law in the future.

Failure to provide bright line rules or "meaningful guidance" as to what constitutes acceptable lending practices may lead to a backlash from the lender community. This backlash may expose itself in various ways. Some banks may become reluctant to make loans to any government, regardless of whether that government is held in high esteem at the time the applications is made. Other banks may make loans, but only at inflated interest rates. Still others will engage in the process of divestment in the developing world where most of these human rights violations take place.

Developing countries have the most to lose from this potential backlash. Currently, "[d]eveloping states make up the great majority of the world's states, but they hold only a small fraction of the international capital and must therefore depend on various external sources of capital for their development." One of the largest inflows of capital into developing countries comes from capital markets investments—including equity and debt securities and bank lending. "The World Bank estimates that from 1990-1999 . . . capital markets inflow[]" into developing countries was approximately $47 billion. The loss of that money could have devastating effects on the already devastated developing world.

---


174 Kieserman, *supra* note 58, at 888.


176 Id.

177 Id. at 498-499.
V. Alternatives to the ATCA

The ATCA has proven to be an effective means for creating civil liability for human rights perpetrators; however, it nevertheless remains an unreliable tool for victims of abuses. Not only is the definition of the law of nations amorphous, but the procedural challenges facing plaintiffs make it difficult for any person or group to obtain remuneration for wrongs committed. Codification of the common law standard and the development of an international lending agreement may provide better alternatives for victims and more guidance for lenders.

A. Codification of ATCA common law

The ATCA places “an awesome duty on federal district courts” to determine what constitutes a cause of action or violation of the law of nations.\(^ {178}\) While the gradual development of the law may create a flexible standard, legal uncertainty and risk of liability may chill foreign investment.\(^ {179}\) By codifying ATCA common law and creating bright line rules about what actions give rise to liability and how proximate a joint venturer must be to attach liability, lenders will be protected from the “judicial expansion” of the “law of nations” which may potentially include “less egregious” acts.\(^ {180}\) This protection hopefully will enable lenders to continue their investments in the developing world without the fear of future liability.

But how should the ATCA be codified?\(^ {181}\) First and foremost, it should rid itself of its amorphous definition of the law of nations and enumerate specific acts prohibited under the law. The specific acts included should be those already prohibited by ATCA common law. For example, genocide, slavery and forced labor, war crimes, torture, arbitrary detention, murder, rape and enforced disappearances should be qualified as acts that give rise to a cause of action. Second, the law should be clear about the state action requirement. It should not be left to the judicial branch’s discretion to pick and choose when an act must include state action and when it does not. Finally, the law should clarify knowledge and proximity requirements by adopting an aiding and abetting standard of liability similar to the one defined in Unocal.

While there are great benefits to codification, it is not without negative effects. “[M]any judicial doctrines benefit from their common law origins,

\(^{178}\) Tel-Oren v. Libyan Arab Republic, 726 F.2d 774,781 (D.C. Cir. 1984).

\(^{179}\) But see Becker, supra note 161, at 205-206.

\(^{180}\) See Thadhani, supra note 172, at 642-643.

\(^{181}\) See Becker, supra note 161, at 202-203 (proposing possible legislation in lieu of the ATCA common law).
as opposed to being born of the legislature." Common law development allows for flexibility, changing standards and careful consideration of all of the possibilities. A more flexible standard might be necessary in lender liability lawsuits because those cases rely on the particular facts that are often "nebulous in nature." For example, in every instance alleged, there is a different extent of knowledge of and proximity to the violation alleged. Common law doctrine might be better equipped to deal with different levels of proximity and knowledge.

That said, the benefits of codification outweigh the benefits of the common law doctrine. While a flexible standard is needed, continuing investment in the developing world is needed more. Codification will enable banks to maintain their presence in the developing world without fear of impending litigation.

B. International lending agreements

Besides codifying the ATCA and its common law interpretation, it may be effective to establish an international agreement regulating loan practices. Such an agreement may not be the best means by which lenders can be held liable; however, it may prevent ATCA liability for banks in the future. This is important because as the ATCA’s common law interpretation becomes more expansive, the international community will view the Act’s extraterritorial reach as sign of American imperialism.

The international community is open to creation of codes that regulate corporate conduct. The OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the UN Global Compact, and the Wolfsberg AML Principles are just a few examples of how the states and the private sector have come together to make corporate responsibility a priority. These agreements, however, are soft law; they are non-binding. They were made non-binding because (1) it is unlikely that consensus on corporate conduct would be achieved any time soon, and (2) there was no mechanism for monitoring and enforcing compliance.

---

183 Id. at 425.
184 Engström, supra note 49, at 32-33.
185 See Foreword to Annual Report on the OECD Guidelines for Multinational Enterprises 3, (Kathryn Gordon et al. eds., 2003); see Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO Session 204, 17 ILM 422 (Nov. 16, 1977); UN Global Compact, supra note 45; Wolfsberg, supra note 46.
186 Engström, supra note 49, at 34.
Of these agreements, the Wolfsberg Anti-Money Laundering Principles provide the best model for a potential agreement regulating loan practices. The Wolfsberg Principles were not established by states, but rather by a group of leading international banks, including UBS, CS and Citigroup. The principles established set forth global anti-money laundering guidelines for international and private banks. Members of the Wolfsberg Group agree that their "bank policy will be to prevent the use of worldwide operations for criminal purposes." In order to accomplish this goal, the guidelines include "know your customers' policies" to "ensure that private banking services are only offered to clients with legitimate sources of wealth."

The Wolfsberg AML Principles are non-binding; however, they do have some force within the banking world. Members of the Wolfsberg Group, like UBS, have incorporated the guidelines into their corporate policies. UBS, in particular, has acknowledged its commitment to the principles set forth at Wolfsberg and has made "knowing your customers" an essential element to business transactions with those wishing to use the bank for private banking. If banks are willing to incorporate anti-money laundering guidelines into their corporate policy, ones that require them to expend resources so that they can "know [their] customers," then why would they be opposed to establishing the same requirements for those that apply for loans? With impending liability, it would seem that such an agreement would be in their best interest.

VI. Conclusion

It is unclear as to whether victims of torture and death squad attacks will be successful in their claim against UBS, CS and Citicorp. Through the use of the ATCA, they hope to gain remuneration from defendants for financing the South African government in its commission of human rights abuses during the 1980s and early 1990s. Relying on a "but for" standard of causation, plaintiffs argue, but for the loans, the apartheid government would not have survived as long as it did and acts of torture and murder by death squads would not have occurred.

On its face, plaintiff’s assertion that the act of making a general loan is sufficient to attach liability seems extreme. It begs the question whether a

---

187 Wolfsberg, supra note 46.
189 Wolfsberg, supra note 46, § 1.1.
190 UNION BANK OF SWITZERLAND, CORPORATE GOVERNANCE HANDBOOK 129 (2002).
191 Id.
192 Sebok, supra note 6.
private bank has a legal duty not to loan money to governments or corporations that then use the capital to fund human rights abuses. This Note demonstrated that the allegations are not extreme. Banks, like UBS, CS and Citicorp, have a negative duty not to interfere with the human rights of others. The ATCA and its subsequent case law provide an enforcement mechanism that may hold banks to that negative duty. Still, the ATCA liability regime is not wholly effective. While it empowers victims and promotes human rights, it fails to establish bright line rules for banks lending money to governments and corporations with questionable human rights reputations. Codification of ATCA common law and the establishment of international lending agreements may provide more effective alternatives for victims seeking to hold lenders accountable for facilitating their abuses.

The private sector, including the private banking industry, has a negative human rights duty under both international and U.S. law not to interfere with the human rights of others. International law imposes this negative duty through conventions and intergovernmental agreements.\textsuperscript{193} Recent ATCA cases adopted some of these duties imposed by international law.\textsuperscript{194} The Ninth Circuit case, \textit{Doe v. Unocal} is the first instance where a court actually found that a corporation has breached its negative duty not to commit human rights abuses such as genocide, war crimes and slave trading.\textsuperscript{195}

The ATCA and its common law applications therefore may provide a venue by which victims can hold banks accountable to emerging human rights obligations. Victims in the South African case resorted to ATCA liability because it stands alone as the only mechanism for victims seeking civil restitution.\textsuperscript{196} In determining whether ATCA liability will attach, courts will review the case in light of the various tests established by ATCA case law, the level of connectedness between the loan and the alleged abuse and the procedural obstacles standing in the way of a cause of action.

If the court establishes a precedent for holding private banks liability, the effects of that decision will be both positive and negative. On the one hand, liability will empower victims and promote human rights broadly. On the other hand, it may be detrimental to the cause of human rights because an ATCA standard of lender liability does not establish bright line rules needed to guide actions of the lender community. As a result, the new common law standard may chill foreign investment and deprive the developing world of funds it desperately needs.

\textsuperscript{193} See \textit{infra} Section II for discussion about negative duties.

\textsuperscript{194} Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995) (holding that individuals have a duty not to commit crimes of genocide and war crimes).

\textsuperscript{195} Doe v. Unocal, 2002 WL 31063976, 9 (9th Cir. 2002).

\textsuperscript{196} See \textit{Developments in the Law, supra} note 14, at 2033.
In order to avoid the negative effects, the United States should codify the common law standard, and the international community should establish a non-binding international banking agreement. These instruments will not only empower victims and promote human rights, but they will also provide banks with clearer guidelines by which they can engage in transactions.