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Introduction

As highly efficient economic entities, corporations are capable of generating vital economic development—but they also have the potential for inflicting devastating human rights abuses. There is tremendous profit to be made from abusive behavior, and in the absence of effective regulation, corporations often seek to maximize profit at the expense of basic rights.

The spread of economic globalization has triggered international calls to develop mechanisms to hold transnational corporations responsible for their conduct. But such entities are inherently difficult regulatory targets, with enormous economic and political strength and the ability to move assets and operations around the world. Our largely domestic legal systems are inadequate to deal with enterprises that operate on a global scale. It is difficult to conceive of effective regulation of these actors without either strengthened international oversight or coordinated domestic efforts. In the meantime, domestic litigation against corporations is one piece of the worldwide struggle to force the global economy to respect human rights.

I. Corporate Accountability

Efforts to increase transnational accountability focus both on developing legal norms that bind corporations and on identifying legal structures with the power to enforce such norms. On the international level, one combined approach utilizes treaty-based

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regimes: international agreements set standards for corporate behavior in areas such as pollution and corruption, and require individual states to enforce compliance.[1] In a parallel effort, the United Nations Human Rights Commission has drafted basic norms governing corporate human rights behavior; if adopted, compliance would be monitored through the United Nations system. Voluntary codes of conduct have also proliferated over the past few years, developed by the United Nations as well as by many individual corporations. These voluntary efforts, however, have been widely criticized for their failure to provide for enforcement.

Domestic efforts to regulate corporate behavior must first address a central aspect of the enforcement conundrum, the question of whether the legal regime of the home country—the site of incorporation—or of the host country—the site of the activities at issue—should govern. At first blush, it seems obvious that the country where events take place should have the final say as to what activities it will or will not permit within its borders. The United States, for example, dictates rules of behavior for all operations within our borders. The reality around the world, however, is that home countries usually do not have the power to regulate multinational enterprises. Unequal bargaining power leads to supremely unfair investment conditions. Moreover, multinational businesses, protected by carefully designed corporate structures, can often insulate themselves from liability in any one host country. Such entities easily take advantage of differences among legal systems, transferring operations and assets to the most favorable location—often the place where they are least likely to be held accountable. In the 1970s and 1980s, the underdeveloped and socialist countries sought to impose their host country rules on corporations doing business in their territory. These efforts included a movement in the United Nations to develop codes of corporate conduct that would have required respect for local priorities and laws and reinvestment of profits in the host countries. With the triumph of the global economy, most such host country efforts have collapsed.

Regulation by the home country thus may be a more practical

1. *See, e.g.*, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, arts. 6, 7, 32 I.L.M. 1228, 1233-34 (operator of polluting facility or waste dump liable for damage); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, 973 U.N.T.S. 4, 5 ("[T]he owner of a ship . . . shall be liable for any pollution damage caused by oil . . . .").

option. This can involve both norm enunciation and enforcement mechanisms. A detailed set of environmental, labor and human rights standards was introduced into the U.S. Congress last year.[2] The standards would have applied to all U.S. corporations accepting assistance from a number of important government programs; violators would have been denied access to this crucial public support. International norms can also be enforced through litigation, as discussed in the following sections. Such home country enforcement efforts raise sensitive issues of imposing foreign standards on weaker nations. Governments of some third world countries resent western efforts to impose higher labor and environmental standards, arguing that such regulations will cost them jobs. Activists in some of these nations reject their governments' views, however, arguing that their political leaders respond to the pressure of international business interests, not the interests of their own citizens.

Indeed, transnational corporations have become so proficient at protecting assets through complex corporate structures, and at dominating the political and legal systems of the impoverished states in which they do business, that the 1990s have seen several such states asking for access to home State courts to enforce the rights of their citizens. For example, the South African government joined South African plaintiffs in asking English courts to resolve a claim against an English company for damages inflicted on workers at its South African plant.[3] The government of Ecuador took varying positions as to litigation against Texaco for environmental damage, eventually asking the U.S. federal court to decide the case.[4] In the words of one Ecuadoran legislator, litigation against Texaco in the United States represented the only possibility of "finding just treatment" for those injured by the oil company's operations.[5]

II. Domestic Litigation: Negligence Claims

Domestic litigation must allege claims cognizable in the

2. The Transparency and Responsibility for U.S. Trade Health Act of 2001, H.R. Res. 460, 107th Cong. (2001) (introduced by Rep. Cynthia McKinney).

3. *See* Statement of Case on Behalf of the Republic of South Africa (May 26, 2000), Lubbe v. Cape PLC, 1 W.L.R. 1545 (2000) (appeal taken from Eng. C.A.) (arguing that consideration of "public interest" weighed in favor of deciding the case in England, not in South Africa) (on file with author).

4. *See* Jota v. Texaco, Inc., 157 F.3d 153, 156-58 (2d Cir. 1998) (discussing the various Ecuadoran government submissions).

5. *Id.* at 157.

particular court system, and must target defendants subject to the personal jurisdiction of those courts. Suits have been filed in several common law legal systems against domestic corporations based on environmental and negligence claims. Such actions have been brought in England, Canada and Australia, asserting negligence claims arising out of corporate activities in foreign countries, where the firm is incorporated in the forum state.[6]

Such claims are possible only when they fall within recognized causes of action such as negligence. Most legal systems will apply the law of the place where the events took place, and local laws designed to insulate repressive regimes may make it difficult to pursue cases based on human rights claims. Such claims are impossible, for example, when a national legal system does not recognize as a tort a human rights violation such as a summary execution committed by a police officer or torture in the course of interrogations. Moreover, although such domestic claims may serve as partial "surrogates" for international human rights claims, they risk losing the moral blameworthiness inherent in the formal categories of international human rights law. As noted by one U.S. judge, an international human rights violation should not be reduced "to no more (or less) than a garden-variety municipal tort."[7]

III. Domestic Litigation in U.S. Courts: Human Rights Claims

In the United States, a unique statute, the Alien Tort Claims Act,[8] permits suits based directly on violations of international law. The statute grants the federal courts jurisdiction over a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[9] The statute was originally enacted as part of the First Judiciary Act in 1789. The founders of the new nation were concerned about the international repercussions of several incidents in which the states failed to provide redress to

6. *See* Richard Meeran, *Accountability of Transnationals for Human Rights Abuses,* 148 NEW L.J. 1686 (1998) & 148 NEW L.J. 1706 (1998). The House of Lords recently rejected an effort to dismiss a series of cases in favor of a forum in South Africa. *Lubbe,* 1 W.L.R. 1545.

7. Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995). Judge Woodlock continued: "This is not merely a question of formalism or even of the amount or type of damages available: rather it concerns the proper characterization of the kind of wrongs.... In this light, municipal tort law is an inadequate placeholder for such values." *Id.*

8. 28 U.S.C. § 1350 (1994).

9. *Id.*

individuals harmed by violations of international law.[10] The statute ensured that the federal government could offer relief in such situations, by authorizing civil suits in federal courts by aggrieved aliens. Although cited in an early opinion by the U.S. Attorney General,[11] the statute was largely ignored until the Second Circuit decided the *Filártiga* case in 1980.[12] In *Filártiga,* the family of a young Paraguayan man who was tortured to death in Paraguay filed a lawsuit against a Paraguayan police officer. The district court dismissed the case, holding that the torture by a state official of that state's own citizen did not violate international law.[13] The Second Circuit disagreed, however, holding that the statute addresses violations of the law of nations as that body of law evolves over time, and concluding that torture by a state of its own citizens violated modern norms of international law.[14]

Filártiga has been followed by every circuit and district court to reach a decision on the issue.[15] The statute has been consistently interpreted as applying to acts that violate "universal, obligatory and definable" norms.[16] Thus courts have found that human rights and humanitarian law violations such as genocide, summary execution,

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10. *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish... Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 490-91, 520-24 (2000) (discussing history of ATCA).

11. 1 Op. Att'y Gen. 57 (1795) (suggesting, in response to complaint that U.S. citizens had attacked a British colony in Sierra Leone, that those injured file civil suit for damages under ATCA).

12. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

13. *See id.* at 880 (summarizing district court decision).

14. *Id.* at 881, 884-85.

15. *See, e.g.,* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied,* 121 S. Ct. 1402 (2001); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998); Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir.), *cert. denied,* 519 U.S. 830 (1996). In one decision by the D.C. Circuit, a three-judge panel rejected an ATCA claim without reaching agreement on the significance of the statute. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1003 (1985). One judge disagreed with the *Filártiga* holding, *id.* at 798-823 (Bork, J., concurring), while one agreed with it, *id.* at 775-98 (Edwards, J., concurring), and one would have dismissed the case on the basis of the political question doctrine, *id.* at 823-27 (Robb, J., concurring).

16. First articulated in *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987), this standard has since been widely accepted. *See, e.g., Martinez,* 141 F.3d 1373; *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 51-52 (1995).

war crimes and crimes against humanity, disappearance, slavery and forced labor trigger jurisdiction under the ATCA.[17] Claims have been rejected where the courts find no universal consensus as to the prohibition, including claims against private corporations for environmental harm, and claims based on expropriation of property, state contract law, fraud and free speech violations.[18]

Post-*Filártiga* cases have recognized additional categories of defendants who can be held liable under the ATCA. *Filártiga* held liable the actual torturer. Defendants in several subsequent cases have included military commanders held responsible for violations committed by troops under their command. Philippine dictator Ferdinand Marcos, for example, was held responsible for thousands of executions, disappearances and torture committed by his military forces.[19]

While all cases prior to 1995 considered violations committed by officials of recognized states, the Second Circuit decision in *Kadic v. Karadzic*[20] addressed for the first time the responsibility of nonstate actors. *Kadic* involved claims of gross human rights abuses, including genocide, torture and war crimes, against Radovan Karadzic, the head of the unrecognized Bosnian Serb regime. The regime was in de facto control of large segments of Bosnia, but was not a recognized

17. *See, e.g., Estate of Marcos,* 25 F.3d at 1475-76 (summary execution, torture, disappearance); *Kadic,* 70 F.3d at 246 (genocide, war crimes, and crimes against humanity); *Abebe-Jira,* 72 F.3d at 845 (torture); Doe I v. Unocal Corp., 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (slavery and forced labor).

18. *See, e.g., Beanal,* 197 F.3d 161 (rejecting environmental claim against corporation); Bigio v. Coca Cola Co., 239 F.3d 440, 447-50 (2d Cir. 2000) (rejecting ATCA jurisdiction over claim that defendant acquired property that had previously been expropriated by Egyptian government on basis of the owners' religion); Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997) (dismissing ATCA claim for loss of property); Wong-Opasi v. Tenn. State Univ., 2000 WL 1182827, at *2 (6th Cir. Aug. 16, 2000) (unpublished disposition) (rejecting ATCA jurisdiction over state law contract and tort claims); Hamid v. Price Waterhouse, 51 F.3d 1411, 1417-18 (9th Cir. 1995) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds are not breaches of the "law of nations" for purposes of jurisdiction under the Alien Tort Statute); Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations'").

19. *Estate of Marcos,* 25 F.3d 1467. *See also, e.g., Kadic,* 70 F.3d 232 (leader of the Bosnian Serbs held responsible for violations committed by troops); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (military commander held responsible for violations committed by troops); Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993) (same); *Forti,* 672 F. Supp. 1531 (same).

20. 70 F.3d 232.

state. Noting that international law determines *who* can be held liable under the ATCA, the court held first that the international prohibitions against genocide and certain war crimes apply to all actors, including private citizens.[21] Second, the court found that although certain international law norms govern only official action, these norms also apply to private actors who act "in concert with" a state.[22]

These two principles permit the application of the ATCA to corporate defendants. Private corporations are liable for violations of human rights norms such as genocide, slavery and war crimes that by definition apply to private actors as well as official government agents. Moreover, corporations can be held liable for violations committed "in concert with" government officials. This principle of private corporate liability under the ATCA has been upheld in a handful of preliminary decisions, although some have been dismissed on other grounds and none has yet resulted in a final judgment. In *Doe I v. Unocal Corp.*,[23] for example, the district court found that a corporation can be held liable for private acts of slavery and forced labor because the international law prohibitions apply to all actors. Similarly, in *Beanal v. Freeport-McMoRan*,[24] the district court found that a private corporation can be held liable for genocide, which by definition is barred whether committed by "public officials or private individuals."[25]

These decisions have also recognized that corporations can be held responsible under the ATCA for international law violations that require state action, such as torture and summary executions. As stated by the court in *Beanal*, "[A] corporation found to be a state

21. *Id.* at 241-43.

22. *Id.* at 245. Plaintiffs alleged that Karadzic acted in concert with the recognized government of the former Yugoslavia. The Second Circuit also held that the official action requirement is satisfied by officials of a de facto regime, noting that state action does not turn on formal recognition, but requires "merely the semblance of official authority." *Id.*

23. 963 F. Supp. 880, 891-92 (C.D. Cal. 1997), *dismissed on motion for summary judgment*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (appeal pending).

24. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 372-73 (E.D. La. 1997). In *Beanal*, however, the district court dismissed plaintiff's third amended complaint, holding that even as amended, it still did not adequately allege genocide. Beanal v. Freeport-McMoran, Inc., 1998 WL 92246 (E.D. La. March 3, 1998) (unpublished opinion), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

25. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989).

actor can be held responsible for human rights abuses which violate international customary law."[26] State action will be found when the private corporation acts in complicity with state actors; the courts apply the well developed standards of domestic civil rights cases to determine complicity.[27]

IV. The Peculiarities of Domestic Legal Systems

Each domestic legal system has its own peculiarities, with variations in the basic definitions of legal claims as well as rules of jurisdiction and procedures. As a result, civil human rights claims under the *Filártiga* model are peculiar to the U.S. legal system. In other countries, efforts to hold individuals and corporations liable for both private and official misconduct proceed along different legal tracks.[28] The line between civil and criminal actions, for example, varies widely. Many civil law systems permit private parties to initiate criminal prosecutions; in such systems, an individual harmed by a human rights violation would be more likely to file a criminal charge than a civil lawsuit. In the United States, criminal prosecutions can only be initiated by the government; despite a federal statute authorizing prosecutions for torture committed anywhere in the world, there have been no criminal prosecutions.[29]

On the other hand, civil litigation for human rights violations is decidedly more attractive in the United States in part because the Alien Tort Claims Act permits suits for violations of international law. International law, which is binding on all states, defines the claim. Thus, torture is actionable even if the laws of a repressive

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26. *Beanal*, 969 F. Supp. at 376.

27. *See, e.g., Kadic*, 70 F.3d at 245; *Beanal*, 969 F. Supp. at 374-80; *Unocal*, 963 F. Supp. at 890-91.

28. The comparative analysis in this section is developed more fully in Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. ___ (forthcoming Winter 2002).

29. 18 U.S.C. § 2340A (1994) (imposing penalties for "[w]hoever outside the United States commits or attempts to commit torture."). The U.S. government has refused to initiate prosecutions despite efforts by human rights groups to gather information on potential criminal defendants present in the United States. Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention,* 42 HARV. INT'L L.J. 141, 148-49 & n.38 (2001) (citing Interview with Gerald Gray, Executive Director, The Center for Justice & Accountability, in San Francisco, Cal. (June 5, 2000)). *See also* Coletta A. Youngers, *The Pinochet Ricochet,* NATION, May 8, 2000, at 5, 6 (discussing U.S. government refusal to initiate torture prosecution).

nation permit it. Similarly, forced labor is an international law violation even if a local legal system permits slavery or other internationally forbidden labor practices.

No other country has a statute that creates a specific statutory claim for human rights violations. Of course, as in the United States, such claims can also be brought under other civil provisions. Torture constitutes assault and battery; summary execution constitutes wrongful death. But the parallels may be incomplete, and, as noted above, the standard tort claims may pose barriers to human rights litigation. For example, in some systems, a wrongful death claim may not be possible where the military is responsible for the killing. Repressive legal regimes may permit forced labor. Individuals may be excused from responsibility for their actions, no matter how heinous, if they act under official orders. The U.S. willingness to impose *international* standards of behavior deprives human rights violators of the ability to shelter behind the repressive laws of abusive governments.

In addition, international human rights litigation is possible in the United States because of several mundane U.S. principles and practices. To begin, U.S. rules of personal jurisdiction permit litigation against individuals who are temporarily present in the United States, if they are served with a lawsuit during their stay. Thus, the federal courts were able to assert personal jurisdiction over Radovan Karadzic, who was served while in New York City on a temporary stay.[30] Foreign corporations are subject to suit when doing business in the United States, even if such contacts are a small part of their worldwide operations. As a result, U.S. courts upheld personal jurisdiction over Royal Dutch Petroleum Company and Shell Transport and Trading Company, two foreign corporations, based largely on the operations of their investor relations offices in New York.[31]

Once general personal jurisdiction has been asserted, the U.S. system does not require a finding of a connection between the events at issue and the United States. Thus, the Shell parent companies can be sued in federal court in New York for acts that took place in Nigeria. U.S. courts may dismiss human rights cases on the basis of

30. *Kadic,* 70 F.3d at 247. The *Kadic* court relied on FED. R. CIV. P. 4(e)(2), which authorizes service of process upon a person physically present in a judicial district, and *Burnham v. Superior Court of California,* 495 U.S. 604 (1990), which found personal jurisdiction based upon such service to be constitutional.

31. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94-99 (2d Cir. 2000).

forum non conveniens, if another forum is considered more appropriate. In the *Wiwa* decision, however, the Second Circuit indicated that the U.S. policy favoring international human rights accountability weighs against such dismissals, given that such suits cannot be brought as human rights claims in other countries.[32]

Many legal systems do not recognize transient jurisdiction over individual defendants, or "doing business" jurisdiction over corporations. International agreements focus on the domicile of the individual defendant, the place of incorporation of a corporate defendant, or the location of the incidents at issue in the litigation. These are the basic rules adopted by most of the countries of Europe in the Brussels Convention,[33] and the basis for an international convention currently under negotiation.[34] Under these rules, unless a defendant is sued at home, a claim can only proceed if key events took place in the forum state.[35]

Most domestic legal systems, in fact, also recognize additional grounds of jurisdiction, rules that would seem exorbitant to U.S. lawyers today. For example, several countries permit suit against an individual whose property is present in the locale—a rule known dismissively as the "Swedish umbrella rule"—that is, don't leave your umbrella in Sweden, or you may find yourself subject to suit in Swedish courts for any and all claims.[36] Similarly, French citizens may bring suit in French courts for any claim, against any defendant.[37]

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32. *Id.* at 103-06.

33. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, arts. 2 (domicile of individual or corporation), 5(3) (place of events at issue), 1990 O.J. (C 189) 1 (as amended), *reprinted in* 29 I.L.M. 1413 [hereinafter Brussels Convention].

34. *See generally* Van Schaack, *supra* note 29 (discussing the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters).

35. An important exception is provided for suits against co-defendants. Brussels Convention, *supra* note 33, arts. 6(1), 6(2). Thus, if one defendant is subject to suit in a forum, jurisdiction can be asserted against all joint tortfeasors. This rule is broader than those in place in the United States, and avoids the difficulties faced by U.S. plaintiffs who cannot find a single jurisdiction in which all co-defendants can be brought to court in a single lawsuit.

36. "The danger of leaving one's umbrella in Sweden is known the world over. For if a non-resident leaves his umbrella in Sweden, he creates the authority for a Swedish court to cast him in a personal judgment for a debt obligation in any amount." Hans Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 INT'L & COMP. L.Q. 335, 335 (1972).

37. Articles 14 and 15 of the French Civil Code assert French jurisdiction over

U.S. jurisdiction rules are not more expansive than those in other legal systems—but they happen to function in a manner that permits civil human rights litigation by aliens for events that took place in another country to proceed more easily than in other systems.

Additionally, practical litigation rules may be just as important in rendering civil human rights litigation attractive in the United States—and difficult if not impossible in other countries. Perhaps most important, most legal systems follow the "loser pays" system of attorney fees: the losing party must pay the legal fees of the winner.[38] This system has a devastating impact on novel legal claims, particularly when litigated by plaintiffs with minimal resources. None of the U.S. human rights plaintiffs could have risked filing their claims if they had faced the possibility of paying the legal fees of the defendants.

The legal costs of the plaintiffs themselves pose a significant barrier in many countries. In some systems, steep filing fees must be paid to the court before initiating litigation. In others, legal fees to one's own attorney must be pre-paid. Moreover, costly public interest litigation is possible in the United States because of a broad network of public interest law firms, supported by pro bono assistance from private firms. Such networks simply do not exist in most of the world. In addition, where collection of judgments is possible, contingency fees in the United States permit private firms to finance litigation, viewing the payment of expenses as an investment likely to reap huge profits if a human rights case is successful. In the litigation against the Estate of Ferdinand Marcos, for example, a private law firm representing the class of thousands of victims of abuses sought a contingency fee that may be over $34 million.[39]

Finally, well-known features of the U.S. legal system contribute

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any suit brought by a French national or brought against a French national.

38. JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 599, 1026 (1994) ("In most of Europe and Latin America, and much of the rest of the world, including England and Canada, the rule is that the loser pays the winner's attorney fees . . . ."). One commentator cites "loser pays" as the "[f]irst and most important[]" obstacle to human rights litigation in English courts. Michael Byers, *English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 241, 244 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

39. Teddy Casino, *Fast Forward: Poorer But Richer,* BUSINESS WORLD, Aug. 6, 1999. The huge proposed fee aroused fierce protests from some members of the class. *Id.* (quoting some class members as describing a proposal to award the class $150 million, with over $34 million in contingency fees to the legal team, as "nauseating").

to the feasibility of initiating litigation. The notice pleading system permits plaintiffs to file claims with bare bones allegations, without providing all of the details of the underlying facts.[40] Liberal discovery can then be used to flesh out the claims—with the defendants obligated to furnish all relevant information in their control.[41] Thus, a civil case can be filed based upon a reasonable belief in the allegations of the complaint, with the expectation that proof sufficient to convince a jury can be obtained in the course of discovery.[42]

These peculiarities of the U.S. legal system are both cause and effect of significant cultural differences in the way in which litigation is viewed by different societies. Many societies view the regulation of corporate behavior and the punishment of criminal behavior as the role of the government, not private citizens. Thus, French victims of a human rights violation might view regulation of the behavior of French corporations abroad as the job of the government, rather than an issue to be addressed through litigation. Reformers and activists would therefore concentrate their efforts on pressuring the government to change its policies, rather than filing a lawsuit.[43]

Moreover, human rights victims might view private civil litigation as an inappropriate response to the abuses they suffered, even as a trivialization of the grossly criminal abuses inflicted on them. "The civil process is conceived in terms of private, individualistic situations," while "[t]he criminal process effectuates the public interest . . . ."[44] Thus, the French would be less likely to utilize the tort suit as a means of making a symbolic statement, or as a means of punishing the defendant.[45] Indeed, in most legal systems, civil remedies are purely compensatory, with punitive damages permitted

40. The federal rules require only a "short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a), a requirement that allows a case to proceed based upon skeletal allegations of the key facts.

41. *See* FED. R. CIV. P. 26 (setting forth scope of permissible discovery in federal litigation).

42. *See* FED. R. CIV. P. 11(b) (requiring that attorney certify that claims are, "to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances").

43. *See* Mauro Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study,* 73 MICH. L. REV. 793, 878 n.380 (1975) (explaining the lesser rate of public interest litigation in civil law systems as resulting, in part, from "a different conception of the respective roles of legislation and adjudication in the law-making process").

44. Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry,* 6 TEMP. INT'L & COMP. L.J. 217, 269-70 (1992).

45. *Id.*

only in a handful of systems outside of the United States. Most legal systems view criminal prosecution, not civil damage awards, as the appropriate means to punish and to express a moral judgment.[46]

By contrast, in the United States, civil litigation is a generally accepted means of promoting social reform. Such "public law litigation" focuses not on private disputes, but rather on "the vindication of constitutional or statutory policies."[47] "The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy."[48] Given this legal culture, the use of civil litigation as a means of impacting human rights policies is a natural development in the U.S. legal system.

Conclusion

As a result of these fundamentally different approaches to civil litigation, and despite the excitement generated within the United States by the *Filártiga* case, international interest has been minimal until recently. But it is important to place differences in emphasis into a larger context. In the United States, civil litigation is a preferred means to further general international principles of accountability. In other legal systems, the same goals are obtained through different legal tools, including criminal cases that incorporate claims for damages. By recognizing both the similarities and differences of our approaches, we can coordinate the common effort to hold responsible both individuals and corporations who violate fundamental human rights.

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46. As Professor Merryman has explained, in many legal systems:

> [M]orally reprehensible ... actions are matters for the criminal law rather than for the civil law. In the civil trial, as a general rule, the plaintiff's recovery is limited to compensation for the loss he suffered. If the judgment of the community is going to be brought to bear on a defendant because of the moral character of his action, it must be done through the processes of the criminal law ....

MERRYMAN, *supra* note 38, at 1022.

47. Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1284 (1976).

48. *Id.* at 1302.