Santa Clara University
School of Law

Santa Clara Law
Santa Clara Law Digital Commons

Faculty Publications

Faculty Scholarship

1-1-2004

With All Deliberate Speed: Civil Human Rights Litigation as a Tool For Social Change

Beth Van Schaack
Santa Clara University School of Law, bvanschaack@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
57 Vand. L. Rev. 2305

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

With All Deliberate Speed: Civil Human Rights Litigation as a Tool For Social Change

*Beth Van Schaack**

I. ATCA-STYLE LITIGATION AS PUBLIC IMPACT LITIGATION 2308
II. THE IMPACT OF HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS 2317
A. *On Plaintiffs and Their Communities* 2318
B. *On Defendants and Potential Defendants* 2326
C. *On the Human Rights Corpus* 2334
D. *On Other Processes of Social Change* 2338
III. CONCLUSION 2347

It has been said that *Filártiga v. Peña-Irala*[1] is the *Brown v. Board of Education*[2] of human rights litigation.[3] Like *Brown*, *Filártiga* presents one of those rare "breakthrough moments" in law.[4] In *Filártiga*, the Second Circuit confirmed that victims of human rights abuses abroad could seek legal redress in United States courts under the then-obscure Alien Tort Claims Act (ATCA).[5] *Filártiga* thus inaugurated a steady line of cases in U.S. courts invoking the ATCA

---

* Assistant Professor of Law, Santa Clara University School of Law. The author has worked on a number of human rights suits in United States courts and is a legal advisor to The Center for Justice & Accountability, a nonprofit human rights law firm in San Francisco, CA. The author is grateful for the support of the School of Law Faculty Scholarship Support Fund and for the comments and insights of Carolyn Patty Blum, Sandra Coliver, Terry Collingsworth, Matt Eisenbrandt, Deena Hurwitz, Ralph Steinhardt, Beth Stephens, and Stephanie Wildman on this project. The author is also indebted to Roy Rosenthal and Kimberly Pederson for research assistance.

1. 630 F.2d 876 (2d Cir. 1980).
2. 347 U.S. 483 (1954).
3. H. H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1990-91).
4. Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1012 (1997).
5. 28 U.S.C. § 1350 (2004) (granting the federal courts original jurisdiction over "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.").

HeinOnline -- 57 Vand. L. Rev. 2305 2004

and related statutes[6] to adjudicate international human rights claims. For a variety of reasons, including the very existence of these statutes, civil litigation has emerged as a prominent means for the promotion of international human rights norms in the United States.[7]

Beyond the shared status of the two cases as legal watersheds, the analogy between these cases—and indeed the premise of this Symposium Panel—merits greater scrutiny. Accordingly, this essay meditates on the way in which *Filártiga* and its progeny simultaneously fit within, and diverge from, the model of public impact litigation inaugurated—or at least exemplified—by *Brown*. A brief summary of these cases reveals that in some respects, ATCA-style litigation is a more modest enterprise, akin to personal injury or mass tort suits involving individual victims seeking redress for violations of international norms. That said, human rights advocates share the ambitions of practitioners of "public impact" litigation in using judicial processes to transcend the dispute between individual litigants, advance a particular political cause or agenda, and produce lasting and systemic changes in countries where human rights violations occur.[8] At the same time, these cases are no longer exclusively a tactic of human rights lawyers. Members of the plaintiffs' bar, who are perhaps motivated more by the potential high stakes promised by these cases than by ideological or reform goals, are increasingly initiating such suits. Thus the diversification of human rights litigation in terms of actors, desired outcomes, and motivations resists classification as any one litigation model.

This Essay then discusses the various "impacts" ATCA-style litigation in United States can have on plaintiffs, their communities, defendants, potential defendants, the human rights movement, and other processes of social change in target countries. A necessarily impressionistic survey of the results of ATCA-style cases filed to date reveals that these impacts are most salient on the parties involved and their immediate communities. The broader impact of human

6. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2004) (providing cause of action for torture and summary execution); Anti-Terrorism Act, 28 U.S.C. § 2333 (2004) (allowing triple damages recovery for victims of terrorist acts); Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1604-07 (2004) (providing exceptions to the general rule of foreign state immunity).

7. *See* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 2 (2002) (discussing reasons for prominence of human rights civil litigation in the U.S.).

8. Paul B. Stephan, *Export/Import: American Civil Justice in a Global Context: A Becoming Modesty — U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 653-54 (2002). *See generally* Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996) (positing an evolutionary link between civil rights litigation and domestic human rights litigation).

HeinOnline -- 57 Vand. L. Rev. 2306 2004

rights litigation is more speculative, as it remains difficult to measure to what degree ATCA-style litigation has contributed to the deterrence of perpetrators and ultimately the reform of states' treatment of their citizens and others within their jurisdiction and control.

However, because confirmed first order effects remain worthy of praise and replication, this lack of empirical "proof" of broader second order effects does not undermine this effort. Indeed, practitioners of ATCA-style litigation should be wary of espousing an overabundance of objectives for this litigation, because doing so may undermine or overshadow what these cases do accomplish for individual victims of human rights abuses. Likewise, human rights advocates should not pin their hopes on achieving these broader impacts at the expense of their clients and their clients' experience with the litigation process. In any case, notwithstanding the first and second order effects that have been achieved, this Essay cautions that such litigation should not replace other forms of human rights advocacy. An overreliance on adversarial litigation, as opposed to other processes of social change, raises some of the same concerns that surface in the civil rights context about the efficacy of resorting to law and the judicial process to promote durable social change and the ability of the judicial process to address major social and economic problems.[9]

Putting these cautions to the side, several key cases are poised to offer real opportunities for victims of rights violations to obtain monetary compensation for the first time. The Supreme Court recently confirmed the jurisprudential validity of these suits, affirming the conclusions of the majority of courts to consider the issue.[10] This Essay is thus concerned with the more strategic and normative questions that remain: how do these cases advance the human rights movement's norms and ideals?[11] Should human rights

9. *See generally*, JACK M. BALKIN ET AL., WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 3-74 (Jack M. Balkin ed., 2001) (discussing *Brown's* legacy); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (discussing the struggles of racial equality from the *Plessy* era through school desegregation); ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE (1982) (discussing efficacy of using of litigation to promote social change in a number of substantive areas); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001) (exploring *Brown* and its aftermath); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (questioning impact of *Brown, Roe v. Wade*, and other Supreme Court cases on social change).

10. Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2761-62 (2004) (allowing suits involving violations of norms "of international character accepted by the civilized world and defined with . . . specificity").

11. This Essay assumes the existence of a "human rights movement" with shared and identifiable goals and strategies. To be sure, the movement is not monolithic. However, a core of

advocates promote an increase in ATCA-style litigation in the United States? Should advocates encourage the adoption of similar statutes abroad? How can ATCA practitioners ensure that these cases exert the maximum impact—on parties and beyond? As the potential for human rights enforcement in the classical sense becomes real, civil cases in U.S. courts will increasingly join other domestic and international institutions in their efforts to ensure comprehensive accountability for human rights abuses, develop enforceable human rights norms, provide redress for victims, and ultimately reform human rights conditions around the world.

I. ATCA-STYLE LITIGATION AS PUBLIC IMPACT LITIGATION

"Public interest" litigation typically displays two paradigmatic forms, each with its own objectives and strategies: direct client advocacy and public impact litigation.[12] Direct client advocacy prioritizes the needs of a given client as the primary focus of the provision of legal services. In contrast, *Brown* and its progeny exemplify the public impact model, which seeks to use legal tools and the legal process to achieve more systemic change and advance broader goals than the resolution of a discrete dispute between two parties.[13] Many ATCA-style cases can be situated along a continuum linking these two approaches, with different cases exemplifying characteristics of the two models. Additionally, some of the most recent ATCA-style cases cannot realistically be characterized as either form, instead adhering to a private law model of mass tort litigation.[14]

---

human rights NGOs and activists/lawyers have committed themselves to ensuring the fulfillment and enforcement of the corpus of human rights norms set forth in the Universal Declaration of Human Rights and subsequent multilateral instruments and conventions. Anti-impunity has become an increasingly important component of this movement.

12. Karen L. Loewy, Note, *Lawyering For Social Change*, 27 FORDHAM URB. L.J. 1869, 1869-70 (2000) (citing Preface to Symposium, *Political Lawyering Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996)); Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 294-95 (1993-94). Activists have identified a third strategy of "rebellious lawyering" focusing on community organizing and empowerment. *See* William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 465 (1994) (distinguishing empowerment lawyering from other forms of public interest lawyering).

13. *See* Abram Chayes, *The Role of The Judge In Public Law Litigation*, 89 HARV. L. REV. 1281, 1291-95 (1976) (calling attention to this new species of litigation).

14. *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 422 (1999) (noting that mass tort litigation is not typically brought to seek the reform of public, or even quasipublic institutions, but involves private parties alleging private harms and invoking state, rather than federal or constitutional, law).

HeinOnline -- 57 Vand. L. Rev. 2308 2004

While *Filártiga* itself was a test of the modern applicability of the ATCA, the path of ATCA litigation has not exhibited the same level of coordination that marked the desegregation litigation leading up to and later heralded by *Brown*.[15] Indeed, rather than proceeding through a series of strategic test cases, ATCA litigation has evolved more organically and opportunistically. This is due in part to the cases' tort character; although potential plaintiffs abound,[16] constitutionally grounded principles of personal jurisdiction require at least the transient presence of a defendant. In addition, litigation is party-driven, without national or international oversight,[17] so the direction this line of precedent has taken is not readily subject to control. Although several key nongovernmental organizations (NGOs) and affinity groups routinely engage in ATCA-style litigation,[18] and

---

15. *See* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470, 473 (1975) (discussing the NAACP's strategy of using exemplary case litigation to combat racial segregation); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1228 (2003) (discussing NAACP's litigation test case strategy); *see also* Loewy, *supra* note 12, at 1881 (2000) (describing ACLU's test case strategy).

16. It has been estimated that there are thousands of survivors of torture and other human rights abuses in the United States. Mary Fabri, *Torture and Impunity: Legal Recourse May Lead to Healing*, 16 TRAUMATIC STRESS POINTS 2 (2002), *at http://www.istss.org/publications/TS/Spring02/index.htm* (last visited Nov. 8, 2004). Nonetheless, many potential plaintiffs will decline to participate in litigation because they fear retaliation against themselves or family members who remain in their home country, or because they are concerned that litigation will be too emotionally draining or outcomes too uncertain.

17. Harvey Rishikoff, *Framing International Rights with a Janusism Edge — Foreign Policy and Class Actions — Legal Institutions as Soft Power*, 2003 U. CHIC. LEGAL F. 247, 273-74 (2003).

18. The Center for Constitutional Rights (CCR) inaugurated this field with the *Filártiga* case. According to its mission statement:

> CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, to train the next generation of constitutional and human rights attorneys, and to strengthen the broader movement for constitutional and human rights.

Center for Constitutional Rights, About, Our Mission, *at* http://www.ccrny.org/v2/about/mission_vision.asp (last visited Feb. 6, 2005). Similarly, the Center for Justice and Accountability is devoted to bringing ATCA-style cases in order to "deter torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable." Center for Justice and Accountability, About CJA, Mission, *at* http://www.cja.org/aboutCJA/aboutCJA.shtml (last visited Feb. 6, 2005). In addition, certain "cause" NGOs have begun to incorporate ATCA-style litigation into their issue-specific strategies. Examples include the International Labor Rights Fund, whose mission statement explains that the organization promotes the "enforcement of labor rights internationally through public education and mobilization, research, litigation, legislation, and collaboration with labor, government and business groups." International Labor Rights Fund, About ILRF, *at* http://www.laborrights.org (last visited Feb. 6, 2004). Likewise, EarthRights International seeks to combine "the power of law and the power of people in defense of human rights and the environment, our earth rights." EarthRights International, About ERI, Mission, *at* http://www.earthrights.org/about/

seasoned ATCA lawyers regularly collaborate on cases, no one NGO has coordinated this litigation in the centralized way that the NAACP's Legal Defense Fund (LDF) was able to direct the desegregation litigation.[19]

ATCA-style litigation comes in three primary forms: actions against individual perpetrators, actions against corporations doing business in countries where human rights abuses are occurring, and actions against U.S. government officials or employees involving alleged abuses in or attributable to the United States. Although an important goal of civil human rights litigation is the reform of abusive government practices, principles of foreign sovereign immunity have prevented most suits against repressive governments from proceeding in a direct manner (unless one of the narrow exceptions to immunity

---

mission.shtml (last updated Feb. 6, 2005). The following NGOs have also engaged in ATCA-style litigation: Global Exchange (http://www.globalexchange.org), the Asian Law Caucus (http://www.altrue.net/site/alc/section.php?id=3007), Judicial Watch (http://www.judicialwatch.org/cases.shtml), and Sweatshop Watch (http://www.sweatshopwatch.org/swatch/marianas/lawsuit.html). Other human rights organizations have at times supported litigation here and abroad, but generally do not bring cases. For example:

> Human Rights Watch researchers conduct fact-finding investigations into human rights abuses by governments and non-state actors in all regions of the world. . . . By exposing human rights violations, this publicity shames abusers and helps to put pressure on them to reform their conduct. Human Rights Watch seeks dialog with offending governments to encourage them to change abusive laws and policies.

Human Rights Watch, About HRW, Some Frequently Asked Questions About Human Rights Watch: How Do You Do Your Work, *at* http://www.hrw.org/about/faq (last visited Feb. 6, 2005). Likewise, Amnesty International "seeks to disclose human rights abuses accurately, quickly and persistently. It systematically and impartially researches the facts of individual cases and patterns of buman rights abuses. These findings are publicized, and members, supporters and staff mobilize public pressure on governments and others to stop the abuses." Amnesty International, About AI, Statute of Amnesty International, 3. Methods, *at* http://web.amnesty.org/pages/aboutai-statute-eng (last visited Feb. 6, 2005). And, the mission of Human Rights First, formerly Lawyers Committee for Human Rights, is to "support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad." http://www.humanrightsfirst.org/about_us/about_us.htm (last visited Nov. 5, 2004). Many of these latter organizations fear that becoming involved in litigation will jeopardize their ability to conduct fact-finding missions overseas or refrain from litigation on the grounds that it is being pursued by other groups. Law school human rights clinics may also initiate suits or work with NGOs on cases. *See generally* Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003) (cataloging work of law school human rights clinics).

19. The bringing of strategic criminal cases in Europe through the *partie civile* process (which allows victims of crime to initiate criminal proceedings) and pursuant to the principle of universal jurisdiction may manifest a greater degree of coordination than civil litigation in tbe United States. *See* Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 2-3 (2001) (describing advocacy network developed in Europe to pursue universal jurisdiction cases).

HeinOnline -- 57 Vand. L. Rev. 2310 2004

applies).[20] Thus, ATCA-style litigation must proceed more indirectly against individual defendants who do not benefit from other forms of immunity, such as head of state or diplomatic immunity, or who as private actors are amenable to suit.[21] The first ATCA cases generally proceeded against individual defendants hailing from defunct, pariah or politically unimportant regimes.[22] Recently, however, plaintiffs' lawyers have become more ambitious in their targets, pursuing sitting heads of state[23] and other high government officials hailing from U.S.-allied nations or strategically important regimes.[24]

In the second class of cases, plaintiffs have filed a number of cases against multinational corporate entities (MNCs) typically engaged in resource extraction or offshore production (either directly or through wholly-owned subsidiaries) in states where human rights abuses are prevalent. The apparent viability of the corporate cases provoked a number of NGOs concerned with environmental and labor rights to add ATCA litigation to their advocacy tactics.[25] Some such cases involve allegations that the corporations engaged, or continue to engage, in rights abuses directly.[26] Others attempt to hold corporate

---

20. *See* Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1602 et seq. The FSIA withholds immunity to certain designated states for suits involving claims of money damages for acts of torture, extrajudicial killing, or terrorism. 28 U.S.C. § 1605(a)(7) (2004).

21. The case against Radovan Karadzic, the self-proclaimed leader of a rogue Serbian state, paved the way for ATCA cases against corporate defendants. In *Kadic v. Karadzic*, the Second Circuit confirmed that private actors could be held liable for certain international law violations. 70 F.3d 232, 236 (2d Cir. 1995) ("We hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor.").

22. Cases have been brought against several individuals hailing from former dictatorships. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (case involving former prisoners in Ethiopia against official of former Ethiopian government); *Kadic*, 70 F.3d at 236 (case against the self-proclaimed leader of "Republika Srpska," the Serb Republic in Bosnia-Herzegovina); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Ca. 1987) (action against a former general by Argentine citizens currently living in the U.S. for injuries committed by subordinates under the general's authority and control); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996) (case against Ghanaian officer).

23. *See, e.g.*, Tachiona v. Mugabe, 169 F. Supp. 2d 259, 265-68 (S.D.N.Y. 2001) (dismissing suit against President of Zimbabwe and other sitting officials on immunity grounds, but granting default judgment against the President's political party), *rev'd* 386 F.3d 205 (2d Cir. 2004) (finding that individuals entitled to diplomatic immunity were not proper agents for service of process for political party).

24. *See, e.g.*, Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000) (case against Chinese Politburo members and others).

25. *See supra* note 18.

26. *See, e.g.*, Arias v. DynCorp, No. 01-01908 (D.D.C. 2001) (alleging that the company unlawfully sprayed poisons on farmers in Colombia and Ecuador).

actors liable for the abuses of foreign governments through theories of complicity, joint action, and agency.[27]

With respect to the third class of case against U.S. agents or officials, ATCA-style litigation has rarely provided the opportunity to "engineer"[28] the kind of domestic institutional reform agenda pursued by other public impact litigation,[29] such as *Brown* and its progeny.[30] In a virtually extinct line of cases targeting past and present U.S. government officials in an effort to influence U.S. foreign policy, courts have been close to unanimous in ruling that such suits are barred by sovereign immunity doctrines or raise nonjusticiable political

27. *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880, 883-84 (C.D. Cal. 1997) (alleging company in joint venture with Burmese autocracy was jointly liable for governmental abuses committed in connection with pipeline project).

28. MARK TUSHNET, MAKING CIVIL RIGHTS LAW 6 (1994) (noting civil rights pioneer Charles Hamilton Houston's description of civil rights litigation as "social engineering").

29. Thus, these cases may never entirely achieve Professor Chayes's vision of "public law" litigation with its attendant dialogues between the courts and state bureaucracies to effectuate constitutional values. Chayes, *supra* note 13, at 1282-83; Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

30. Suits involving abuses by United States government officials or employees can proceed under other statutory schemes designed specifically for this purpose. For example, suits alleging the perpetration of international torts by U.S. government employees or officials generally proceed under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b), 2671-2680 (2004). The FTCA provides an exclusive remedy for tort claims for personal injury or death against a government employee acting within the scope of his office or employment (except for intentional torts committed by agents other than law enforcement agents), with the government substituted as defendant. Alvarez-Machain v. United States, 331 F.3d 604, 631-32 (9th Cir. 2003). In *Alvarez*, for example, the plaintiff's ATCA claims against U.S. agents for arbitrary detention were converted to FTCA claims. *Id.* However, the plaintiff's claims under the ATCA against a Mexican national involved in the incident at the U.S. Government's behest, but deemed not to be a government employee, proceeded to a bench trial and resulted in a $25,000 judgment for the plaintiff. The Supreme Court recently reversed on other grounds. Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2746 (2004). Cases against U.S. officials involving constitutional violations proceed under 42 U.S.C. § 1983 or as *Bivens* actions. Likewise, the Supreme Court suggested that the ATCA would provide a remedy for individuals detained and mistreated in U.S. detention centers in Guantanamo Bay and elsewhere. Rasul v. Bush, 124 S.Ct. 2686, 2693-94 (2004).

HeinOnline -- 57 Vand. L. Rev. 2312 2004

questions.[31] However, suits may proceed to the extent that private actors are working in conjunction with U.S. government agencies.[32]

The first generation of individual ATCA-style actions was initiated by lawyers affiliated with nonprofit human rights organizations, or lawyers working pro bono, who were inspired by the tradition of using legal tools to advance morality-driven goals.[33] At the outset, these legal pioneers sought to establish the ATCA as a tool for the enforcement of human rights norms and to gain judicial elaboration of the scope of those norms. Although ostensibly tort disputes seeking retrospective relief,[34] obtaining an executable judgment was often a secondary goal of this litigation. Indeed, most of the cases' damage awards were issued by default and/or are unenforceable—"a teasing illusion like a munificent bequest in a pauper's will."[35] Nonetheless, the cases exposed the presence of alleged abusers within the United States,[36] created an opportunity for norm enunciation, and achieved, at a minimum, a symbolic denunciation of abuses. Many ATCA-style cases involving individual victims exemplify the client advocacy approach to litigation, with practitioners intent on providing their clients with a meaningful experience through civil litigation as a form of psychosocial rehabilitation. Other cases, by contrast, are more defendant-oriented and are thus geared toward exposing both the abuses and the

31. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (claims by Nicaraguans, members of Congress, and two American citizens challenging United States policy in Nicaragua dismissed on political question grounds, sovereign immunity grounds, and for lack of pendant jurisdiction); De Arellano v. Weinberger, 788 F.2d 762, 764 (D.C. Cir. 1986) (suit to enjoin operation of regional military training center for Salvadoran soldiers on Honduran ranch dismissed by the district court on political question grounds and affirmed for failure to state a claim for which relief can be granted); Saltany v. Reagan, 702 F. Supp. 319, 321 (D.D.C. 1988), *aff'd* 886 F.2d 438 (D.C. Cir. 1989) (suit dismissed on immunity grounds for U.S. bombing damage in Libya); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1338-40 (S.D.N.Y. 1984), *aff'd* 755 F.2d 32 (2d Cir. 1985) (dismissing case seeking to enjoin movement of U.S. cruise missiles in Great Britain on political question grounds).

32. For example, suit was recently filed against two private contractors regarding alleged abuses in detention centers in Iraq. Complaint, Al Rawi v. Titan Corp., (S.D. Cal. Filed June 4, 2004) *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/Al_Rawi_v_Titan_Complaint.pdf.

33. Loewy, *supra* note 12, at 1876.

34. Chayes, *supra* note 13, at 1282-83 (cataloging characteristics of traditional private law litigation).

35. Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

36. Amnesty International and others have estimated that there may be upwards of one thousand human rights abusers in the United States. Sandra Coliver, *Human Rights Accountability: Impact of Tort Cases Against Individual Perpetrators*, ALTERNET (Nov. 10, 2003), *at* http://www.alternet.org/story/17151/.

perpetrators to public scrutiny and opprobrium.[37] Human rights advocates have generally cheered these strategies and results, although a few detractors have denounced this endeavor as nothing more than ideological theatre.[38]

As ATCA jurisprudence became more established and courts confirmed that corporations could be sued for human rights abuses, the statute was "discovered" by plaintiff-side lawyers more accustomed to bringing shareholder derivative actions and mass tort litigation through the class action mechanism.[39] These practitioners have filed a number of cases against corporate entities amenable to suit in the United States, some on the heels of individual actions involving similar claims and with the benefit of their predecessor's factual investigations and legal briefing.[40] The arrival of these legal

---

37. For example, Toto Constant, the head of the Haitian paramilitary organization FRAPH, was recently sued in the Southern District of New York after a long campaign to secure his deportation. *See* http://www.cja.org/cases/Constant.shtml.

38. *See* wa Mutua, *supra* note 8; Lutz & Sikkink, *supra* note 19, at 7 (arguing that human rights cases brought in U.S. have had little impact in countries where abuses occurred and provide little more than "symbolic benefits" for plaintiffs).

39. A number of class action and plaintiff-side firms have recently engaged in litigation alleging international human rights violations under the ATCA. These include, for example, Milberg Weiss Bershad & Schulman LLP Practices, Human Rights, Overview (representing victims in Holocaust litigation and the parents of Nigerian children allegedly administered experimental drugs without consent, *Abdullahi v. Pfizer Inc.*, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 16, 2002), *vac'd and remanded*, 77 Fed. Appx. 48 (2d Cir. 2003)), *at* http://www.milbergweiss.com/practice/practicedetail.aspx?pgid=808 (last visited Feb. 6, 2005); Cohen, Milstein, Hausfeld & Toll, Our Practice Areas, International Human Rights (representing class of former comfort women suing Japan, Indonesian villagers abused by security forces employed by Exxon Mobil, and South African NGOs seeking compensation from U.S. companies who did business with the apartheid regime), *at* http://www.cmht.com/humanrights.html (last visited Feb. 6, 2004); McCallion & Associates, LLP, Practice Areas: International Human Rights (representing victims suing Union Carbide for Bhopal incident (*In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986)), *at* bttp://www.mccallionlaw.com/litigation_pgs/practice.html (last visited Nov. 8, 2004); Berger and Montague, PC, Practice Areas, Civil/Human Rights Litigation (representing WWII victims in cases against Swiss and other banks (*In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), *aff'd*, 225 F.3d 191 (2d Cir. 2000)); a class of Sudanese citizens suing a Canadian oil company accused of acting in complicity with the repressive Sudanese government (Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003)); a class of victims from Nigeria suing Royal Dutch Shell), *at* http://www.bergermontague.com/civil-human-rights-litigation.cfm (last visited Feb. 6, 2005); Fagan & Associates (representing class of apartheid victims against corporations doing business in South Africa); Hagens Berman LLP, Current Cases, Rio Tinto Litigation (representing class in suit against a mining company active in Papua New Guinea (Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002)), *at* http://www.hagens-berman.com/rio_tinto_lawsuit (last visited Feb. 6, 2005).

40. For example, individual plaintiffs brought suit against Royal Dutch Shell and others in connection with the company's oil extraction operations in Nigeria. Wiwa v. Royal Dutch Petroleum Co., 1998 U.S. Dist. LEXIS 23064, at *1-3 (S.D.N.Y. Sept. 25, 1998), *rev'd in part and aff'd in part,* 226 F.3d 88 (2d Cir. 2000). After plaintiffs had successfully defended against several motions to dismiss on personal jurisdiction, *forum non conveniens*, and other grounds, a

entrepreneurs marks the departure of ATCA-style litigation from the exclusive domain of *pro bono* and NGO litigators.

Human rights lawyers have greeted these new entrants with ambivalence. On the one hand, activists are encouraged that the jurisprudence is robust enough to attract attorneys with pecuniary motivations and welcome the increased pressure on MNCs to reform their overseas practices in keeping with human rights standards. On the other hand, they recognize the potential for ill-founded cases to create "bad law" and for other goals of the movement to be undermined where counsels' objectives, priorities, and tactics may diverge dramatically from those of human rights lawyers.[41] A promising response to this tension can be found in attempts by career human rights lawyers and NGOs to partner with members of the plaintiffs' bar. Under this division of labor, the activists provide the expertise in client relations, knowledge of the relevant norms, contacts on the ground, client relationships, and political pull. The firms provide the familiarity with the class action device and the resources to ensure some measure of equality of arms vis-à-vis corporate adversaries.[42]

---

class action was filed by class action attorneys Berger & Montague, P.C. against the company. Kiobel v. Royal Dutch Petroleum, Case No. 02 Civ. 7618. For information on the case, see MOSOP OGONI, *Shell in Ogoni Class Action Lawsuit* (March 2003), *at* http://www.nigerdeltacongress.com/sarticles/shell_in_ogoni_class_action_laws.htm. Likewise, in *Jama v. United States I.N.S.*, a law school clinic with pro bono attorneys brought suit on behalf of individual asylum seekers who alleged that they had been subject to abuse (including torture and abject living conditions) in detention centers administered by private contractors hired by the then INS. 22 F. Supp. 2d 353 (D.N.J. 1998). Several years later, a personal injury firm, Ressler & Ressler, filed a class action, certified pursuant to Rule 23(b)(3), on behalf of all detainees in the same facility. DaSilva v. Esmor Correctional Services Inc., 215 F.R.D. 477, 478-81 (D.N.J. 2003) (recounting procedural history); Ressler & Ressler, Significant Practice Areas, Class Actions and Mass Torts, (noting the certification), *at* http://www.resslerlaw.com/class_actions.htm (last visited Feb. 5, 2005).

41. For example, in the cases involving the detention of asylum seekers, class and defendants' counsel, without consulting counsel for the individual actions, agreed upon a notice plan, whose design and implementation soon proved to be unrealistic and unworkable. *See DaSilva*, 215 F.R.D. at 483 (rejecting postponement of an opt out election based on difficulty of delivering notice to immigrants being held for deportation). When the individual plaintiffs attempted to opt out of the class, class counsel and defendants' counsel resisted, demanding that the individual plaintiffs litigate their claims within the context of the class action. *Id.* In particular, defendant Esmor Correction Services argued that allowing the individual plaintiffs to opt out would jeopardize any settlement of the class action. *Id.* Although the reported opinion does not address the issue head on, the case contains whiffs of collusion between defendants' and class counsel concerning the notice plan and any potential settlement of the action. *Id.* at 484. The court allowed the individual actions to proceed, in part based upon the plaintiffs' extensive investment in the case, but also, it appears, because the court recognized that counsel for the individual actions were monitoring class counsel in the way that the ostensible class representatives could not. *Id.* at 484-85.

42. For example, the International Labor Rights Fund (ILRF) has partnered with asbestos and tobacco litigators Provost & Umphrey Law Firm LLP to sue Coca-Cola over rights abuses by

Nonetheless, the proliferation of lawyers involved in ATCA-style litigation has given rise to concerns about coordination and oversight. Given the indeterminacy of the ATCA's reach and the weak constraints on initiating suit, activists and entrepreneurs of various stripes have seized on the statute's potential to serve as the basis for suit for any number of grievances that may be styled as "torts in violation of international law."[43] Thus, in certain instances, the statute has become a vehicle for advocacy groups to advance their more narrow political agendas through cause-based litigation[44] or for plaintiffs' attorneys to pressure deep-pocketed defendants.[45] To date, the courts have proved themselves capable of rigorously evaluating the underlying claims[46] to ensure that they are grounded in international law[47] and are consistent with domestic and international law immunity principles. Even where unmeritorious ATCA-style cases are disposed of by the courts in the same way that they dispose

---

its bottlers in Colombia. International Labor Rights Fund, *Colombian Plaintiffs File Amended Complaint Against Coca-Cola* (Apr. 16, 2004), *available at* http://www.laborrights.org/press/coke_amended_0404.htm.

43. *See, e.g.*, http://www.fofg.org/ourwork/our_work_story.php?doc_id=457 (noting suit for genocide against President Jiang Zemin).

44. *See* Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 481 (2002) (discussing use by Falun Gong practitioners of the ATCA to sue high ranking Chinese officials whenever they travel to the United States).

45. For example, a controversial set of cases was filed recently against multiple corporate defendants seeking to hold them liable for complicity in apartheid by virtue of their doing business in South Africa during the apartheid era. *See In re* South Africa Apartheid Litigation, Memorandum Opinion and Order, 02 M.D.L. 1499, 2004 U.S. Dist. LEXIS 23944 (S.D.N.Y. November 29, 2004) (dismissing case on multiple grounds, including inadequate theory of liability); *see* also Jonathan Birchall, *The Limits of Human Rights Legislation*, THE FINANCIAL TIMES LTD., Jan. 20, 2005, at 13 (noting that the apartheid case did not have wide support of the U.S. human rights community and was "widely expected to face rapid dismissal.").

46. *See* Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 487-88 (2001) (noting that courts have weeded out cases alleging inappropriate claims).

47. For example, courts have rejected claims for relief when the action giving rise to the suit was related to commercial endeavors. *See, e.g.*, Bigio v. Coca Cola, 239 F.3d 440, 455 (2d Cir. 2000) (rejecting claims based on fraud and breaches of fiduciary duty); IIT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (declining jurisdiction over an action for fraud, conversion, and corporate waste); Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142, 145 (7th Cir. 1973) (rejecting claims based on contractual rights); Valanga v. Metropolitan Life Ins., 259 F. Supp. 324, 327 (E.D. Pa. 1966) (finding that commercial torts, such as interference with contractual relations, do not qualify for universal enforcement); De Wit v. KLM Royal Dutch Airlines, N.V., 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (finding no subject-matter jurisdiction based on breach of contract and corporate tort claims). *See also* Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (finding free speech violations do not rise to the level of a law of nations violation); Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997) (finding that a foreign sovereign's expropriation of property does not violate any universal norm under international law).

HeinOnline -- 57 Vand. L. Rev. 2316 2004

of other weak cases that come before them, the notoriety of several high profile suits has nonetheless given rise to a perception that ATCA-style litigation is proceeding without adequate limitations, increasingly motivated by less than meritorious impulses, interfering with U.S. foreign relations and trade opportunities, and, accordingly, is less worthy of approbation. Further, cases advancing weak or frivolous claims may threaten to trivialize more worthy cases. Pleas for a cautionary approach have even begun to be heard from seasoned ATCA lawyers who, as a result of this more decentralized development of ATCA jurisprudence and the emerging diversity of lawyers engaged in this work, have difficulty keeping track of all the cases that have been filed to date[48] and must consider whether and how to influence shaky cases in order to protect case precedent and the integrity of the enterprise. It remains to be seen to what extent the Supreme Court's guidance in *Sosa* will curb some of the more controversial cases.

II. THE IMPACT OF HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS

As ATCA-style jurisprudence has matured and proliferated, it is increasingly possible to gauge the impact of these cases, even if only through individual case studies and anecdotal evidence. The remainder of this Essay will begin to consider this impact along a number of dimensions to reflect the multifaceted objectives of the human rights movement. The most obvious objective of litigation is the enforcement of human rights norms within the legalist paradigm of the application of a rule of law backed by sanctions. While this level of enforcement has remained elusive, litigation has achieved other objectives of the human rights movement, including the rehabilitation of victims and the empowerment of victimized communities, the establishment of accountability for rights violations, the creation of enforceable expectations of behavior, the clarification of applicable norms, the denunciation of violations, and the fostering and strengthening of a vigorous human rights movement worldwide.

48. Each year, the American Civil Liberties Union reports on ongoing ATCA-style cases, see Jennie Green & Paul Hoffman, *Litigation Update: A Summary of Recent Developments in U.S. Cases Brought Under the Alien Tort Claims Act and Torture Victim Protection Act*, *at* http://sdshh.com/ICLR/1CLR_2003/5_Green.pdf (last visited Nov. 29, 2004); *see also* Terry Collingsworth, *Summary of Current ILRF Cases To Enforce Human Rights Under The ATCA*, *at* http://sdshh.com/ICLR/1CLR_2003/16_Collingsworth.pdf (last visited Nov. 29, 2004) (reporting on ATCA-style cases).

A. On Plaintiffs and Their Communities

From the perspective of individual plaintiffs, the human rights edifice has as an express goal the rehabilitation of the victims of human rights abuses. Where ATCA practitioners adopt a client advocacy approach to litigation, human rights cases in U.S. courts can have a profound impact on victims of human rights violations and their communities.[49] Participating as a plaintiff in human rights litigation can restore and promote a sense of agency—the impression that we exercise some control over the processes and events that affect us—especially when that sense was destroyed by the very conduct that is the subject of the suit. Beyond physical harm, the human rights abuses at issue typically involve protracted denials of dignity, liberty, choice, personal integrity, and autonomy, and the mere act of reconceptualizing oneself as a holder of rights can offer a sense of empowerment.[50] Such litigation presents opportunities for corrective justice and provides victims of human rights violations with "an exercise in self-determination"[51] that inverts the status of victim and perpetrator. By contrast, pervasive impunity can exacerbate the dignitary harm caused by torture and other abuses by perpetuating feelings of injustice, fear, and vulnerability, especially where abusers live in the same communities as their victims.[52]

In addition, litigation provides victims with access to a narrative forum[53] that enables the victim to name her experience[54]

---

49. For a fuller discussion of the impact of litigation on plaintiffs, see Brief of The Center for Justice and Accountability et al. at 7-13, Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004) (No. 03-339) (compiling statements by plaintiffs in ATCA-style suits), *available at* http://www.nosafehaven.org/_legal/atca_pro_cntrJustAccntNCTTP.pdf; Center for Justice & Accountability, For Survivors (compiling statements by survivors/plaintiffs), *at* http://www.cja.org/forSurvivors/forSurvivors.shtml (last visited Feb. 7, 2005). *See also* Joshua Phillips, *The Case Against the Generals*, WASH. POST, Aug. 17, 2003, at W6 (interviewing plaintiff who states, "the whole process -- especially the trial – has been crucial to my healing process").

50. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 661-62 (1987-88); *see also* Jan Gorecki, *Human Rights: Explaining the Power of a Moral and Legal Idea*, 32 AM. J. JURIS. 153, 154-55 (1987) (conceptualizing the driving power of rights).

51. Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL ED. 49, 50 (2004).

52. *See, e.g.*, Fabri, *supra* note 16 ("The effects of torture are compounded by impunity. Impunity for human rights atrocities contributes to the ongoing state of fear that survivors live with day to day. The unpunished crimes of the perpetrators continue to violate survivors' personal sense of integrity and freedom.").

53. Austin Serat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.L.-C.R. L. REV. 353, 356 (1996). ("Narrative provides a link between the daily reality of violence in which law traffics and the normative ideal — justice — to which law aspires.").

HeinOnline -- 57 Vand. L. Rev. 2318 2004

and to situate it within a larger policy or practice of repression.[55] Tort rhetoric in particular invites the attribution of legal responsibility and moral blameworthiness, thus contributing to the alleviation of feelings of guilt that may arise from past participation in political activities, "allowing" oneself to be captured, capitulating under interrogation, and ultimately surviving. These discursive processes of "naming, blaming, and claiming"[56] are important features of civil litigation (as compared with criminal prosecutions)[57] and are especially compelling in ATCA-style litigation where the responsible government may have denied an effective remedy, or even the very existence of violations, and silenced the voices of victims through force or intimidation. In addition, being accorded fair procedures before a neutral and respectful decisionmaker may provide a surrogate for apology, repentance, and contrition from responsible parties[58] and a "controlled substitute for vigilantism"[59] or reprisals. The very process of a court determining the validity of a claim will force an examination of the historical record,[60] even if the outcome is ultimately not successful.[61]

---

54. Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 628 (1996) (discussing the creation of a "self-authored" life story tbrough litigation).

55. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152-62 (1989) (identifying local and political narratives and the "confluence" of the two in a legal judgment).

56. William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .*, 15 LAW & SOC. REV. 631 (1980-81).

57. *See* Stephens, *supra* note 7, at 18-21 (comparing criminal and civil procedures in human rights litigation); 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, 156-59, 195 (2001) (noting different role of victims in civil and criminal processes).

58. Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the 9/11 Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 381 (2003).

59. *Developments in the Law, International Criminal Law*, 114 HARV. L. REV. 1943, 1967 (2001).

60. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383 (1987). In the slavery reparations case, for example, plaintiffs sought to compel the production of relevant documents in order to create an accurate historical record of economic relationships underlying the institution of slavery. *In re* African-American Slave Descendants' Litig., MDL No. 1491, Lead Case No. 02 C 7764, 2004 U.S. Dist. LEXIS 872, at *30-31 (N.D. Ill. Jan. 26, 2004) (discussing accounting cause of action); *In re* African-American Slave Descendants' Litig., MDL No. 1491, Lead Case No. 02 C 7764, 2003 U.S. Dist. LEXIS 12016, at *5 (N.D. Ill. July 14, 2003). In their complaint, plaintiffs argued that the production of those records was essential to "heal the continuing psychic harm associated with slavery, trace ancestral records, provide a public and historical record of the violent force necessary to maintain a hierarchy to support slavery, provide evidence of past and subsequently established discrimination, provide a historical record of the economic benefits that accrued to the defendant private institutions as a result of slavery to more fully describe and document the connection between the institution of slavery and racist discriminatory policies that still exist today, and assist in stemming racial discrimination through the knowledge of the role slavery played in its root causes." Complaint and Jury Trial Demand at ¶ 221, Farmer-Paellmann v FleetBoston

HeinOnline -- 57 Vand. L. Rev. 2319 2004

This judicial record can then enhance and further focus the fact finding and reporting efforts of human rights documentation groups.[62]

Where it is successful, litigation also offers the promise of a re-ordering of one's worldview of good and evil that ascribes new meaning to the traumatic experience itself. Thus, litigation can generate a form of collective memory, particularly in the face of counternarratives that would deny the existence of violations or portray victims as subversives, deserving of punishment.[63] Litigation also provides victims with an opportunity for "history making," although this aim of impact litigation generally must be balanced with the trial's fundamental purpose of reaching a fair legal judgment.[64]

While the cathartic power of litigation is often extolled,[65] it has not been adequately tested empirically.[66] It is clear that litigation is not therapy. Parties to a civil suit are constrained by procedural and evidentiary rules and the imposed order of other judicial rituals, and plaintiffs may find conforming their testimony to justiciable legal claims and admissibility rules to be limiting, illegitimate and alienating. In particular, plaintiffs may not be allowed to reenact their whole story or to emphasize aspects that are the most important to them but are "irrelevant" from the perspective of the legal process. Thus other fora — the press, psychotherapy, reflective writing, support groups, truth commissions, etc. — may be better suited for

---

Financial Corp. (E.D.N.Y. filed Mar. 26, 2004), *at* http://news.findlaw.com/hdocs/docs/slavery/fpllmnflt032602cmp.pdf.

61. *See generally* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003) (discussing the impact of failed cases on processes of social change).

62. Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 197 (2002) ("The often thorough and well-documented human rights reporting that is occurring today will finally have a specific context for assisting in the enforcement of human rights norms.").

63. Serat, *supra* note 53, at 366 ("[T]he litigated case can be used to create a record, and the court can become the archive in which the record services as the materialization of memory."); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 209-39 (2001) (discussing role of law (and particularly of trials involving state abuses) in forging collective memory).

64. *See generally* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW & HISTORY IN THE TRIALS OF THE HOLOCAUST (2001) (arguing that human rights trials should offer a forum for victim testimony and the creation of an "official" historical record). *But see* Stephen Whinston, *Can Lawyers and Judges Be Good Historians? A Critical Examination of the Siemens Slave Labor Cases*, 20 BERKELEY. J. INT'L L. 160, 167-69 (2002) (arguing that errors of history underlie the dismissal of several World War II historical justices cases).

65. Fabri, *supra* note 16; JUDITH HERMAN, TRAUMA AND RECOVERY 209-211 (1997).

66. Jamie O'Connell, *Gambling the Psyche* at 7-8 (noting lack of empirical studies on the impact of litigation on victims) (unpublished manuscript, on file with the author).

HeinOnline -- 57 Vand. L. Rev. 2320 2004

victims to provide a full narrative account of their personal history and to establish broader truths.[67]

In addition, the potential for litigation to retraumatize is ever present. Litigation is inherently adversarial, and defendants are entitled to defend against the accusations leveled at them. In practice, this may involve attempts to discount a plaintiff's account through rigorous cross-examination and the presentation of contrary or impeaching evidence. In particular, where victims do not relate the memories of their experiences in a consistent sequential manner, which is often the case with victims of extreme trauma,[68] a defendant's aggressive cross-examination on credibility and accuracy can do real damage.[69] In addition, the plaintiff must be prepared to lose his case, regardless of the truth of the harm suffered, which can create deep anxiety over the course of the suit and upon the announcement of a negative verdict.[70] Finally, although some measure of anonymity may be available,[71] civil litigation forces plaintiffs into the public eye, which can render them and their loved ones particularly vulnerable to negative social ramifications or even retaliation, especially where abuses are ongoing.[72] Where plaintiff's counsel adopts a client-centered approach and remains attuned to his clients and their evolving perception of the legal process, negative responses to litigation can be identified and addressed through counseling and other interventions. The attorney can enable the plaintiff to situate her lawsuit within a larger movement toward accountability, so that "[h]er particular battle becomes part of a larger, ongoing struggle to impose the rule of law on the arbitrary

---

67. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 524 (1995) (noting that "judges — when faithful to liberal law and professional ethics — may make poor historians.").

68. *See generally* Jane Herlihy et al., *Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, 324 BRIT. MED. J. 324, 324 (2002) (presenting research showing that discrepancies in accounts by victims of extreme trauma is not necessarily indicative of a lack of credibility).

69. Osiel, *supra* note 67, at 540 (noting the potential in the human rights context for "the experience of public testimony . . . [to be] personally degrading rather than empowering.").

70. *See, e.g.*, Ford v. Garcia, 289 F.2d 1283 (11th Cir. 2002) (unsuccessful suit by the relatives of the "four churchwomen" who were raped and killed in El Salvador).

71. *See, e.g.*, Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D. D.C. 1998) (suit on behalf of eight anonymous Algerian women against a violent Algerian political group); Xuncax v. Gramajo, 886 F. Supp. 162, 170 (D. Mass. 1995) (recounting harm to nine year-old boy in a suit against the former Guatemalan Minister of Defense); Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994) (suit by anonymous plaintiffs against Bosnian Serb military leader).

72. *See, e.g.*, Falun Dafa Information Center, *Judgment Against High Ranking Official Handed Down By U.S. Court* (Dec. 23, 2001) (recounting that Chinese plaintiff had been "disappeared" since the filing of the lawsuit), *at* http://www.faluninfo.net/Display AnArticle.asp?ID=5151.

tyranny of the strong."[73] At all times, counsel must be sensitive to the fact that litigation is painful and difficult, even where successful.[74]

In most personal injury suits, the enforcement of the applicable legal right is achieved through the attainment and execution of a money judgment quantifying the established harm. Thus, the traditional relief requested in ATCA-style cases was retrospective, although complaints and judgments often contained a tacit acknowledgment of the incommensurability of the harm caused by the alleged human rights violations.[75] A damage award—even where unenforced—as a medium of social meaning marks a "spiritual victory"[76] over an oppressor, recognizes concrete damage to individuals, and is symbolic of a plaintiff's loss. Where an award can be enforced, money damages provide economic support to enable rehabilitation and reintegration into society and confers a measure of social standing on plaintiffs.

At the same time, the illusion of claim equivalence created by a damage award may ultimately alienate rather than relieve victims of rights abuses. Human rights violations involve not just wrongful injury to material worth—harm that can be relatively easily quantified and compensated for—but also moral injury deserving of nonmonetary responses, such as acknowledgment, retribution and apology. Indeed, the quest for moral accountability in the form of apology or repentance may be more pressing for victims than economic accountability.[77] Plaintiffs may resent the "commodification" of their experience when forced to quantify in financial terms the harm caused

---

73. HERMAN, *supra* note 65, at 211.

74. *See* The Center for Justice and Accountability, *Statements by Plaintiff Juan Romagoza on the Significance of* Romagoza, Gonzalez, & Mauricio v. Garcia & Vides Casanova: *A Case Against Two High Ranking Salvadoran Generals for Torture Committed 1979-83*, at 2 [hereinafter *Statements by Juan Romagoza*], *at* http://www.cja.org/forSurvivors/reflect.doc (last visited Feb. 7, 2005):

> Before the trial started, I couldn't sleep. I felt fear knowing that the generals would confront me. I wasn't frightened of them so much as how my body might react. I was afraid of how I would feel being face to face with them again, so close. . . . I had a lot of problems with insomnia; I had more frequent bouts of depression than I normally do. I was afraid for my family in El Salvador, and I still am afraid.

75. *See* Mushikiwabo v. Barayagwiza, 94 Civ. 3627 (JSM), 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 8, 1996):

> [The judge had seen] no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant . . . [and that] one can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.

76. LOBEL, *supra* note 61, at 8.

77. Tyler & Thorisdottir, *supra* note 58, at 361.

HeinOnline -- 57 Vand. L. Rev. 2322 2004

by torture or the extrajudicial killing of loved ones.[78] Similarly, the introduction of money damages may distort some of the symbolic value of these cases and splinter a sense of solidarity among plaintiffs by creating competition for awards among different victims and subclasses[79] and by raising concerns about distributive justice.[80] Finally, a money damage award without any prospect of enforcement or prospective change may ultimately not satisfy retributive impulses and may actually undermine victims' faith in real justice or reform, thus highlighting a latent fallacy of legal liberalism, which posits that once rights have been granted, civil and political equality will naturally follow.[81]

Taking the perspective of a plaintiff's community, while individual suits involve the allegations of only the named plaintiffs, such suits often manifest a representational quality[82] and as such are capable of accommodating a more contextual and comprehensive consideration of repression beyond that suffered by the body and to

---

78. *Id.* at 367-68 (noting the rejection of compensation for moral wrongs); Richard L. Ahel, *Torts*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 445 (David Kairys ed., 3d ed. 1998) (noting that tort damages perpetuate the fiction that money is equivalent to harm, equate money with human dignity and integrity, and assume that for every pain suffered, there will be an amount that will compensate); *see also* Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DE PAUL L. REV. 417, 432-37 (2003) (discussing the relationship between harm and money for victims of the September eleventh attacks).

79. *See* Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 522 (2002) (discussing how conflicting interests among plaintiffs prevent class certification in some situations); Michael J. Bazyler, Essay, *www.swissbankclaims.com: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L.J. 64, 101 (2001) (discussing infighting among plaintiff subclasses in Holocaust litigation).

80. Tyler & Thorisdottir, *supra* note 58, at 369. This is especially true where individuals' group identification gives rise to preferences for equal distribution, which the tort system cannot accommodate. Hensler, *supra* note 78, at 424-25.

81. Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 906-07 (1993).

82. *See* Center for Justice & Accountability, *Carlos Mauricio's Story*, *at* http://www.cja.org/forSurvivors/CarlosforSurvivors.shtml (last visited Feb. 7, 2005):

> I want to be the voice for people who were never able to speak out, for those who do not want, or are unable, to take their cases to court. Not only those who have been tortured and never want to talk about it, but also those who were killed during torture.

Statements by Juan Romagoza, *supra* note 74, at 3-4:

> I felt like I was in a boat, in the bow of a boat. And I felt like there were many, many people rowing behind — that they were moving me into this moment. That was the vision that I had. And I didn't want to turn back to look. I felt that if I looked back at them, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn, bleeding. So I didn't want to see that, I just felt their support, their strength, their energy.

that suffered by the body politic. This is particularly true where the plaintiff can present evidence that she was harmed as part of a policy or practice of human rights violations against similarly situated individuals or where large scale human rights abuses amounting to genocide or crimes against humanity were committed and are proved.[83] A favorable judgment or verdict in such situations offers a public and official acknowledgement of rights, the stigmatization of violations, a measure of accountability, and a symbolic break with the past. Other victims—of the incident or regime in question and beyond—can experience these dignitary functions of litigation vicariously and can enjoy the reordering of social relations brought about by a finding of liability in an ostensibly bilateral case.[84]

Where litigation proceeds as a class action, members of a community subject to abuse theoretically have the opportunity to participate in litigation more directly. However, the degree to which involvement in a class provides an opportunity for class members to experience the dignitary benefits of litigation will depend on class counsel's willingness and ability to involve the class members and the broader community in the suit. This requires, for example, maintaining regular communications with members of the class, or their more informal representatives, to apprise them of significant developments in the case and canvass their opinions about the direction of the litigation.[85] Community involvement and impact in both individual and class actions can be enhanced where plaintiffs and their lawyers are committed to involving members of the plaintiff's community in litigation, through press work in the country where abuses occurred, the dissemination of educational materials, participation in speaking engagements and the trial itself, community outreach, partnerships with local NGOs and community leaders, and the creation of contact lists for case updates and trial reports. Likewise, lawyers and NGOs can develop and coordinate legal strategies with representative groups and local leaders within the target country's civil society who are also concerned with human

83. *See, e.g.*, Doe v. Saravia, 2004 WL 2913256 (E.D.Cal. Nov. 24, 2004) (determining assassination to be a crime against humanity).

84. Stephan, *supra* note 8, at 644 (noting expressive functions of litigation to enhance information on the scope and meaning of legal rules, articulate moral values, and construct social meaning for parties not before the court).

85. For a discussion of the challenges of the human rights class action, see Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U CHI. LEGAL F. 279, 321-29 (2003).

HeinOnline -- 57 Vand. L. Rev. 2324 2004

rights and the rights of victims and are in direct contact with community members.[86]

The potential for litigation to promote these dignitary and truth-telling functions among plaintiffs and their communities operates in varying degrees in the various models of human rights litigation. These processes are most salient in the individual actions in which the plaintiff works collaboratively with counsel to frame and prosecute her case and where lawyer and client share a mutual political commitment to the suit.[87] As a case becomes more representational, as with a class action, or where a client-centered approach is lacking and the plaintiff is relegated to a more passive role, as may be the case with the mass tort approach, these intangibles may be inoperative. In particular, the appearance of litigation techniques developed in other forms of entrepreneurial litigation (where the attorney develops the case and then trolls for nominal "clients")[88] in ATCA class action litigation threatens to trivialize the role of victims of human rights violations in the litigation process.[89]

In addition, as ATCA litigation becomes more doctrinally focused, representational, and pecuniary, relations between lawyers and clients become more attenuated and the risk of conflicts of interest arises. As has been recognized in the civil rights field, where impact litigation is ideologically motivated, the lawyer's fealty to a particular political agenda may diminish the client's voice.[90] This process may be subtle and unintentional, as attorneys may overlook the growing divide between their goals and their client's interests.[91]

---

86. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 345 (1988) (noting importance of lawyers' engaging in "continual low level mobilization of the constituency"); *see also* Lucie E. White, *Mobilization at the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 538 (1988) (exploring the "potential of welfare litigation to become an occasion for the education and mobilization of poor people and their advocates.").

87. *See* LUBAN, *supra* note 86, at 324 (describing the relationship between attorney and client as a political relationship); Loewy, *supra* note 12, at 1885 (discussing client-centered approach to litigation).

88. *See, e.g.*, Lawyers & Settlements, Legal Help–Free Case Evaluations (client identification service for class action attorneys), *at* http://bigclassaction.com/ (last visited Feb. 7 2005).

89. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883-89 (1987) (discussing risks of conflicts of interest in entrepreneurial class actions).

90. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1449 (1996); LUBAN, *supra* note 86, at 315, 319.

91. *See* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470, 478-79 (1975) (noting LDF's pursuit of integration rather than educational equality, a strategy potentially at odds with the interests of plaintiff classes).

HeinOnline -- 57 Vand. L. Rev. 2325 2004

Likewise, as the pecuniary potential of these cases increases, so too does the risk of a proliferation of poorly-framed "strike" suits against U.S. multinationals[92] and collusive settlements that provide lucrative attorneys' fees and broad preclusive effects at the expense of the plaintiffs' rights to an adjudicative process.[93] The regulatory system governing class actions may not be vigorous enough to protect against these conflicts in the human rights context, especially where members of the class are dispersed and unorganized such that effective monitoring of class counsel and representatives is impossible.[94]

B. On Defendants and Potential Defendants

To date, ATCA-style litigation has proved limited in its ability to produce concrete distributive justice. Many ATCA-style cases have generated justifiably staggering judgments. However, these results have exerted a limited impact on defendants' "bottom line" because very few ATCA judgments have been executed upon in any meaningful sense.[95] The persistent elusiveness of an enforceable damage award in ATCA-style litigation renders the disjuncture between rights and remedies in human rights litigation its most stark. As discussed elsewhere in this Essay, the impact of ATCA-style cases on defendants can be measured by more than simply the percentage of favorable judgments that have been obtained and executed upon. That said, there is no doubt that the availability of collectable judgments will add to the rehabilitative, punitive, and deterrent impact of these cases. To that end, the advent of the corporate cases has generated a new optimism about the possibility of achieving an economic recovery for victims of human rights abuses. Several cases in particular are poised to commence trial after surviving motions to

---

92. Stephan, *supra* note 8, at 651 (noting potential for "opportunistic litigants" to use litigation to "extort rents from vulnerable targets.").

93. *See, e.g.*, Brian Ross, *Prominent Holocaust Claims Lawyer Accused of Neglecting Clients*, ABCNEWS.COM (Sept. 7, 2000) (discussing clients' concerns over class counsel's neglect), *at* http://abcnews.go.com/International/story?id=82680&page=1.

94. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 15-16 (1991); *see, e.g.*, DaSilva v. Esmor Corr. Serv., Inc., 215 F.R.D. 477, 479-80, 484 (D.N.J. 2003) (discussing difficulties of communicating with members of the class, former asylum seekers, many of whom had been deported from the United States).

95. Hope remains that a class of victims of Ferdinand Marcos's regime will be compensated out of Marcos's estate. *Marcos Payout Decision*, GEELONG ADVERTISER (Australia), July 14, 2004, § World, at 20 (noting court's order to Marcos's corporation to release $40 million for compensation to members of class).

HeinOnline -- 57 Vand. L. Rev. 2326 2004

dismiss and summary judgment.[96] In addition, cases brought against individuals with strong economic and personal ties to the United States may eventually result in economic recovery for plaintiffs.[97]

Beyond monetary relief, ATCA-style cases are increasingly seeking prospective injunctive relief, but the ATCA's full potential here has yet to be established. While in theory cases against foreign officials or state actors are amenable to such relief, such an effort would be at best a purely symbolic exercise and at worst a hopeless gesture given the difficulties of extraterritorial enforcement and the dictates of the principle of comity.[98] In contrast, the cases against MNCs better reflect some of the conditions for which equitable relief is appropriate and potentially efficacious: where the entity to be enjoined is within the court's jurisdiction, there are ongoing violations, and there is the threat of irreparable harm (that is, where there is extensive destruction of the natural or cultural environment).[99] To a certain degree, U.S. courts are already experienced with this type of extraterritorial enforcement through transnational commercial litigation.[100] The flexibility inherent to working in equity enables courts to balance the interests of, and constraints on, the parties in fashioning a decree.[101] To be sure, courts are reluctant to issue an injunction that cannot be enforced,[102] and an unenforceable decree might undermine the legitimacy of the principle and of the judicial process more broadly. On the other hand, enforceability is more likely where key corporate decisions and policies are developed in, or issued

96. *See, e.g.*, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1241-48, 1250 (N.D. Cal. 2004) (denying defendants' motion for summary judgment and allowing case to go forward on an agency or aiding and abetting theory); Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386(KMW), 2002 U.S. Dist. LEXIS 3293, at *3 (S.D.N.Y. Feb. 2, 2002) (denying the majority of defendants' motion to dismiss).

97. Two recent cases may be the first to compensate victims. In *Romagoza v. Garcia*, plaintiffs obtained a $54.6 million jury verdict against defendants and have since garnished one of the defendant's investment accounts to partially satisfy the judgment pending an appeal. *See* Writ of Garnishment, Gonzales v. Garcia, Case No. 99-8364-CIV-HURLEY (S.D. Fla. Feb. 4, 2003) (on file with the author). Likewise, in *Jean v. Dorelian*, plaintiffs were able to restrain the payment of lottery proceeds to a defendant while the case proceeded against him. *See* Jean v. Dorelian, Case No. 03-21061 CIV-KING (S.D. Fla. Mar. 10, 2003) (order granting leave to file second amended complaint and temporary restraining order) (on file with the author).

98. *See, e.g.*, Doe v. Karadzic, 866 F. Supp. 734, 735 (S.D.N.Y. 1994) (noting that some plaintiffs in the consolidated case sought to enjoin defendant, the leader of the Bosnian-Serb military in the early 1990s, from committing "genocidal acts, torture, extrajudicial killing, and other violations of the law of nations.").

99. Sarah Light, *The Human Rights Injunction: Equitable Remedies under the Alien Tort Claims Act*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 653, 678 (1999).

100. *Id.* at 668-69.

101. Chayes, *supra* note 13, at 1298 (noting that the decree in public law litigation is often the result of a three-way negotiation between the courts and the parties).

102. *Developments in the Law—Injunction*, 78 HARV. L. REV. 996, 1012 (1965).

from, this country,[103] or where parent companies exercise control over foreign subsidiaries.[104]

Accordingly, plaintiffs in the corporate cases have increasingly sought judicial directives governing MNCs' foreign investment policies, relations with their host governments, offshore production arrangements, project security measures, environmental policies, and labor relations. This approach inevitably envisions a more lasting role for courts in the implementation and supervision of remedies geared toward future behavior and invites courts to address the social and economic conditions in developing countries that threaten human rights values. Thus, the potential to obtain injunctive relief against MNCs may provide a way to indirectly reform governmental policies, where MNCs are compelled to condition investment on improvements in human rights conditions in response to a decree or in order to avoid vicarious liability.

For example, in *Doe v. Unocal*, plaintiffs sought injunctive relief in the form of an order compelling Unocal to terminate its participation in a joint petroleum enterprise with the government of Burma/Myanmar.[105] Plaintiffs' prayer for injunctive relief was adjudicated in connection with their motion for class certification pursuant to Rule 23(b)(2).[106] The court ruled that the plaintiffs had not demonstrated that the relief sought would eliminate the abuses alleged, because it was the government that was committing the abuses, other oil companies would simply take Unocal's place upon the company's withdrawal, and the construction of the pipeline was substantially completed.[107] In this case, injunctive relief might have been more readily available had plaintiffs sought to compel conduct more capable of judicial oversight and concerning Unocal's ongoing activities in Burma, such as the creation of a corporate monitoring process to guarantee that forced labor and forced relocation would not be employed in finalizing or maintaining the pipeline project or an

---

103. *See, e.g.*, Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718, *11-*12 (S.D.N.Y. Apr. 11, 1994) (noting that dismissal for *forum non conveniens* was less inappropriate when plaintiffs sought an injunction and challenged events were initiated in this country).

104. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92-93 (2d Cir. 2000) (seeking to hold parent company liable for actions of foreign subsidiary); Villeda v. Del Monte, 305 F. Supp. 2d 1285, 1288 (S.D. Fla. 2003) (dismissing plaintiffs' claim against company and its foreign subsidiaries).

105. 67 F. Supp. 2d 1140, 1141 (C.D. Cal. 1999).

106. Rule 23(b)(2) allows for class treatment if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2).

107. *Unocal Corp.*, 67 F. Supp. 2d at 1146-47.

HeinOnline -- 57 Vand. L. Rev. 2328 2004

injunction against using Burmese military or police forces to provide pipeline security.

As jurisprudence under the ATCA has become more robust, the genuine threat of legal entitlement increasingly presents the necessary predicate for settlement negotiations. To be sure, some human rights advocates and victims will undoubtedly insist on a full trial on the merits in order to provide a forum for the exposure of rights violations and to create a public record of abuses. In addition, defendants may resist settlement out of fear that it will be perceived as a concession of responsibility for human rights violations. That said, given the arrival of class action attorneys on the human rights litigation scene, settlement is now more than ever a possible outcome for ATCA-style cases.[108] Indeed, in a momentous development, Unocal Corp. recently settled an ATCA case arising out of its pipeline project in Burma[109] for a reported $30 million, which will go to named plaintiffs and the creation of a fund to improve living conditions in the region.[110] Likewise, many of the historical justice cases arising out of the abuses of World War II led to comprehensive settlements,[111] which are no doubt a model for other more recent historical justice cases seeking apartheid and slavery reparations from corporate defendants.[112]

Where lawyers are attuned to the interests of their clients, the settlement of ATCA-style cases can generate some of the multifaceted results victims of human rights abuses may seek from impact litigation. In particular, settlement agreements can be crafted to involve more than money damages—which may simply enable defendants to internalize the "costs" of rights abuses—and to institute protections against repeat abuses. For example, U.S. retailers

---

108. *See Developments in the Law*, *supra* note 59, at 2041 (noting that Texaco reportedly offered a $500 million settlement to the plaintiffs in a human rights suit involving its operations in Ecuador).

109. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000) (granting defendant's motion for summary judgment); *rev'd*, Doe v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, *35-38 (9th Cir. Sept. 18, 2002), *en banc review granted*, Doe v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716, *2-3 (9th Cir. Feb. 14, 2003).

110. *See* Paul Magnusson, *A Milestone For Human Rights*, BUSINESSWEEK (Jan. 24, 2005) at 63 (discussing settlement).

111. *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000). *See generally* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003); JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST (2002) (analyzing the efforts of Holocaust victims to secure reparations).

112. *See* Complaint and Jury Trial Demand, Khulumani v. Barclays Nat'l Bank, Ltd. (Nov. 11, 2001), *available at* http://www.cmht.com/casewatch/cases/apartheid-cmpl.pdf.

contracting with manufacturers on Saipan recently created an $8 million fund as part of a settlement of claims brought against them under the ATCA and other domestic laws to finance a monitoring program to ensure compliance with labor laws, provide partial damages, fund public educational programs, and defray litigation costs.[113]

Even short of a full settlement, the commencement of litigation may make possible discussions between parties that were foreclosed by power inequalities in place prior to the filing of suit. Indeed, the very filing of the suit can provide a "foot in the door" to communicate with a defendant corporation that may have otherwise dismissed the demands of victims and activists. However, where the legal entitlement is insufficient, defendants may have no incentive to negotiate with plaintiffs and may instead become more entrenched in their opposition to the suit. For example, in the slavery reparations suit, defendants were able to evade mediation, which plaintiffs no doubt sought as a step toward settlement. In denying plaintiffs' request for mandatory mediation, the court noted that even if it were empowered to order mandatory mediation, the claims at issue were not likely to be resolved through such a mechanism.[114]

Apart from these formal outcomes, it is possible to conceive of more intangible impacts of ATCA-style litigation on defendants and potential defendants. An increasingly important goal of the human rights movement is to deny impunity to human rights violators for their actions.[115] A trial provides the ultimate vehicle for individual accountability.[116] Indeed, the very act of filing suit against an alleged perpetrator provides a measure of accountability for rights violations. At a minimum, defendants' lives are disrupted while they are forced to either defend their actions, often at considerable cost, or accept a default judgment. Of the individual defendants sued in ATCA-style litigation, only a handful have ultimately remained in the United

113. Deborah J. Karet, Comment, *Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?*, 48 BUFFALO L. REV. 1047, 1080-85 (2000).

114. *In re* African-American Slave Descendants' Litig., 272 F. Supp. 2d 755, 760 (N.D. Ill. 2003).

115. Early efforts to promote international human rights norms focused on state compliance with the various human rights treaties. *See, e.g.*, International Covenant on Civil and Political Rights (setting forth standards to gauge, and institutions to monitor, state compliance). However, since *Filártiga* and the establishment of the two *ad hoc* international criminal tribunals, human rights advocates are increasingly focused on finding ways to hold individual perpetrators accountable for their actions and to provide redress to victims of rights abuses.

116. Jonathan Bush, Book Review Essay: *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2066 (1993) (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992)).

HeinOnline -- 57 Vand. L. Rev. 2330 2004

States.[117] Even if defendants can return to their countries of origin, the existence of a lawsuit against them in the United States can complicate their reintegration and ensure perpetual stigmatization[118] as an alleged or adjudicated human rights abuser.[119]

Civil litigation in the U.S. can never provide a full accounting for human rights violations worldwide, because certain defendants will remain beyond the reach of U.S. courts.[120] Thus, human rights cases in U.S. courts will inevitably remain exemplary. While cases involving single defendants may not entirely encapsulate the systemic and complicitous nature of human rights atrocities,[121] they nonetheless "loom large in significance as markers of accountability."[122] A plaintiff's verdict in the civil context assigns legal and moral responsibility for violations, even where a default is obtained or the judgment remains unexecuted. Thus, each individual case has the potential to chip away—one defendant at a time—at the edifice of impunity that has until relatively recently characterized human rights enforcement.

---

117. Coliver, *supra* note 36. At least seventeen defendants have been sued successfully in the U.S., four since 2001. Of those, five fled the U.S. once suits were filed, and these five had their lives "substantially disrupted." *Id.* Of those defendants who remained in the United States, several have been subject to deportation proceedings. For example, Juan Grijalba, a general in the Honduran army, was sued for abuses committed by his subordinates and is awaiting deportation. Alfonso Chardy, *Ruling Details Torture Claim*, MIAMI HERALD, June 20, 2004, *available at* http://www.mercurynews.com/mld/miamiherald/news/local/8966242.htm?1c. Likewise, Kelbessa Negewo, an Ethiopian found liable for torture in an ATCA proceeding, recently gave up bis U.S. citizenship on the eve of the commencement of denaturalization proceedings against him. Cameron McWhirter, *Accused Torturer Cedes Citizenship*, ATLANTA J.-CONST., Oct. 21, 2004. at 6C. Negewo was later arrested and faces deportation. Harry Weber, *Ethiopian Torture Suspect Arrested in Ga.*, GUARDIAN UNLIMITED, Jan. 4, 2005, *available at* http://www.guardian.co.uk/uslatest/story/0,1282,-4710656,00.html.

118. *Developments in the Law*, *supra* note 59, at 1962 (noting that stigma associated with being identified as a rights abuser can discredit individuals and undermine their political influence).

119. For example, Hector Gramajo, a general in the Guatemalan military, was grooming himself to run for presidency while obtaining a degree at Harvard University's Kennedy School of Government. After being served with the lawsuit (at his graduation), he defaulted, returned to Guatemala, had his visa revoked, was disinvited to a major U.S. conference, and his party did not choose him as its presidential candidate. Lutz & Sikkink, *supra* note 19, at 10, 22-23; Robert Collier, *Bay Area Guatemalans Vindicated by Verdict*, S.F. CHRON., April 26, 1995, at A9 (noting ramifications of suit against Gramajo).

120. *See* Doe v. Unocal Corp, 27 F. Supp. 2d 1174, 1179 (C. D. Cal. 1998), *aff'd*, 248 F.3d 915 (9th Cir. 2001) (dismissing French company Total from suit for lack of personal jurisdiction); Byung Wha An v. Doo-Hwan Chun, Case No. 96-35971, 1998 U.S. App. LEXIS 1303, *4-6 (9th Cir. Jan. 28, 1998) (finding defendants' contacts in the forum were insufficiently continuous and systematic to support the exercise of general jurisdiction over them).

121. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9 (1998).

122. Russell, *supra* note 15, at 1253.

This accountability rationale is different from, and indeed more modest than, a traditional deterrence rationale for litigation. Without some measure of deterrence—such as dissuading those who might perpetrate such atrocities in the future—the effect of a plaintiff's judgment may be limited to retrospective condemnation with little prospective effect. In the human rights context, the deterrent effect of ATCA-style litigation remains speculative.[123] Even at the level of the specific deterrence, there is no guarantee against recidivism by a particular perpetrator, especially given the unavailability of incapacitation by incarceration. Although they are high profile, ATCA cases may be too episodic to exert a more general deterrent effect in the classical sense where defendants "weigh" the costs of injury against the "perceived" benefit of the prohibited activities.[124] As a result, it might be a stretch to postulate that, at this point in time, the existence of the ATCA or the potential to be sued in the United States exerts any sort of generalized deterrent function on potential human rights abusers.[125] And, even assuming the most robust enforcement, these cases involve extreme conduct that is perhaps less amenable to formal processes of deterrence.

That said, the threat of suit undoubtedly registers some impact on potential defendants and abusers. At a minimum, this threat will keep some rights violators from traveling to the United States and may prevent this country from operating as a safe haven for abusers to raise or invest funds visit family members, obtain educational opportunities or medical care, vacation, or retire.[126] Political leaders, who may be more likely to calculate the costs and benefits of ordering or encouraging rights abuses, may be more susceptible to processes of deterrence if they are concerned about preserving their political viability. The threat of suit may also exert reformative pressure on MNCs—many of them publicly traded—to adjust their behavior to avoid suit.[127] Indeed, a cottage industry of sorts has developed to

---

123. *See* Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 973-78 (1966) (noting difficulty of proving deterrence empirically).

124. *Id.* at 960, 961.

125. Stephan, *supra* note 8, at 650 (noting that "without effective coercion the prospects for deterrence seem dim."). *But see* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 31 (2001) (positing a deterrent function of international criminal justice).

126. *See* Bernardo Valiente, *Militaires Piden Preservar Amnistía*, LA PRENSA GRÁFICA (San Salvador), Feb. 14, 2004, at 16 (quoting a military officer complaining that he cannot travel to the United States because of the cases against high ranking Salvadorans).

127. Indeed, Canadian oil company Talisman Energy recently sold its stake in a Sudanese oil project in the face of coordinated pressure from shareholders, activists, an ATCA lawsuit, see *infra* note 166, and potential exclusion from U.S. capital markets.

HeinOnline -- 57 Vand. L. Rev. 2332 2004

advise corporations on doing business in repressive political environments without incurring potential human rights liability.[128]

The reverberations generated by a single damage award against a corporate defendant or costly settlement may be enough to provoke reform across a number of industries and even persuade multinationals to avoid relationships with repressive governments entirely.[129] Such an award will operate as a form of judicially-imposed "secondary sanction"[130] that may compel foreign governments to improve their rights records in order to attract continued investment and involvement by multinationals.

As a worldwide system of accountability for rights violations becomes more established, comprehensive and rigorous, the deterrent power of international human rights law becomes more realistic. Indeed, international, quasi-international or hybrid, regional, and domestic judicial systems are increasingly working in tandem to ensure that individuals are held legally accountable for their actions and victims have fora in which to seek meaningful legal redress.[131] This "community of courts"[132] is gradually establishing a complementary division of labor, whereby international and quasi-international tribunals prosecute high-level defendants accused of

---

128. For example, Verité is "an independent, non-profit social auditing and research organization . . . [whose] mission is to ensure that people worldwide work under safe, fair and legal working conditions." Verité, About Us, *Our Mission*, *at* http://verite.org/aboutus/main.html (last visited Feb. 7, 2005). "[When] Verité auditors identify the exploitation of workers or healtb and safety violations in the workplace, [they] develop concrete steps to correct them through a combination of trainings for management and workers, education programs and remediation programs." *Id.* Their "experience and links with non-governmental organizations (NGOs) span over 65 countries, with regionally-based coordinators overseeing operations throughout Asia, Latin America, Africa, the United States and Europe." *Id.* In addition, World Monitors "is a consulting group based in New York City that provides expertise to multinational companies, non-governmental and multilateral organizations seeking to align their business practices with human rights standards around the world." World Monitors, Inc., *at* http://www.worldmonitors.com (last visited Feb. 7, 2005).

129. *See* Birchall, *supra* note 45, at 13 (noting that "Unocal's settlement in principle also increases pressure on several other energy companies facing similar cases that have survived motions to dismiss - including ChevronTexaco, Shell and Talisman oil.").

130. Robert J. Peterson, *Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from* John Doe v. Unocal *and the Alien Tort Claims Act*, 5 U. CHI. L. SCH. ROUNDTABLE 277, 292-94 (1998) (discussing the way in which ATCA cases represent a potential form of secondary sanction against repressive governments).

131. *See* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 75-97 (2002) (discussing development of international and domestic courts with overlapping and intersecting jurisdictions).

132. Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 372 (1997) (calling attention to "a community of courts around the world, units engaged in a common endeavor.").

mass crimes and rely on national courts to prosecute (civilly or criminally) the lesser perpetrators within their jurisdictional reach.

To be sure, retributive goals may be better achieved through criminal processes and penalties, where defendants are more directly subject to the power of the state, than through civil processes. Nonetheless, domestic civil litigation in the U.S. plays a part where criminal prosecutions are not feasible or forthcoming and where perpetrators are subject to personal jurisdiction here. By exposing the whereabouts of abusers, civil suits can spur or shame the U.S. government into invoking administrative[133] and/or criminal remedies against identified perpetrators.[134] For example, information gathered in connection with civil lawsuits has assisted the Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) in pursuing actions against abusers for visa fraud.[135] Likewise, the commencement of civil litigation in the U.S. can trigger similar judicial responses in the home countries of defendants.[136]

C. On the Human Rights Corpus

Human rights cases under the ATCA generate a form of declaratory relief either explicitly, where such relief is expressly sought by plaintiffs,[137] or implicitly, through norm enunciation and

---

133. For example, aliens can be prosecuted for misrepresenting material facts during immigration proceedings, including involvement in human rights abuses. *See* 8 U.S.C. §§ 1325 (a), 1001 (2004) (criminalizing false statements to government);§§ 1546, 1426 (criminalizing misuse of immigration documents); *see, e.g.*, Shelley Murphy, *US Indicts War Crimes Suspect: Peabody Man Accused Of Immigration Fraud*, BOSTON GLOBE, Sept. 30, 2004, at B1 (discussing immigration fraud charges brought against a former soldier in the Bosnian Serb army accused of participating in the Srebrenica massacre).

134. *See, e.g.*, 18 U.S.C. § 2340 (2000) (providing criminal penalties for acts of torture committed overseas).

135. For example, a civil suit was recently brought against a Honduran military intelligence officer detained in connection with deportation proceedings. The information gathered in the civil case strengthened the U.S. government's case for deportation. The Center for Justice & Accountability, Cases, *Honduras: Juan Lopez Grijalba*, *at* http://www.cja.org/cases/grijalba.shtml (last visited Feb. 5, 2005).

136. Lutz & Sikkink, *supra* note 19, at 21; *see also* Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 315 (2001) (noting that exposure of Argentine general prompted Argentina to seek his extradition and continue judicial processes against him). For example, once Total S.A. was dismissed from a suit in the United States on personal jurisdiction grounds, see *supra* note 120, a suit was commenced against it in France. *See* International Federation for Human Rights, *La FIDH et Son Affliée Francaise la LDH Soutiennent la Plainte Déposé en France Contre les Dirigeants de Total*, Aug. 29, 2002, *at* http://www.fidh.org/communiq/2002/bu2908f.htm.

137. *See, e.g.*, Complaint for Damages and Injunctive and Declaratory Relief, Doe v. Unocal Corp., Case No. 96-6959 (C.D. Cal. Oct. 3, 1996) (on file with the author).

HeinOnline -- 57 Vand. L. Rev. 2334 2004

confirmation.[138] By invoking international human rights within the traditional legalist paradigm, cases brought under the ATCA can transform the abstract and at times hortatory rights cataloged in the various international declarations, covenants and treaties into enforceable legal claims and in so doing give concrete meaning to human rights values[139] and contribute to long-term processes of moral inculcation.[140] This expressive function was particularly important in the early life of these cases, where the justiciability of the norms themselves was uncertain.[141] This transformative potential remains of value, even apart from formal outcomes, because it may advance broader strategic goals, such as laying the foundation for future suits[142] and codification efforts, providing a more comprehensive and concrete set of guidelines for conduct, conveying a legal consensus regarding appropriate behavior, and providing a basis for negotiation from legal principles.[143] Additionally, adjudications involving the personal testimony of victims and concrete facts can add meaning to rights framed in general or abstract terms — such as with the prohibitions against torture and cruel, inhuman, or degrading treatment that have been the subject of intense discussion in the wake of the Abu Ghraib revelations.[144] Thus, judicial pronouncements concerning overseas abuses contribute to the domestication of international norms that can be applied to local violations and aid in the interpretation of U.S. statutes.[145] Even where cases are dismissed

138. Even an unenforceable injunction provides a form of declaratory relief, which may be of value where fundamental human rights are at issue. *Developments in the Law*, *supra* note 59, at 1012-13 (noting that courts are more willing to issue injunctions to protect constitutional rights despite challenges of discovering or punishing violations).

139. Fiss, *supra* note 29, at 11; Stephan, *supra* note 8, at 635 (noting U.S.'s leadership role in developing international law).

140. *Developments in the Law, supra* note 59, at 1966.

141. For example, in *Forti v. Suarez-Mason*, the court recognized the justiciability of the tort of "involuntary disappearance." 672 F. Supp. 1531, 1542-44 (N.D. Cal. 1987) (dismissing disappearance count), *on reconsid.*, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988) (reinstating and clarifying disappearance claim).

142. *See, e.g.*, Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1194-96 (C.D. Cal. 2002) (recognizing the cognizability of systemic racial discrimination under the ATCA, but dismissing case on political question grounds).

143. Koh, *supra* note 3, at 2369 (noting tbat plaintiffs are seeking "judicial declarations of judicial wrongfulness, declarations that they could then use to convert principle into political power").

144. An ATCA suit has already been filed against private contractors operating in Iraq seeking an injunction against further interrogations until they have instituted proper training in conducting interrogations free of torture. Second Amended Complaint, Saleh v. Titan (S.D. Cal. July 30, 2004) (No. 04 CV 1143), *available at* http://www.ccrny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf.

145. Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656-57 (1997).

on other grounds, a court's discussion of the scope or content of particular norms is a "norm-affirming event"[146] that may avow plaintiff's moral claims even where legal claims are found to be not actionable.[147] This function of human rights litigation finds affinity in the *Brown* paradigm; the first *Brown* opinion simply announced the principle that separate was inherently unequal, without mandating a remedy. Indeed, given the ambivalent results of the desegregation/integration experiment occasioned by *Brown*, the announcement of this principle may be *Brown's* most lasting achievement.[148]

Litigation's emphasis on those rights that are deemed justiciable has the potential to influence, and potentially distort, the normative development of the international human rights corpus. U.S. courts adjudicating ATCA cases have consistently identified a narrow category of civil and political rights that constitute "torts in violation of international law" as is required by the statute.[149] In so doing, the courts have determined that other civil and political rights and most economic, social, and cultural rights (ESC)—such as the right to a clean environment, to health, or to cultural expression—are not amenable to judicial enforcement. To date, finding defensible and justiciable "proxies" for ESC rights[150] has proven unsuccessful.[151] This will inevitably limit the ability of ATCA-style suits to reach destructive corporate behavior, because these rights are most often implicated by corporate policies and practices in developing

146. Lutz & Sikkink, *supra* note 19, at 4.

147. *See, e.g.*, Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248, 248 (D.N.J. 1999):

> Every human instinct yearns to remediate in some way the immeasurable wrongs afflicted upon so many millions of people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated. For the reasons set forth above, however, this court does not have the power to engage in such remediation.

148. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 268 (2d ed. 1986). Others, however, have argued that the Court did not go far enough in its declarative rhetoric in linking segregation with attitudes of white supremacy. Jordan Steiker, *American Icon: Does it Matter What the Court said in* Brown?, 81 TEX. L. REV. 305, 312 (2002).

149. *See supra* note 47.

150. *See generally* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000) (theorizing causes of action for massive environmental destruction under the right to life, the right to a healthy environment, the prohibition of apartbeid, etc.).

151. For example, in *Beanal v. Freeport-McMoRan, Inc.*, the court ruled that plaintiffs' allegations that Freeport mining company engaged in acts of "cultural genocide" and environmental torts that destroyed an Indonesian indigenous group's unique cultural identity and ability to sustain itself were not cognizable under the ATCA as "torts in violation of the laws of nations." 969 F. Supp. 362, 373, 382 (E.D. La. 1997).

HeinOnline -- 57 Vand. L. Rev. 2336 2004

countries.[152] Nonetheless, plaintiffs continue to file such claims, which has entrenched a series of negative rulings that may delay or preclude the future justiciability of these norms.[153] In addition, the human rights corpus has its roots in political liberalism and its preoccupation with the protection of the autonomous individual against incursions by the state. Thus, many human rights norms are defined or framed in terms of state action.[154] As a result, human rights litigation cannot reach certain forms of violence emanating from private actors, which in certain contexts provides a greater threat to individuals than state-sponsored violence.

This privileging by the litigation process of certain human rights over others has the potential to subordinate ESC rights that may be of equal or even greater concern to plaintiffs, who may desire above all a greater share in the development potential of their countries. This emphasis may also mask the extent to which rights violations are intertwined with—or a product of—underdevelopment, economic exclusion, discriminatory resource allocations, neocolonialism, and corporate exploitation.[155] Thus, ATCA-style litigation may be powerless in addressing the root causes of rights violations or in promoting a social justice agenda that may do more toward improving the lives of victim communities on a day-to-day basis and that thus may be a higher priority among plaintiff classes.

A reliance on litigation to enforce the corpus of international human rights also invokes a more fundamental critique about the efficacy of a rights-based discourse in achieving social change.[156] According to this perspective, not all reform goals "can be presented in the name of rights."[157] The rhetoric of rights forces a desiccation and abstraction of real life experience by obliging plaintiffs to mould their

---

152. *Developments in the Law, supra* note 59, at 2027-28 (cataloging the ways in which corporations can interfere with ESC rights in developing countries).

153. *See, e.g., In re* South Africa Apartheid Litigation, 02 M.D.L. 1499, 2004 U.S. Dist. LEXIS 23944, at *30 (S.D.N.Y. November 29, 2004) (failing to find aiding and abetting liability under international law); Flores v. Southern Peru Copper Corp., 343 F.2d 140, 160 (2d Cir. 2003) (finding no jurisdiction over environmental law claims even when framed in terms of a right to life or health).

154. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex 39, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (defining torture in terms of state action).

155. RHODA E. HOWARD, *Group Versus Individual Identity in the African Debate on Human Rights, in* HUMAN RIGHTS IN AFRICA 159, 161 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990).

156. *See* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350 (1988) (arguing that rights discourse is incompatible with social change toward substantive equality).

157. ROSENBERG, *supra* note 9, at 11.

lived experiences in terms of available legal rights and remedies. In so doing, plaintiffs may lose sight of real objectives as their visions for the reform and rehabilitation of society become "trapped" in the language of law.[158] Given the subordination of ESC rights in particular, plaintiffs may only advance a limited number of atomistic claims, which may be at odds with how communities view themselves and the harms suffered.[159] Indeed, potential plaintiffs may care more about damage to their communities' ways of life, a concern that ATCA litigation cannot accommodate except minimally through the class action mechanism, which is an imperfect arbiter of group rights. Nonetheless, victims often view their experience in terms of a denial of rights,[160] and thus the rhetoric of rights possesses a powerful symbolic meaning for plaintiffs and other victims.[161]

D. On Other Processes of Social Change

The impact of human rights litigation in the United States in countries where abuses occur also remains unproven. Such litigation inevitably proceeds alongside other processes of social change, and the relationship between the two is a complex one—at times synergistic and antagonistic. However, anecdotal evidence suggests that the positive impact of such cases on the expansion of the human rights movement and in countries where abuses have occurred and beyond is growing.[162]

Litigation as a visible, public, and "newsworthy" phenomenon can serve an educative function, by teaching the general public about international norms of behavior, calling attention to injustices, persuading changes of opinion, provoking a public outcry, and mobilizing grassroots campaigns.[163] Within the U.S., press accounts of

---

158. Crenshaw, *supra* note 156, at 1354.

159. Magee, *supra* note 81, at 907 (noting that "remedies law has traditionally ignored group-claims theory, despite historical practices amounting to group-based injury").

160. Patricia Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.–C.L. L. REV. 402, 405 (1987).

161. Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 TENN. L. REV. 1065, 1069 (1997).

162. *But see* Lutz & Sikkink, *supra* note 19, at 19-20 (positing no impact of early cases).

163. ROSENBERG, *supra* note 9, at 7-8 (noting extrajudicial influences of court action). For example, the ATCA case against Coca-Cola has given rise to a consumer campaign against the company led by Corporate Campaign, Inc. (an organization dedicated to promoting labor issues by, among other things, launching media and consumer campaigns). *See* International Labor Rights Fund Campaign to Stop Killer Coke (a campaign dedicated to stopping a cycle of murders involving union leaders at Coca-Cola bottling plants in South America), *at* http://www.killercoke.org/ (last visited Feb. 5, 2005); Coke Watch (same), *at* http://www.cokewatch.org/ (last visited Feb. 5, 2005); Collingsworth, *supra* note 62, at 193 (noting the Coca-Cola litigation has

the extent of repression elsewhere, and even direct participation in the judicial process by individual jurors, can generate a societal empathy for human rights victims,[164] thus contributing to a domestic human rights consciousness and the development of a political constituency supportive of an ethical foreign policy.[165] Greater domestic attention to rights abuses occurring overseas will increase pressure on the U.S. government to condemn abuses and bring its influence to bear on repressive governments.[166]

While ATCA-style litigation takes place in the United States, the audience for these suits—and thus their educative reach—is international. Even when pursued in a foreign forum, litigation can provide a community mobilizing and organizing tool for victims of rights violations and their supporters in the implicated country and empower local activists with "hope and inspiration"[167] by changing "the limits of the possible."[168] Litigation here can also lead to the development of transnational advocacy networks by connecting exile communities with groups in the target country.[169] In the class action context, the process of defining, providing notice to, and communicating with the class can identify, activate, and join individuals who have been similarly injured and foster a sense of solidarity, shared identity, and political power. Especially where organizations representing victims or working to enforce human rights in the target countries initiate or support litigation here as part of a coordinated strategy,[170] litigation can bolster domestic and grassroots

---

created a broader campaign aimed at forcing the company to publicly denounce the violence in Colombia).

164. *See* Toni M. Massaro, *Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2101-02 (1989) (discussing empathy and empathetic capacity).

165. *See, e.g.*, Peter Waldman, *Evangelicals Give U.S. Foreign Policy An Activist Tinge*, WALL ST. J., May 26, 2004, at A1 (noting influence of evangelical lobbying groups on legislation addressing religious persecution and other rights violations abroad).

166. *See* Concurrent Resolution Declaring Genocide in Darfur, Sudan, H.R. Con. Res. 467, 108th Cong. (2004) (enacted). Events in Sudan are the subject of a lawsuit against a Canadian oil company. *See* Presbyterian Church of the Sudan v. Talisman Energy, No. 01 Civ. 9882 (AGS), 2003 U.S. Dist. LEXIS 3981 (S.D.N.Y. Mar. 19, 2003).

167. Matsuda, *supra* note 60, at 349; *see Statements by Juan Romagoza, supra* note 74, at 2:

> I feel that it was the right thing to do, to bring the case. It is not that hope is stronger than fear, because at times the fear is very strong, but people think now that there's a chance for justice. It feels to me like a collective communion, that people feel some kind of joy or hope that something new can come out of this case.

168. Roht-Arriaza, *supra* note 140, at 315.

169. *See generally* M.E. Keck & K. Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (1998).

170. *See* Collingsworth, *supra* note 62, at 187, 192 (noting that labor union representing workers at a Colombian Coca-Cola plant asked an affiliated labor union in the U.S. to file a complaint in the Southern District of Florida against Coca-Cola on their behalf).

efforts to address ongoing human rights violations. Thus an opportune case with good press and other penetration in the implicated country[171] can provoke civil deliberation about rights abuses[172] and catalyze or otherwise undergird moral, legal, and political challenges to mechanisms that may have been put in place—such as amnesty laws—to shield perpetrators from liability for past abuses in their home countries and end a conspiracy of silence about abuses.[173]

Thus, litigation here can bring about a "breakthrough moment"[174] in the target country and contribute to societal processes of communal rehabilitation, forgiveness, accountability, and reconciliation that underlie other efforts at transitional justice.[175] In these ways, the commencement of litigation, even in a foreign forum, can create "cascade effects" in the nation where the abuses occurred and beyond that may signal more durable social change.[176] These processes may only be effective, of course, where the foreign state is receptive to them, such as where political power has shifted away from a repressive government or where a domestic human rights constituency has gained a measure of political power and momentum.[177] By contrast, where abuses continue, the potential for an adversarial process to bring about reconciliation or repentance is more limited.

A complex dialectic exists between litigation and legislative processes. It has been long theorized that majoritarian victories

---

171. *See* Lutz & Sikkink, *supra* note 19, at 19 (arguing that early ATCA-style cases produced little impact in the countries implicated because the proceedings were not widely publicized).

172. *See* Roht-Arriaza, *supra* note 136, at 316 (noting that cases make abuses a topic of national conversation).

173. For example, several lawsuits in the United States against former members of the Salvadoran military, including a co-conspirator in the assassination of Archbishop Romero, have prompted a national conversation and debate in El Salvador concerning the amnesty laws enacted to insulate members of the military from legal responsibility. Coliver, *supra* note 36; Daniel Valencia, *Saca Considera Necesaria la "Ley de Amnistía para la Consolidación de la Paz"* (discussing potential repeal of amnesty law), *at* http://www.diariocolatino.com/nacionales/detalles.asp?NewsID=3605 (last visited Mar. 3, 2005). An English version of the article is available at: http://www.crispaz.org/news/list/2004/0313.htm.

174. Hunter, *supra* note 4, at 1012 ("Breakthrough moments in law occur rarely but not randomly, regardless of arena. They usually follow long periods of incremental, often nearly imperceptible, social change occurring at a glacial pace. When they do occur, they crystallize what has gone before at the same instant that they propel social structures forward.").

175. *See generally* MINOW, *supra* note 121 (discussing processes of transitional justice).

176. Lutz & Sikkink, *supra* note 19, at 8; *see, e.g.*, Stacie Jonas, *The Ripple Effect of the Pinochet Case*, 11 HUM. RTS. BRIEF 36 (Spring 2004) (discussing the vast impact of the *Pinochet* case in Chile).

177. *See* Lutz & Sikkink, *supra* note 19, at 31-32 (identifying factors that enhance impact of foreign judicial processes).

HeinOnline -- 57 Vand. L. Rev. 2340 2004

through the political process may be more effective than judicial victories in provoking the kind of "cultural shifts" or transformation of norms and practices necessary to invoke more lasting social change.[178] That said, critiques of using litigation to provoke systemic change often assume an ability to participate effectively — and ultimately to win — in the legislative arena,[179] which may not be the case in the human rights context. Indeed, individuals often turn to the courts where legislative bodies are unresponsive or to correct pathologies in the political process.[180] Litigation in the United States can thus provide an outlet for political action where legislative options for seeking reform in countries where violations are occurring are unavailing. Thus, litigation in the United States presents a more viable option where no political constituency exists in implicated countries, as where victims of human rights violations are members of minority groups without effective political representation or capacity. Litigation here is also available where political institutions in the country in question are ineffective or lacking entirely[181] or where it is simply too dangerous for victims and their advocates to press claims politically or legally.[182] Indeed, where people are dying, it is unreasonable to wait for domestic political processes to function if other outlets to expose abuses are available.

Where political processes are operative, an opportune lawsuit may create an environment where legislative action and more broad-based public engagement and discourse become possible, like an "icebreaker through a frozen sea."[183] The reparative legislative response to the *coram nobis* cases brought on behalf of survivors of the WWII Japanese internment in the United States[184] provides a model

178. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 980 (1997); Hunter, *supra* note 4, at 1012.

179. Hunter, *supra* note 4, at 1011.

180. ROSENBERG, *supra* note 9, at 4.

181. White, *supra* note 86, at 538. The role of litigation as a form of political action has been recognized by the U.S. Supreme Court in connection with civil rights litigation. NAACP v. Button, 371 U.S. 415, 429-30 (1963) ("Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.") (footnotes omitted).

182. *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (noting that victims, lawyers, and judges involved in lawsuits against Paraguay's security forces had been threatened and killed, and efforts to prosecute offenders were routinely sabotaged).

183. Jack Greenberg, Remarks Before the Bar Association of San Francisco for the 50th Anniversary of *Brown v. Board of Education* (May 6, 2004).

184. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

for the type of political leverage a lawsuit can generate,[185] although such outcomes may be equally attributable to political expediency or processes of interest convergence.[186] Litigation in the United States can also prompt more systemic interventions by other branches of government in implicated countries and provide "cover" for progressive members of society and in government to push for reform internally.[187] Litigation in one forum may also generate changes in foreign policies elsewhere toward repressive states. Indeed, the *Filártiga* model has been cited in connection with burgeoning efforts to hold human rights abusers liable in domestic courts in Europe and elsewhere.[188]

For example, several groups of plaintiffs filed class action suits in the United States against Texaco alleging environmental harm in Ecuador and Peru in connection with its oil extraction projects there. The cases were dismissed on comity and *forum non conveniens* grounds, which involved a determination that the courts in Ecuador could handle the suit.[189] Originally, Ecuador opposed the suit, but after a change of government, it sought to intervene in support of plaintiffs.[190] On appeal, the Second Circuit vacated and remanded, in part on the grounds that Texaco was not required to submit to jurisdiction in Ecuador and because the district court had insufficiently considered the government's change of position vis-à-vis the litigation.[191] On remand, the case was again dismissed on *forum non conveniens* grounds.[192] The suit is currently in trial in Ecuador.[193]

Litigation in United States courts also provides an outlet for U.S.-based human rights activists, given that domestic legislative

---

185. *See* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 510 (1998) (suggesting reparations claims may help focus "community education and political organizing efforts.").

186. *See generally* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 532-34 (1980) (noting legal and political explanations for the *Brown* decision).

187. This process of bypassing domestic remedies to pursue international options that will in turn pressure domestic processes has been termed a "boomerang pattern." Lutz and Sikkink, *supra* note 19, at 4.

188. *See* Brief of Amici Curiae International Jurists in Support of Affirmance at 13-25, Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004) (No. 03-339) (discussing influence of *Filártiga* precedent in domestic and international fora), *at* http://www.nosafehaven.org/_legal/atca_pro_IntntnlJurSuppAffirm.pdf.

189. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996).

190. Aguinda v. Texaco, Inc., 175 F.R.D. 50, 50 (S.D.N.Y. 1997).

191. Jota v. Texaco, 157 F.3d 153, 159, 161 (2d Cir. 1998).

192. Aguinda v. Texaco, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

193. *See* Amy Taxin, *Chevron Demands Petroecuador Pay Cost from Lawsuit*, REUTERS LIMITED, June 15, 2004.

HeinOnline -- 57 Vand. L. Rev. 2342 2004

strategies to address violations abroad are limited and often of limited efficacy.[194] Victims and their advocates may not constitute a viable constituency or may—by virtue of their refugee or immigrant status—lack the political voice or economic resources to be heard effectively. To the extent that victims can mobilize political capacity here and partner with sympathetic supporters,[195] calls for trade sanctions and embargoes, contingent economic aid, and diplomatic denouncements often go unheeded and, where implemented, often manifest varying degrees of effectiveness.[196] With respect to domestic legislation that may regulate the conduct of U.S. MNCs operating abroad, legal action can "counterbalance" the power certain defendants may exercise over political processes.[197] For example, Sweatshop Watch initiated litigation in the Northern Mariana Islands concerning United States retailers' labor practices there after efforts by unions to utilize political strategies had failed.[198]

Although litigation can provoke and promote other processes of social change, it can also inhibit the development of, deflect attention

194. The passage of the Torture Victim Protection Act ("TVPA") as a companion to, and expansion of, the ATCA, represents an important legislative victory in the United States for human rights activists. 18 U.S.C. § 1350 (2000). The TVPA was enacted in part to implement the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment, but also as a legislative response to a concurring opinion in an early ATCA case challenging the use of the ATCA in human rights litigation, see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). The legislative history of the TVPA indicates that Congress sought to reaffirm the line of cases inaugurated by *Filártiga* in the face of judicial resistance. *See* Torture Victim Protection Act of 1991, H.R. REP. NO. 102-367 pt 1, at 3 (1991); The Torture Victim Protection Act of 1991, S. REP. NO. 102-249, at 3-4, 5 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under [the ATCA], which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.'"). In addition, the TVPA expanded the reach of the ATCA by allowing suits by United States citizens in addition to noncitizens.

195. Other examples of domestic human rights legislation include: the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (providing protection to victims of trafficking and enabling prosecution of traffickers); the Cambodian Genocide Justice Act, Pub. L. No. 103-236, § 572(a), 108 Stat. 486, 486-87 (1994) (providing for research into the crimes of the Khmer Rouge period with an eye toward prosecuting responsible individuals); The Sudan Peace Act, Pub. L. No. 107-245, § 11, 116 Stat. 1504 (2002) (requiring Secretary of State to collect information on incidents of war crimes and crimes against humanity in Sudan).

196. The United States has imposed sanctions on Burma/Myanmar in response to that country's human rights record. However, evidence is slight that sanctions have led to an improvement in the country's rights record. BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. DEP'T. OF STATE, CONDITIONS IN BURMA AND U.S. POLICY TOWARD BURMA FOR THE PERIOD SEPTEMBER 28, 2003 – MARCH 27, 2004, *at* http://www.state.gov/p/eap/rls/rpt/31335.htm (last visited Feb. 7, 2005).

197. Karet, *supra* note 113, at 1050.

198. *See* JOANNIE C. CHANG & NIKKI F. BAS, SWEATSHOP WATCH, WHO WINS IN A GLOBAL ECONOMY?, *at* http://www.sweatshopwatch.org/headlines/2004/global_jan04.html (last visited Feb. 7, 2005).

and resources away from, or even undermine other strategies for social change that may be more efficacious or durable. These alternative strategies include reparations strategies through the political process;[199] direct action; transnational advocacy in countries where abuses are prevalent;[200] grassroots educational campaigns; traditional human rights advocacy based upon fact-gathering and shaming; the development of monitoring bodies and international regulatory standards, such as environmental or labor codes of conduct for extraterritorial activities;[201] and the creation and promotion of international institutions.[202] The technical, rarified and inaccessible nature of litigation may do little to contribute to the growth of grassroots social movements in certain contexts and communities, especially where individuals are not accustomed to invoking judicial processes to bring about social change.[203] Likewise, lawyers may actually displace natural leaders within community groups, leading to the disempowerment, and even demise, of the group.[204] In addition, litigation (and its attendant legalisms such as standing rules, statutes of limitation, or justiciability doctrines) may diffuse political or moral claims rather than empower potential political constituencies. Indeed, litigation in the United States may ultimately contravene or undermine the strategies of local activists where it is not part of a campaign at the grassroots level in the targeted country.

For example, a number of lawsuits were filed recently on behalf of African-American descendants of slaves and former slaves against companies allegedly unjustly enriched by the practice of slavery during the antebellum period by, for example, loaning money to slave traders and owners, utilizing slave labor, and insuring slaves as property for slaveholders.[205] Defendants jointly sought dismissal on

199. *See* Yamamoto, *supra* note 185, at 482 (discussing the history of U.S. efforts to provide Japanese-Americans with reparations).

200. *See* Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 386-87 (1996) (discussing how transnational advocacy can supplement U.S. labor laws to help workers respond to new pressures of the global economy).

201. For example, the U.N. Commission on Human Rights has been considering a set of nonbinding human rights standards for transnational corporations. *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR Sub-Comm'n on the Promotion & Protection of Hum. Rts., 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/203/12/Rev. 2 (2003), *available at* http://www1.umn.edu/humanrts/links/norms-Aug2003.html (last visited Feb. 7, 2005).

202. *Id.*; Rishikoff, *supra* note 17, at 274.

203. Quigley, *supra* note 12, at 465-75.

204. *Id.* at 462-63.

205. The individual lawsuits were consolidated in the Northern District of Illinois. *In re* African American Slave Descendants Litig., 231 F. Supp. 2d 1357 (N.D. Ill. 2002).

HeinOnline -- 57 Vand. L. Rev. 2344 2004

grounds that plaintiffs lacked standing, the statute of limitations had expired, the plaintiffs had failed to state a claim upon which relief could be granted, and the case presented a nonjusticiable political question.[206] In dismissing the case without prejudice, the court "in an abundance of caution" meticulously affirmed each of defendants' arguments for dismissal.[207] With respect to defendants' defense on standing, for example, the court found plaintiffs had not established a link between the defendants and the alleged harm and that plaintiffs did not have a personal stake in the dispute or a particularized injury.[208] At the same time, when ruling on defendants' political question defense, the court determined that the issues raised by the complaint were best resolved by the representative branches of government.[209] It remains to be seen whether these rulings will bolster the reparations movement's[210] political claims or provide juridical fuel for opponents, but it is clear that the political grounds have indelibly shifted in light of the court's ruling.

The high-profile nature of ATCA-style litigation creates the potential to generate legislative, executive, and other "backlash"[211] that might nullify gains made in litigation. Indeed, it is apparent that the more ambitious applications of ATCA-style litigation have perhaps subjected the ATCA to new political vulnerabilities. In particular, opposition to human rights litigation in United States has crystallized along two dimensions, with the two primary foes to a certain degree working in tandem. First, the corporate cases have mobilized a powerful constituency of multinational corporations who have circled the wagons in defense of their brethren. Various corporate consortia have filed amicus briefs attesting to difficulties, or the increased costs, of conducting business abroad where human rights litigation is a risk[212] and have initiated at least preliminary discussions about

---

206. *In re* African American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1044 (N.D. Ill. 2004).

207. *Id.* at 1053-65.

208. *Id.* at 1047-48.

209. *Id.* at 1060.

210. *See generally* National Coalition of Blacks for Reparations in America (N'Cobra) (discussing the reparations movement), *available at* http://www.ncobra.org/aboutus.htm (last visited Feb. 7, 2005); Reparations Coordinating Committee, Tulsa Reparations Litigation, *available at* http://homepage.mac.com/millerej11/Menu2.html (last visited Feb.7, 2005).

211. Hunter, *supra* note 4, at 1011.

212. Brief of the National Foreign Trade Council, Sosa v. Alvarez-Machain,, 124 S.Ct. 2739 (2004) (No. 03-339), *available at* http://www.nosafehaven.org/_legal/atca_con_NFTC supportingSosa.pdf; Brief of National Association of Manufacturers, Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004) (No. 03-339), *available at* http://www.nosafehaven.org/_legal /atca_con_NAMsupportsSosa.pdf; Brief of the National Foreign Trade Council et al, Doe v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716

potential legislative "reform" of the ATCA.[213] Second, the Bush administration, in a change in executive policy toward human rights litigation in United States courts,[214] has intervened in a number of cases that in its estimation conflict with, or at a minimum complicate, U.S. foreign policy concerns, as where officials or heads of state from allied or powerful countries are sued.[215]

Backlash may also occur in the countries that are the subject of suit.[216] In particular, U.S. judgments may be resisted by individuals in power as a form of judicial imperialism or neocolonialism, especially when default judgments are obtained.[217] This, in turn, may actually enhance the stature of defendants and cloak them in the mantle of the political martyr. Indeed, "[t]he possibility of resistance matters, because the events that have given rise to the lawsuits in question remain largely under the control of foreign governments and beyond the reach of U.S. courts."[218] For example, the apartheid litigation[219] has generated significant opposition within high political circles in South Africa,[220] although the cases have generated some NGO and

---

(2003), *available at* http://www.nftc.org/default/usa%20engage/unocal%20amicus.pdf. The corporate campaign against the ATCA has been spearheaded by USA Engage, a coalition of business organizations opposed to unilateral sanctions regimes, see http://www.usaengage.org/about_us/index.html (last visited Dec. 14, 2004).

213. Jenna Greene, *Gathering Storm: Suits that Claim Overseas Abuse Are Putting U.S. Executives on Alert and Their Lawyers On Call*, LEGAL TIMES, July 21, 2003.

214. Compare Brief for the United States, Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004) (No. 03-339) (opposing suits), *available at* http://www.nosafehaven.org/_legal/atca_con_USsupportingSosa.pdf; Brief for the United States, Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001) (Nos. 00-56603, 00-56628), http://www.nftc.org/default/usa%20engage/brief-as-filed.pdf (same), *with* Memorandum for the United States as Amicus Curiae, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585 (1980) (No. 79-6090) (supporting jurisdiction).

215. *See generally* Brian C. Free, *Awaiting* Doe v. Exxon Mobil Corp.: *Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y 467 (2003) (discussing a case against Exxon Mobile Corporation and the power of federal courts to remedy human rights violations committed abroad when a judicial resolution is opposed by the executive branch).

216. Stephan, *supra* note 8, at 630, 651 (noting potential for lawsuits in U.S. courts to "invite hostility and retaliation" rather than prompt reform).

217. Charles F. Hollis, III, *Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United States Courts*, 1 SANTA CLARA J. INT'L L. (Spring 2003), *available at* http://www.scu.edu/scjil/current/FinalHollisArticlePage3.shtml.

218. Stephan, *supra* note 8, at 657.

219. *In re* South Africa Apartheid Litigation, MDL 1499, 02-MD-1499 (JES), 2003 U.S. Dist. LEXIS 13797 (S.D.N.Y. May 21, 2003).

220. *See* Thabo Mbeki, South African President, Statement to the National Houses of Parliament and the Nation on the Occasion of the Tabling of the Report of the Truth and Reconciliation Commission 9 (Apr. 15, 2003) (transcript available *at* http://www.nftc.org/default/ussabc/Mbeki_Sp.pdf) ("[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our

popular support.[221] Where suits proceed far from the events in question, a foreign judgment may not carry the moral legitimacy necessary to convey opprobrium or bring about the internalization of the norms expressed.[222]

III. CONCLUSION

Human rights cases brought in United States courts evince a faith in the power of "impact" litigation to achieve goals that transcend the dispute between individual litigants. In practice, it is clear that human rights litigation produces important first order results, especially in the realm of corrective justice for victims, which may be operative regardless of formal outcomes. These results are the most tangible on the micro scale and become more diffuse and speculative as the lens moves farther from the immediate parties. Thus, human rights litigation has empowered individuals even where it has not necessarily constrained perpetrators. The present limits on what human rights litigation can achieve beyond the re-ordering of relations between the two parties and toward the reform of state practices should not overshadow what these cases can achieve, because these results are worthy of praise and duplication. These limits do, however, caution against adopting an unreasonable faith in the power of litigation. That said, the increasing potential of such litigation to contribute to a burgeoning movement toward accountability for rights violations pursued by complementary state and international institutions is tantalizing.

Thus, litigation must remain one component of a multifaceted strategy toward the enforcement, broadly defined, of human rights norms. Practitioners must be attuned to whether political, social and economic forces have pushed a particular society to a point where litigation in a foreign forum can make an impact. In addition,

---

Constitution of the promotion of national reconciliation."); *see also* Declaration from Penuell Mpapa Maduna, South African Minister of Justice, to Judge John E. Sprizzo (July 11, 2001) (expressing his views on the the apartheid litigation) *at* http://www.nftc.org/default/ussabc/Maduna%20Declaration.pdf. *But see generally* Supplemental Declaration in Opposition to Defendants' Joint Motion to Dismiss by Archbishop Desmond Tutu, *In re* South Africa Apartheid Litigation, MDL 1499, 02-MD-1499 (JES), 2003 U.S. Dist. LEXIS 13797 (S.D.N.Y. May 21, 2003), *available at* http://www.woek.de/pdf/kasa_tutuaffidavit_dec_2003.pdf (supporting litigation).

221. The plaintiff in one of the Apartheid litigation suits, the Khulumani Support Group, is an NGO for victims of the apartheid regime, *see* http://www.khulumani.net/index.php?option=com_content&task=view&id=25&Itemid=60;http://www.khulumani.net/index.php?option=com_content&task=category&sectionid=4&id=7&Itemid=63.

222. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 486 (1999) (noting that judgments against defendants may not generate the desired "signaling effect" if the process is considered biased or illegitimate).

practitioners must remain sensitive to the way in which litigation in a foreign forum is embedded within a broader human rights strategy of a particular community. Thus, litigation may be able to mobilize victims of human rights violations or support a campaign against a particular company or practice at the grassroots level, especially where activists on the ground are consulted on whether and how human rights litigation in the United States might advance their domestic strategies and goals. By contrast, these "cascade effects" may be inoperative where litigation proceeds in a foreign vacuum. A focus on litigation here to the exclusion of other processes of social change has the potential to marginalize the voices of victims of human rights abuses and derail other potentially efficacious strategies for social change. To the extent that human rights cases are pursued by attorneys from outside of the human rights movement, human rights attorneys and activists must engage with counsel to ensure that human rights values are brought to bear on the process.

Even where systemic change remains elusive, it must not be forgotten that small victories are meaningful.[223] This brings us back to the client advocacy model of public interest litigation. In striving for greater impact, practitioners must not neglect the client. In many respects, an enduring value of human rights litigation is the transformative potential of litigation on individual participants. Indeed, the highest ideals of the law can in many respects be achieved through good client advocacy: the representation of persons in pain, one individual at a time.

223. Matsuda, *supra* note 60, at 347.

HeinOnline -- 57 Vand. L. Rev. 2348 2004