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# The Human Rights Implications of Corruption: An Alien Tort Claims-Act Based Analysis



THE HUMAN RIGHTS IMPLICATIONS OF  
CORRUPTION:  
AN ALIEN TORT CLAIMS ACT-BASED ANALYSIS

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## *Introduction*

Human rights and corruption are two fields of study that are gaining increased attention in the business world. In the realm of human rights, organized attempts to define and prevent abuses have largely been a phenomenon of the past 60 years. With the drafting, adoption, and signing of the Universal Declaration of Human Rights, the global community definitively announced that human rights considerations are relevant and common to all peoples.<sup>1</sup> Although many countries continue to have poor track records of human rights, the signatories of the UDHR have at least agreed in principle to their importance. The landmark document has been the foundation of the efforts of various non-governmental and intergovernmental organizations seeking to ensure that state parties abide by the declaration's articles. Today, the influence of these organizations has expanded to the private sector and forced multinational corporations to reconsider the business strategies they employ in their operations abroad.

Structured interest in defining and curbing corruption, on the other hand, began just 30 years ago. Global uptake of this interest has been slow, and only recently has the international community drafted a document – the United Nations Convention against Corruption – that is potentially as important to the anti-corruption movement as the UDHR is to the human rights movement.<sup>2</sup> The diverging opinions of the global community regarding the definition of corruption and what constitutes its externalities, as well as the written work of several academics suggesting that corruption has positive ramifications for society, have significantly contributed to the lengthy delay. Now that the convention exists, however, NGOs and IGOs dedicated to curbing corruption possess a potentially powerful tool for advancing their efforts.

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<sup>1</sup> The U.N. General Assembly adopted the UDHR on December 10, 1948.

<sup>2</sup> The U.N. General Assembly adopted the U.N. Convention against Corruption on October 31, 2003.

Given the recognized importance of preventing human rights abuses, an analysis of the human rights violations resulting from corruption would further strengthen the argument against it. This paper will consequently attempt to uncover the human rights implications of corruption and examine how MNCs are contributing to its persistence. A discussion will follow concerning possible measures for combating corruption and the impact of these recommendations on global corporate strategies.

### *Background – Human Rights*

During World War II, extensive human rights abuses turned many nations into advocates for an international organization committed to preventing such abuses from recurring. That organization would later materialize as the U.N., which would play an integral role in outlining human rights issues. The U.N.'s most significant contribution to human rights is the UDHR, which some academics have even declared to be “the most important legal document in the history of the world.”<sup>3</sup> From the UDHR emerged two U.N. covenants – the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights – that codified human rights into binding international treaties.<sup>4</sup> These covenants, along with the two optional protocols to the ICCPR, comprise what is now known as the International Bill of Human Rights.

The separation of economic and political rights was a direct function of the Cold War rift between the United States and the Union of Soviet Socialist Republics. With the U.S. refusing to guarantee the economic rights stipulated by the U.N. Commission on Human Rights, and the

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<sup>3</sup> Robert F. Drinan, *The Mobilization of Shame: A World View of Human Rights* (New Haven: Yale University Press, 2001) 9.

<sup>4</sup> The ICESCR was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on January 3, 1976. The ICCPR was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on March 23, 1976.

U.S.S.R. equally adamant in refusing to guarantee certain political rights, the International Bill of Human Rights was consequently divided into two treaties. The U.S. still has not ratified the ICESCR, using principles of free market capitalism as its justification for opposition. The adoption of the 1993 Vienna declaration was a sign of progress in repairing the division of economic and political rights into separate categories of human rights. However, significant outstanding issues in this research field remain, such as the blatant discrepancy between theory and practice, and what enforcement mechanisms are necessary to close this gap.

The human rights movement today is led by NGOs like Amnesty International, founded in 1961 and focused on “preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.”<sup>5</sup> The organization’s annual reports provide detailed accounts of the human rights violations occurring throughout the world. The U.S. Department of State also issues an annual report concerning each country’s standing with respect to those human rights outlined in the ICESCR and the ICCPR.

### *Background – Corruption*

Support for anti-corruption measures has increased significantly during the last 15 years. Academic and practitioner interest in corruption, especially with respect to the role that MNCs play in allowing and encouraging its persistence, has led to the formation of anti-corruption coalitions, detailed analyses of corruption’s negative externalities, and sponsored research by prominent NGOs and IGOs seeking to identify corruption’s sources via case studies.

Interest in actively combating corruption began in the 1970s as a result of the Watergate and Lockheed Martin scandals, which involved domestic campaign funding and international

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<sup>5</sup> For further information about Amnesty International, see [www.amnesty.org](http://www.amnesty.org) (last visited April 27, 2004).

business, respectively. The fallout from these scandals led to the development of the Foreign Corrupt Practices Act of 1977, which was met with initial skepticism from the rest of the world. It was not until the fall of the U.S.S.R. and the emergence of highly publicized domestic scandals in other developed countries that the international community saw the urgent need for adopting anti-corruption measures. In 1993, Transparency International, an organization dedicated to curbing corruption, was formed and has become one of the leading resources for corruption researchers. The organization's website provides corruption surveys, country and issues papers, and other publications relevant to academics and practitioners worldwide.

A number of international organizations have also contributed to the anti-corruption effort at the regional level.<sup>6</sup> The Organization for Economic Cooperation and Development took the boldest step against corruption by adopting the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997. Entering into force in 1999, the convention criminalized bribery of foreign public officials. The Council of Europe established the Group of States against Corruption in 1998 to monitor member states' efforts in promoting the Guiding Principles for the Fight against Corruption, and also passed the Criminal Law Convention on Corruption in 1999. The Organization of American States adopted the Inter-American Convention against Corruption in 1996, calling on member states to criminalize bribery by developing national legislation based on the FCPA. The recent adoption of the U.N. Convention against Corruption by the General Assembly, and subsequent signing by 106 state parties, is an outgrowth of these regional efforts.

Progress in the fight against corruption, however, has not received blanket support from the worldwide academic community. Some critics suggest that corruption is an effective

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<sup>6</sup> David Hess and Thomas W. Dunfee, "Fighting Corruption: A Principled Approach; The C<sup>2</sup> Principles (Combating Corruption)," *Cornell International Law Journal* 33.3 (2000): 602-603.

mechanism for evading inefficient bureaucratic red tape.<sup>7</sup> In response, anti-corruption advocates note that bribery actually incentivizes corrupt officials to develop more hurdles, solicit bigger bribes, and create more elaborate extortion schemes.<sup>8</sup>

The manner in which the forerunners in the fight against corruption have defined the term is also considered by some critics to be a form of Western cultural imperialism, in that it condemns types of gift giving historically acceptable in other societies.<sup>9</sup> The signing of the U.N. Convention against Corruption by a geographically and economically diverse group of 106 state parties, however, indicates that fighting corruption is not simply a Western concept. The widespread acknowledgement of the historic document also implies that critics of anti-corruption advocates are no longer in the majority amongst the global community.

Still others point to the supposed economic benefits of corruption, noting that bribery prevents excessive wage inflation and creates a necessary price floor for certain goods and services in imperfect markets.<sup>10</sup> However, economic and statistical studies seem to contradict those claims. For example, two researchers seeking to determine the causes of economic corruption found that corruption is pervasive in many African and Latin American countries with low levels of economic growth.<sup>11</sup> While the results of such studies often include subjective scales and opinions that slightly impair their objectivity, the secretive nature of corruption limits the availability of hard empirical data. Consequently, researchers look to alternative approaches in attempting to establish the negative externalities of corruption.

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<sup>7</sup> Nathaniel H. Leff, "Economic Development Through Bureaucratic Corruption," *American Behavioral Scientist* 8.3 (1964): 8-14.

<sup>8</sup> Abdiweli M. Ali and Hodan S. Isse, "Determinants of Economic Corruption: A Cross-Country Comparison," *Cato Journal* 22.3 (2003): 451.

<sup>9</sup> James C. Scott, *Comparative Political Corruption* (Englewood Cliffs: Prentice-Hall, 1972).

<sup>10</sup> Francis T. Lui, "Three Aspects of Corruption," *Contemporary Economic Policy* 14.3 (1996): 26-29.

<sup>11</sup> Ali 449-466.



## *Literature Review*

While several researchers have mentioned in passing that there is a link between human rights and corruption, few have attempted to draw a tangible connection between the two fields of study. TI has sponsored the vast majority of the research seeking to describe the relationship between the two fields. Economist Laurence Cockcroft, a member of the TI Board of Directors, asserts that the human rights movement and anti-corruption movement have a lot in common.<sup>12</sup> He suggests that transparency and accountability are correlated with both greater respect for human rights and lower levels of corruption. Cockcroft believes that making advances in the human rights and anti-corruption movements is dependent on the responsible development of national integrity by civil society.

Constitutional law expert Nihal Jayawickrama asserts that corruption violates human rights by grouping corruption into two categories, petty corruption and grand corruption, and describing how these forms of corruption lead to violations of the UDHR, ICESCR, and ICCPR.<sup>13</sup> While Jayawickrama outlines an effective framework for considering the link between the two research fields, his arguments are based on seemingly broad anecdotal examples of corruption and lack a specific, systematic treatment of documented instances of corruption.

Mary Robinson, executive director of the Ethical Globalization Initiative and former U.N. High Commissioner for Human Rights, noted in *TI Global Corruption Report 2004* that the relationship between human rights and corruption demands further consideration. She pointed out that if human rights violations and corruption are linked, then respecting human rights could serve as an important aid in the anti-corruption movement. Analyzing the human rights

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<sup>12</sup> Laurence Cockcroft, "Corruption and Human Rights: A Crucial Link," Berlin, 1998, 1-5.

<sup>13</sup> Nihal Jayawickrama, "Corruption – A Violation of Human Rights?" Sofia, 1998, 1-6.

implications of corruption could potentially make human rights law an effective mechanism for combating corruption in courts and lead the public to more fervently reject corruption.

### *Methodology*

The first step in examining the human rights implications of corruption was identifying classifications of corruption. After considering several different approaches presented in the writings of corruption researchers, it was decided that the institutional grouping used in the TI Global Corruption Barometer survey would serve as the most effective means for dividing corruption into subcategories. The survey, commissioned from Gallup International in July 2002, asked 30,487 citizens in 44 countries, “If you had a magic wand and you could eliminate corruption from one of the following institutions, what would your first choice be?” The survey offered 11 specific choices, which were business licensing, courts, customs, education system, immigration, medical services, police, political parties, private sector, tax revenue, and utilities. The three categories with the highest overall percentage of respondents – political parties (29.7%), courts (13.7%), and police (11.5%) – were determined to be the most valuable for research. This conclusion assumes that the respondents want to eliminate corruption from the institutions that they perceive to be the most corrupt.<sup>14</sup>

The next step was to identify human rights laws and norms applicable to corrupt activities. Given the historical importance of the U.N. in the human rights movement, its documents were analyzed to pinpoint the human rights that MNCs were responsible for acknowledging and encouraging. Violations of these rights, as a result of corrupt actions, would then serve to establish the link between the two fields of study and further substantiate the

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<sup>14</sup> Further assuming that perceptions reflect reality, the greatest amount of useful data, which are allegations of corruption, should concern the three institutions mentioned.

position of anti-corruption advocates. The U.N. Human Rights Sub-Commission provides a list of human rights that companies must respect and promote.

- Right to equal opportunity and non-discriminatory treatment
- Right to security of person
- Rights of workers (companies shall not use forced or compulsory labor, shall respect the rights of children, shall provide a safe and healthy workforce, shall provide workers with remuneration that allows for an adequate standard of living for them and their families, shall ensure the freedom of association and the right to collective bargaining)
- Respect for national sovereignty and human rights (including not paying bribes, ensuring that the company's goods and services are not used to abuse human rights, respecting civil, cultural, economic, political and social rights in particular, the rights to development, adequate food and drinking water, highest attainable standard of physical and mental health, adequate housing, education, freedom of thought, conscience and religion, freedom of opinion)
- Consumer protection
- Environmental protection

This list is valuable because it draws a specific connection between MNCs and human rights.

Supplementing this list are the UDHR, ICESCR, and ICCPR.

In drawing the link between human rights and corruption empirically, a number of different methods were considered. One possible strategy was searching through the press releases of the general media for well-publicized instances of corruption. This strategy, however, was rejected on the basis of being too abstract and broad. Another potential method was identifying instances in which the World Bank and International Monetary Fund withheld aid packages in response to rampant corruption in a given country. This method was later abandoned on the grounds of lacking identifiable acts of corruption attributed to the withholding of aid packages, which makes analysis very difficult.

Ultimately, legal cases brought under the Alien Tort Claims Act served as an effective springboard for identifying specific, well-publicized events whose background allowed for analysis through the lens of human rights and corruption. The ATCA, adopted in the U.S. in 1789, states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The act

was largely inactive for 200 years before becoming a vehicle by which victims of international law violations abroad filed suits in U.S. courts.<sup>15</sup>

While quite a number of cases have been filed under the ATCA, only the 26 cases brought against MNCs were considered for analysis, given the paper's focus on the role of business in allowing corruption to persist.<sup>16</sup> The background of these cases, laid out in case transcripts and general press releases, was reviewed to identify allegations of corruption related to political parties, courts, and police.<sup>17</sup> The examples described in the results are the cases that best matched the prescribed categories of corruption.

It is important to note that allegations, and not findings of liability, are serving as the basis for the analysis in this paper. All of the cases mentioned were dismissed on procedural grounds or pending review, meaning that there was no substantive resolution of the issues brought under the ATCA. While it is impossible to ascertain which party would prevail if each case were permitted to proceed, this paper assumes that the allegations brought by the plaintiffs are true for what they reveal concerning the human rights implications of corruption.

### *Political Corruption*

A classification of corruption that has important human rights implications is political corruption, in which political leaders use the control and authority bestowed upon them on behalf of the general public interest for their personal benefit. The resulting private gain can consist of both financial profit and greater political influence in society. The scale of this private gain from

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<sup>15</sup> The ATCA itself is now coming under fire from the Bush administration and USA\*Engage, a National Foreign Trade Council-affiliated coalition seeking to "inform policymakers, opinion-leaders, and the public about the counterproductive nature of unilateral sanctions." USA\*Engage seeks to repeal or sharply limit the extent to which the ATCA can be applied. The appropriate interpretation of the ATCA will not be discussed here in further detail, except to note that the U.S. Supreme Court is currently in the midst of determining the scope of the ATCA for the first time ever in its review of *Sosa v. Alvarez-Machain*.

<sup>16</sup> See [www.usaengage.org](http://www.usaengage.org) for a comprehensive listing of current and recent ATCA cases.

<sup>17</sup> It was assumed that all of the cases were related to abuses of human rights, given the nature of the ATCA.

an economic standpoint can be enormous, as the table below detailing alleged embezzlement figures suggests.<sup>18</sup>

<b>Head</b>	<b>Position</b>	<b>Country</b>	<b>Tenure</b>	<b>Amount (USD)</b>
Mohamed Suharto	President	Indonesia	1967-1998	15 to 35 billion
Ferdinand Marcos	President	The Philippines	1972-1986	5 to 10 billion
Mobutu Sese Seko	President	Zaire	1965-1997	5 billion
Sani Abacha	President	Nigeria	1993-1998	2 to 5 billion
Slobodan Milosevic	President	Serbia/Yugoslavia	1989-2000	1 billion
Jean-Claude Duvalier	President	Haiti	1971-1986	300 to 800 million
Alberto Fujimori	President	Peru	1990-2000	600 million
Pavlo Lazarenko	Prime Minister	Ukraine	1996-1997	114 to 200 million
Arnoldo Alemán	President	Nicaragua	1997-2002	100 million
Joseph Estrada	President	The Philippines	1998-2001	78 to 80 million

The importance of combating political corruption was highlighted by the TI 2003 GCB survey, in which 29.7% of respondents selected political parties as the institution from which they would most like to see corruption eliminated. Citizens of 33 of the 45 polled countries, and at least 10% of the respondents of each polled country, ranked political parties as their first choice. Political corruption is most often associated with campaign financing and election processes, but also takes on other forms, such as the regulatory influence of MNCs in developing countries.<sup>19</sup>

This type of political corruption exists in both legal and illegal forms. Regulatory influence of MNCs occurs in a legal context when weak legislation permits the financial benefits resulting from the negotiation and signing of public contracts to flow in part to corrupt officials. It takes place in an illegal context when public officials are directly paid bribes, a practice criminalized by the FCPA and the OECD Anti-Bribery Convention.

Regulatory influence of MNCs in developing countries persists because both the MNC and the foreign government are eager to establish a long-standing relationship. From the MNC's

<sup>18</sup> Robin Hodess, "Introduction," *Global Corruption Report 2004* (London: Pluto Press, 2004) 13.

<sup>19</sup> These forms of political corruption concern the spending levels of political parties on election campaigns and the lack of transparency regarding the sources of campaign funding.

point of view, a strong relationship may enable it to avoid costly compliance with environmental laws or obtain favorable changes in those laws. In the energy industry, for example, the operations of oil and natural gas exploration and production companies like ExxonMobil, British Petroleum, and ChevronTexaco create enormous amounts of toxic waste that must be removed in accordance with local environmental standards. The ability to circumvent these standards significantly lowers operating costs and raises profit margins. From the foreign government's perspective, a close relationship will encourage the MNC to expand its operations, leading to more foreign direct investment, tax revenue, and local jobs.

The foreign government is consequently willing to accept noticeable discrepancies between the environmental standards of its own country and the MNC's home country. Often, this discrepancy is viewed by developing countries as an integral part of enticing FDI. The lax standards that result, along with lax regulation, lead to physical injuries and deaths, environmental damage, and other human rights abuses.

The energy industry is particularly susceptible to this form of political corruption because of the grand scale of fossil fuel E&P operations. The initial investment for E&P companies, which covers the cost of aerial and seismic surveys, exploratory drilling, appraisals, development, and production, can amount to tens of millions of dollars. It is thus much easier to hide corrupt payments in this business than in others that are less capital-intensive. Cost overruns, a vehicle through which corrupt payments are often disguised, may be small in relative terms but still amount to enormous sums in absolute terms. Consequently, reported investment costs do not reflect fair market value, but instead include concealed subsidies eventually paid out to public officials as bribes.<sup>20</sup>

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<sup>20</sup> Shaxson, Nicholas, "The Elf Trial: Political Corruption and the Oil Industry," *Global Corruption Report 2004* (London: Pluto Press, 2004).

One ATCA case that particularly highlights the dangers of MNC regulatory influence in developing countries is *Wiwa v. Royal Dutch Petroleum*, in which plaintiffs alleged that the energy giant was involved in abuses of human rights in Nigeria.<sup>21</sup> These violations include the hangings of two leaders of the Movement for the Survival of the Ogoni People, the torture of another leader, and the shooting of a peaceful protestor during the mid-1990s.<sup>22</sup> All three of these actions are direct violations of the ICCPR. Article 6.1 of the covenant states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 21 of the covenant states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Royal Dutch Petroleum had also been accused of ongoing environmental destruction in the Ogoni region and several breaches of the Racketeer Influenced and Corrupt Organizations Act.

According to plaintiff allegations, Royal Dutch Petroleum established a close relationship with the Nigerian government by continuously supplying corrupt payments to its leaders. These bribes enabled the MNC to avoid strict compliance with existing environmental legislation. As Royal Dutch Petroleum's operations expanded and its destruction of the surrounding environment became more pervasive, the Ogoni people, who inhabited the land affected by the MNC's E&P facilities, began to protest Royal Dutch Petroleum's actions. However, the MNC

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<sup>21</sup> This case was filed with the Southern District Court of New York on February 28, 2002.

<sup>22</sup> Writer and activist Ken Saro-Wiwa, who was one of the two leaders executed in 1995, founded MOSOP in 1990. The protestor was demonstrating against the bulldozing of her crops in preparation for the construction of Royal Dutch Petroleum midstream infrastructure, used to transport unfinished products to refineries for processing.

ignored these demonstrations, knowing that it had the support of the government. Nigerian law also limits the liability of MNCs, further encouraging Royal Dutch Petroleum to ignore the protests. As the number of demonstrators grew, however, the company began to view the ongoing protests as a nuisance, leading it to allegedly conspire with the government to engage in the aforementioned human rights abuses.<sup>23</sup>

Political corruption in Nigeria thus led to denials of the right to life, the right to freedom from torture, and the right to peaceful assembly, established by the ICCPR. Further, Royal Dutch Petroleum did not respect or promote the right of the Ogoni people to environmental protection recommended by the U.N. Human Rights Sub-Commission. The case has currently proceeded to the discovery stage, but a motion to dismiss filed by Royal Dutch Petroleum on December 2, 2003, is pending.

### *Judicial Corruption*

Another common type of corruption that has implications for human rights is judicial corruption, in which domestic court systems worldwide, designed for the fair enforcement of legal frameworks, are subjected to outside influences, rendering these courts partial and biased. Judicial corruption is an important consideration in international business because it allows MNCs to escape liability for the various types of harm caused by their international operations. In ATCA cases, plaintiffs allegedly injured by MNCs know that they will be unable to obtain a fair trial in their own court system, let alone justice and compensation, and consequently seek redress in U.S. courts.

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<sup>23</sup> Royal Dutch Petroleum possibly also feared that some of its local employees might defect in response to pressure from the community, which would lower production efficiency, raise costs, and create logistical problems.



The enormous backlog in U.S. courts, however, often prevents foreign injured parties from securing a court date for many months, or even years. When the plaintiffs actually obtain a hearing, the judge presiding over the case faces enormous pressure from various interest groups that lobby to have the case dismissed.<sup>24</sup> One of the most common legal vehicles utilized by the defense to this end is *forum non conveniens*, defined by LegalDefinitions.com as “a common law doctrine that permits a case to be dismissed if there is another forum that is more convenient and would serve the interests of justice to litigate elsewhere.”<sup>25</sup> The motion to dismiss is often successful, with the judge noting that allegations of judicial corruption in the country of investment are insufficient for rendering that court system as an inadequate forum for the case, and the MNC consequently escapes legal liability.

Judicial corruption thus denies plaintiffs the right to obtain a fair trial in court in which both parties, the injured locals and the MNC, are equal before the law. Article 2.3 of the ICCPR states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Parties seeking relief under the ATCA as a result of being injured in developing countries by MNCs are clearly being denied the “effective remedy” to which they are entitled by the ICCPR.

Article 14.1 of the same covenant states:

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<sup>24</sup> Many foreign trade ministers in developing countries believe that holding MNCs responsible for their actions abroad is a deterrent to FDI. The U.S. executive branch, seeking to appease these foreign officials, consequently applies pressure on the judiciary to dismiss the cases.

<sup>25</sup> In the context of ATCA cases, defendants often note that the relevant evidence and victims remain in the country of investment, rendering its courts more convenient. Plaintiffs often respond by pointing out that the interests of justice are not considered in those courts because corruption prevents the plaintiffs from obtaining a fair trial.

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Judicial corruption prevents the realization of this fairness of courts clause in the ICCPR.

The TI GCB provides empirical evidence of the relevance of combating judicial corruption. Respondents indicated that after political parties, courts were the institution from which elimination of corruption was most desirable. In four of the 44 countries polled – Peru (35.0%), Indonesia (32.8%), Cameroon (31.0%), and Luxembourg (18.1%) – courts ranked first. Not surprisingly, four ATCA cases – *Beanal v. Freeport-McMoRan* (mining operations in Indonesia), *Doe v. ExxonMobil* (natural gas E&P in Indonesia), *Flores v. Southern Peru Copper* (mining operations in Peru), and *Maugein v. Newmont Mining* (mining operations in Peru) – have been brought against MNCs operating in Peru and Indonesia.<sup>26</sup>

The story behind *Maugein v. Newmont Mining* began in 1992, when Newmont Mining teamed up with Peruvian mining company Buenaventura, the French Mining Bureau, and the World Bank's private-sector investment division to develop the Yanacocha gold mine, a few hundred miles north of Lima, Peru. In 1994, the French Mining Bureau announced its intention to sell 60% of its 24% interest to Normandy Mining. Newmont Mining and Buenaventura filed suit in Peru to block the sale and were victorious, giving Newmont Mining a majority interest in the mine. Three years and several appeals later, the Peruvian Supreme Court reconfirmed the

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<sup>26</sup> *Beanal v Freeport McMoRan* was filed with the Eastern District Court of Louisiana on November 29, 1999. *Doe v. ExxonMobil* was filed with the District Court of the District of Columbia on June 20, 2001. *Flores v. Southern Peru Copper* was filed with the Southern District Court of New York on July 16, 2002. *Maugein v. Newmont Mining* was filed with the District Court of Colorado on January 15, 2004.

decision of the lower courts by a 4-3 vote. Newmont Mining then bought Normandy Mining to become the world's largest producer of gold.

Patrick Maugein, chairman of SOCO International, filed a civil racketeering suit against Newmont Mining, demanding punitive damages for the consulting fee that he was denied because of the Peruvian court decision in favor of Newmont Mining and Buenaventura.<sup>27</sup> The basis of the suit was the allegation of corruption in the Peruvian courts, which he believed were biased in favor of Newmont Mining and Buenaventura.

Unfortunately for Maugein, it was not until after the case was dismissed that his allegations were substantiated by the discovery of the "vladivideos," a collection of approximately 2,500 videotaped meetings between Peruvian secret service chief Vladimiro Montesinos and highly positioned public officials. The videos vividly depict the manner in which corruption enabled Montesinos and his boss, former president Alberto Fujimori, to control all aspects of the Peruvian public sector. One of the videos made public contains implicating evidence of Montesinos bribing a judge to rule in favor of Newmont Mining. Montesinos, now serving a nine-year sentence after being found guilty on charges of usurping power, gave sworn testimony from jail that the 1997 Peruvian Supreme Court vote was fixed in a conspiracy plot involving Newmont Mining, Buenaventura, him, and \$4 million. Further substantiating the allegations of judicial corruption was a certified audiotape, from the Congress of Peru, of a conversation between Montesinos and former Newmont vice president and chief administrative officer Lawrence Kurlander, in which the two discuss how to influence the vote. The vladvideos and audiotape provide very clear evidence that Newmont Mining has an enormous amount of influence on the Peruvian courts.

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<sup>27</sup> SOCO International is an international oil and natural gas E&P company.

Judicial corruption can have several downstream human rights ramifications beyond denying the right to a fair trial. Four years after the Peruvian Supreme Court vote, another suit was filed against Newmont Mining, this time in U.S. courts, in which plaintiffs sought redress for a toxic spill that injured more than 1,000 indigenous villagers from the Andean countryside.<sup>28</sup> More than 300 pounds of mercury, a byproduct of the extraction process, leaked along a 25-mile stretch of road, causing mercury poisoning among the locals. The spill reinforced allegations of recklessness on the part of Newmont Mining, which had been accused in the past of disposing of cyanide in an unsafe manner, leading to water and soil contamination and the destruction of plant life, livestock, and fish. Newmont Mining's actions violate Articles 12.1 and 12.2b of the ICESCR, which state:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the improvement of all aspects of environmental and industrial hygiene.

Given Newmont Mining's ability to influence the judiciary, the plaintiffs sought relief under the ATCA, but the case was dismissed on *forum non conveniens* grounds on May 20, 2002.

Newmont Mining failed to meet the U.N. Human Rights Sub-Commission's guidelines for companies and human rights in several respects. It not only undermined the Peruvian court system by willingly paying bribes and soliciting public officials to do the same, but also acted irresponsibly with regard to the health and safety of its operating environment and surrounding communities. Newmont Mining, through judicial corruption, prevented those harmed by its actions from obtaining adequate relief in the only forum deemed convenient and available to the injured parties.

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<sup>28</sup> *Castillo v. Newmont Mining* was filed with the District Court of Colorado on August 17, 2001.

### *Police/Military Corruption*

A third type of corruption that frequently has human rights implications is that which occurs in relation to the police and military. Defined by Merriam-Webster as the “organization or regulation of a political unit through exercise of governmental powers especially with respect to general comfort, health, morals, safety, or prosperity,” the police and military forces are public institutions designed to ensure the security and welfare of a nation’s citizens both internally and externally. When officials of these institutions engage in corruption, they knowingly fail to perform their ascribed function, and instead neglect or negatively impact the security and welfare of the citizens that they are supposed to protect. Neglect is considered passive in this spectrum of corruption; it consists of non-intervention when their job function normally calls them to action. Negative impact is considered active; it consists of taking measures that cause actual harm to the population.

A notable case tied to this form of corruption is *Sinaltrainal v. Coca-Cola*, in which plaintiffs working for Coca-Cola bottling plants in Colombia alleged that the company cruelly denied the right of its workers to form unions.<sup>29</sup> Trouble for Adolfo de Jesus Munera, a regional leader of the Sinaltrainal food industry workers’ union, began in 1997 when the plant chief accused him of being a sympathizer with Colombian rebel forces. Army troops raided his house, forcing him to flee the region. Coca-Cola then sent him a letter announcing his termination for not showing up at work, prompting Munera to file suit in Colombia and demand his job back.

After obtaining a favorable ruling in the lower court and having the ruling overturned in the appellate court, Munera had his case accepted by the Colombian Constitutional Court on August 22, 2002. He was shot to death nine days later, becoming the eighth union leader from a

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<sup>29</sup> The case was filed with the Southern District Court of Florida on July 20, 2001, on behalf of the five union leaders that hitherto had been murdered, tortured, and/or unlawfully detained. Although Munera was not one of those five, his story is representative of the circumstances that the other union leaders faced.

Coca-Cola plant in Colombia to be murdered through 2002. Coca-Cola's actions are part of a larger trend among MNCs operating in Colombia, as nearly 4,000 union activists from the national union federation have been assassinated in the past 20 years without detailed investigations and prosecutions.<sup>30</sup> Sinaltrainal alleged in its ATCA filing that Coca-Cola knowingly paid these paramilitary units to bring destruction to the union.

Plaintiffs suggest that the alignment of interests between these assassin squads and the world's most recognized brand name can be explained by nothing other than corruption. Instead of protecting the rights of workers, the police and military units, now financially supported by Coca-Cola, are in fact denying the human rights of local employees and abusing the human rights of regional union leaders. In addition to the human rights of life and freedom from torture mentioned above, the ICCPR also stipulates a right to freedom from unlawful detainment.

Article 9.1 of the ICCPR states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Furthermore, the raid of Munera's home and the defamation of his reputation by the plant chief violate Article 17 of the ICCPR, which states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Instead of protecting Munera and others from these attacks, Coca-Cola and the paramilitary units engaged in the attacks. This form of corruption also leads to violations of rights with respect to unions, validated by the ICCPR and the core covenants of the International Labor Organization.

Article 22 of the ICCPR states:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

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<sup>30</sup> Juan Gonzalez, "Bottling Coke and Spilling Blood," *New York Daily News*, November 11, 2003.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

As unions represent the ability to collectively bargain and improve the conditions of workers on a continual basis, it is likely that Coca-Cola and other MNCs oppose unions because they contribute to higher labor costs and their contracts add undesirable legal responsibility. With respect to the recommendations outlined by the U.N. Human Rights Sub-Commission, Coca-Cola is failing to ensure that its Colombian workers are safe and healthy, given the freedom of association, and allowed to engage in collective bargaining. On March 31, 2003, the court granted Coca-Cola's motion to dismiss for lack of subject matter jurisdiction.

Several other cases, including *Estate of Rodriguez v. Drummond* (coal mine operations in Colombia), *Doe v. Unocal* (gas pipeline project in Burma), and *Villeda v. Fresh Del Monte Produce* (banana plantations in Guatemala), involve situations similar to that of *Sinaltrainal v. Coca-Cola*.<sup>31</sup> In each case, there are premeditated assaults on unionization by paramilitary units. *Doe v. Unocal* involves another type of human rights abuse resulting from corruption in the police and military, that of forced labor. Articles 8.3a and 8.3b of the ICCPR state:

- (a) No one shall be required to perform forced or compulsory labor;
- (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labor may be imposed as a punishment for a crime, the performance of hard labor in pursuance of a sentence to such punishment by a competent court.

These cases collectively provide strong evidence of the damaging effects that corruption of the police and military can have on human rights in an international business context.

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<sup>31</sup> *Estate of Rodriguez v. Drummond* was filed with the Northern District Court of Alabama on March 14, 2002. *Doe v. Unocal* was filed with the Central District Court of California on March 25, 1997. *Villeda v. Fresh Del Monte Produce* was filed with the Southern District Court of Florida on August 2, 2001.

The human rights ramifications of this form of corruption can extend beyond abuse of plant workers and environmental destruction. In *Bowoto v. Chevron*, plaintiffs alleged human rights abuses exacted on peaceful demonstrators by military squads transported by Chevron vehicle units.<sup>32</sup> The villagers were protesting the environmental destruction of the Niger Delta resulting from the MNC's dredging operations. Petitions signed by residents went unheeded, leading unarmed locals to an offshore platform to protest Chevron's actions and demand a meeting between community elders and Chevron representatives.

On May 28, 1998, soldiers, carried in Chevron-leased helicopters operated by company pilots, violated the right of peaceful assembly by opening fire on the protestors, who lacked weapons and showed no indications of desiring a violent confrontation. Given that Chevron security personnel on the platform were armed, it would be both irrational and extremely dangerous for the local villagers to want anything except to verbally express their dissatisfaction with Chevron's operations. Instead of ensuring the security and welfare of the population, the soldiers, financially and materially supported by Chevron, engaged in abuses of human rights. Under the recommendations of the U.N. Human Rights Sub-Commission, Chevron has a responsibility to respect and promote the rights of the U.N. covenants in its operating community. Instead, the MNC engaged the military and its officials to disregard their fiduciary responsibility to the population. Defendant's motion for summary judgment was denied on March 23, 2004, and the outcome of the case is pending.

### *Recommendations*

The aforementioned ATCA cases suggest that corruption does have significant, negative externalities relating to human rights. Given that human rights abuses result from political,

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<sup>32</sup> This case was filed with the Northern District Court of California on May 27, 1999.



judicial, and police/military corruption, the next step is to reexamine the cases from a macro perspective and identify possible ways to curb corruption.

Corruption is able to persist because there is supply of and demand for it. Consequently, both the payers and recipients of bribes should be held accountable for its existence.<sup>33</sup> The ATCA cases relevant to political and police/military corruption indicate that a great deal of importance should be placed on dealing with the supply side of corruption. In international business, supply-side responsibility often falls on MNCs, which are based in some of the world's wealthiest nations.<sup>34</sup> These MNCs have enormous economies of scale and multi-billion dollar market caps, and are consequently in the best position to shape policy concerns in developing countries. Regarding MNCs and their role in perpetuating corruption, there are three main issues that must be addressed – lack of awareness, poor enforcement mechanisms, and failure to consider relevant stakeholders.

According to one of the surveys comprising the TI 2002 Bribe Payers Index, in which Gallup International surveyed business experts across 15 leading emerging market economies, only 19% of respondents were aware of the OECD convention criminalizing bribery. In a press release accompanying the 2002 BPI, TI Chairman Peter Eigen noted, “The convention does not seem to have made any difference, so far, to the bribery approaches of many multinational firms.” The results suggest that there is a definite and immediate need to raise awareness.

Awareness campaigns in MNCs need to be a top-down effort. Executives must have a firm understanding of what corruption entails and the negative consequences of participating in it. Only then can awareness be effectively disseminated throughout the organization.

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<sup>33</sup> Historically, many have only assigned responsibility to the recipients, claiming that bribery was an integral and unavoidable part of doing competitive business abroad.

<sup>34</sup> This statement does not assume that there are no other sources of corruption. In the oil industry, for example, domestic corporations also pay bribes to public officials and are often politically aligned with them. In inter-institutional corruption of the public sector, government officials are at both ends of the flow of corrupt payments.

Furthermore, companies should hire consultants to evaluate the quality and effectiveness of their whistle-blowing programs. Does the program produce results? Have adequate steps been taken to protect the anonymity of the process? Does the whistle blower suffer negative fallout from his or her action afterwards? An effective whistle-blowing program has the potential not only to identify those engaged in corrupt activities, but also hinders other employees from participating in them. Aside from the possibility of improving its public relations image, though, a company has very little incentive to add these overhead costs.<sup>35</sup> Consequently, the most effective way to push these types of measures through is via industry-wide efforts.

The need for effective whistle-blowing programs within each corporation alludes to another uphill battle in the effort to curb corruption, which is finding effective ways to enforce existing conventions. Organizations like the OECD have drafted document after document condemning corruption, and even criminalizing it. However, without proper enforcement, corruption will continue to flourish. There have hitherto been no convictions under the OECD convention against bribery. Enforcement of such conventions requires a collaborative effort of the domestic court systems of both the source and recipient of investment. At the source, tangible negative reinforcement, such as heavy fines and investment restrictions, must be levied on those individuals and their corporations found in violation of the convention. On the receiving end, judicial infrastructure must show dramatic improvement. Possible changes in the court systems of many developing countries seeking investment include greater independence of the judiciary from government and MNCs, as well as increased liability for foreign corporations in the country of investment. Failure to show progress towards these changes should lead to punishment via investment sanctions.

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<sup>35</sup> This statement assumes that the corporation collectively adopts a bottom-line perspective; that is, it will not simply act on the basis of moral goodness.

The other main piece of the supply-side puzzle is the failure of MNCs operating in developing countries to consider relevant stakeholders. In the years pre-dating stakeholder analysis, stakeholder and shareholder were virtually synonymous. That is, the only concern of the corporation was maximizing profit. Today, however, relevant stakeholders in addition to equity shareholders include employees, suppliers, customers, and the community.<sup>36</sup> While MNCs appear to consider these stakeholders domestically, the same cannot be generally said of their operations abroad.<sup>37</sup> There is a large discrepancy, for example, between the domestic and foreign environmental standards to which MNCs adhere. While MNCs should not be forced to adopt the exact same standards abroad as they do at home, they should take into further consideration the fact that they are citizens of the communities in which they invest and operate. ATCA cases, however, reveal that MNCs view their foreign operations as profit generators, leading to mistreatment of local populations and environmental destruction.

Awareness programs concerning the environment abroad may be difficult to implement alone, and consequently should be complemented by the raising of environmental standards worldwide.<sup>38</sup> Contrary to the belief of many foreign governments, research shows that raising environmental standards within a given country does not damage the level of FDI. To further alleviate such concerns, an international convention, like those concerning human rights and corruption, should be drafted to describe in greater detail the minimal environmental standards to which all ratifying nations must adhere. Diverging opinions across the world may result in slow

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<sup>36</sup> The paradigm shift can be attributed to a number of factors, of which the most relevant is probably the growth in size and lobbying power of NGOs and IGOs dedicated to identifying and publicizing issues in business.

<sup>37</sup> Then again, MNCs may not be engaging in stakeholder analysis domestically either, and instead are simply trying to improve their public relations images and avoid negative reinforcement.

<sup>38</sup> Objections to these efforts are important to consider. The Bamako Convention, for example, prohibits members of the European Union from engaging in waste tourism to African nations. Critics, including several African nations, suggest that these conventions are violations of both national sovereignty and market efficiency. A country ought to be able to do what it pleases with its own territory, given the right price. These critics fail to consider, however, the disparity between developed and developing countries, which would only continue to expand without a certain degree of regulation.

progress, but the U.N. Convention against Corruption testifies to the potential benefit of such efforts.

Increased awareness, better enforcement, and stakeholder analysis can combine to have a dramatically positive impact in the world's efforts to curb corruption. Instead of waiting to be scrutinized and criticized for their position on human rights and reacting accordingly, MNCs should adopt a proactive approach in promoting and respecting the principles outlined for companies by the U.N. Human Rights Sub-Commission.

### *Conclusion*

The history of corruption probably dates back to the creation of the first social structure, in which public authority was vested in an individual responsible for using it to benefit the community. However, a lengthy history is not a valid excuse for allowing it to persist.<sup>39</sup> Furthermore, qualitative research of ATCA cases suggests that political, judicial, and police/military corruption have important negative implications in the realm of human rights. These forms of corruption lead to injuries and deaths among local populations, as well as devastation of the environment. Addressing the supply side of these forms of corruption seems to be a good place to start, given the influence of MNCs on the policies of developing countries. However, a long-term approach must also consider ways to reduce the demand for bribes by public officials. Although even the most optimistic researchers in the field are pessimistic about the likelihood of eradicating corruption completely, the U.N. Convention against Corruption suggests that even small steps of progress are beneficial to the global community.

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<sup>39</sup> Approximately 30% of respondents in the TI 2003 GCB expected that corruption would increase over the next three years.

## *Future Research*

This paper concluded that corruption does have human rights implications. Both the anti-corruption movement and the human rights movement have large international organizations with local chapters around the world. Are there ways for Amnesty and TI to work together so that the goals of both organizations are achieved? Do synergies exist?

One of the major recommendations of this paper is that there must be a greater degree of judicial autonomy in developing countries. What tangible ways are there to strengthen judicial autonomy? Effective measures towards this end would not only reduce the pressure on U.S. courts to hear cases involving international law violations abroad, but would also reduce instances of corruption and human rights abuse in the country of investment. Judicial autonomy from the influences of political leaders and MNCs would also force companies to abide by higher working and environmental standards.

Although this paper highlighted the failures of several MNCs in their operations abroad, a number of companies have served as pioneers in the anti-corruption and human rights movements, proactively adopting higher standards with significant consequences for failing to adhere to them. Which MNCs materially consider these two fields as important business issues? What strategies have they employed to demonstrate their commitment to curbing corruption and fighting against abuses of human rights? Are these strategies transferable across countries and industries?

The OECD Anti-Bribery Convention has been in force for more than five years, and yet there have been zero convictions resulting from it. Certainly part of the problem is a lack of awareness, highlighted by the results of the TI 2002 BPI. Are there other ways to make the convention a more effective legal mechanism?

The U.N. Convention against Corruption merges international opinions concerning corruption into one cohesive document, and has consequently generated a significant amount of excitement with regards to its potential in the anti-corruption movement. What effect will the convention have on attitudes towards corruption among political leaders, businesspeople, and the general population? What factors suggest that this convention will or will not suffer a fate similar to the OCED Anti-Bribery Convention?

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