

# ARE FINANCIAL INSTITUTIONS LIABLE FOR FINANCIAL CRIME UNDER THE ALIEN TORT STATUTE?

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## INTRODUCTION

Global financial crime affects millions of financial end-users,<sup>1</sup> causes billions, if not trillions, of dollars in losses,<sup>2</sup> and enables rogue leaders to plunder national wealth.<sup>3</sup> Recent admissions, settlements and

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1. See Editorial, *Libor's Trillion-Dollar Question*, BLOOMBERG (Aug. 27, 2012), <http://www.bloomberg.com/news/2012-08-27/libor-s-trillion-dollar-question.html> (describing the Libor rate price fixing fraud and noting that the Libor rate affects nearly every kind of financing agreement from credit cards to auto finance to mortgages).

2. *Id.* (“If, for example, underreporting caused Libor to be artificially depressed by 0.1 percentage point for only a few months, payments on more than \$300 trillion in mortgages, corporate bonds and derivatives tied to the benchmark might have fallen short by about \$75 billion or so. If the problem lasted a few years, the shortfall could be close to \$1 trillion”).

3. See, e.g., Joe Palazzolo, *Tunisia Hires Ace To Track Down Ben Ali's Assets*, WALL ST. J. BLOG (Oct. 24, 2011, 12:31 PM), <http://blogs.wsj.com/law/2011/10/24/tunisia-hires-ace-to-track-down-ben-alis-assets> (noting that former Tunisian President and his family looted the nation and detailing efforts to recover the assets); *How Did Egypt Become So Corrupt?*, AL JAZEERA (Feb. 8, 2011, 15:12 GMT),

investigations have uncovered widespread global racketeering and fraud by large global corporations resembling organized crime more than banking.<sup>4</sup> The financial institutional activity includes: admissions of price fixing (Barclays),<sup>5</sup> settlements of bid-rigging claims (J.P. Morgan),<sup>6</sup> confessions of money laundering (HSBC),<sup>7</sup> and settlement of money laundering charges (Standard Chartered).<sup>8</sup>

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<http://www.aljazeera.com/programmes/insidestory/2011/02/201128111236245847.html> (describing rampant corruption in Egypt); Lanny A. Breuer, Assistant Attorney General, U.S. Dep't of Justice, Speech at the Twenty Sixth National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html> (attributing the origination of the "Arab Spring" to a young Tunisian who was the victim of local corruption).

4. See, e.g., Ellen Rosen, *Municipal Bonds, UPS, JPMorgan, Student Loans: Compliance*, BLOOMBERG (July 23, 2012), <http://www.bloomberg.com/news/2012-07-23/municipal-bonds-ups-jpmorgan-student-loans-compliance.html> (Discussing illegal activity at 13 major banks, including Bank of America, JPMorgan Chase & Co., and UBS AG); Jessica Silver-Greenberg, *Regulator Says British Bank Helped Iran Hide Deals*, N.Y. TIMES, Aug. 7, 2012, at A1, *available at* <http://www.nytimes.com/2012/08/07/business/standard-chartered-bank-accused-of-hiding-transactions-with-iranians.html?r=1&hp> ("In June, the Justice Department and the New York County district attorney's office reached a \$619 million settlement with ING Bank over accusations that it had illegally moved billions of dollars into the United States for sanctioned Cuban and Iranian entities.").

5. Peter J. Henning, *What the Barclays Settlement Means for Other Banks*, N.Y. TIMES (July 3, 2012), <http://dealbook.nytimes.com/2012/07/03/whats-next-after-the-barclays-settlement/> ("Barclays admitted to submitting false information at the behest of its traders to benefit pricing for derivatives, and later providing incorrect interest rates to counter media speculation about the bank's stability.").

6. Eric Dash, *JPMorgan Settles Bond Bid-Rigging Case for \$211 Million*, N.Y. TIMES (July 7, 2011), <http://www.nytimes.com/2011/07/08/business/jpmorgan-settles-bond-bid-rigging-case-for-211-million.html> ("JPMorgan Chase reached a \$211 million settlement with federal and state authorities on Thursday to resolve allegations that it cheated governments in 31 states by rigging the bidding process for reinvesting the proceeds of dozens of municipal bond transactions.").

7. Richard Blackden, *HSBC's 'money-laundering' apology*, THE TELEGRAPH, (July 12, 2012), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9393874/HSBCs-money-laundering-apology.html> ("Stuart Gulliver, HSBC's chief executive, told staff yesterday that "between 2004 and 2010, our anti-money laundering controls should have been stronger and more effective and we failed to spot and deal with unacceptable behaviour.").

8. Ian Katz, *U.S. Treasury Will Continue Standard Chartered Probe*, BLOOMBERG (Aug. 14, 2012), <http://www.bloomberg.com/news/2012-08-14/u-s-treasury-will-continue-standard-chartered-probe.html> ("The U.S. Treasury Department said its investigation of Standard Chartered Plc will continue after the bank settled a New York money-laundering probe for \$340 million."). See also Jessica Silver-Greenberg, *supra* note 4 ("Using its New York-based operations, a major British bank schemed with the Iranian government for nearly a decade to launder \$250 billion, leaving the United States financial system

An intriguing question is whether the financial crime engaged in by financial institutions, such as fraud and money laundering, constitutes a violation of international law. Treating such misconduct as violating international law would allow claims to be brought against financial institutions under the Alien Tort Statute (“ATS”).<sup>9</sup> The ATS allows non-U.S. citizens to sue defendants<sup>10</sup> in federal court for tortious conduct

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vulnerable to terrorists and corrupt regimes, New York’s top banking regulator charged on Monday.”).

9. 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). ATS litigation against financial institutions would be illustrative of the global trend of pursuing claims over “allegations of corporate misconduct overseas.” Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions*, 29 BERKELEY J. INT’L L. 456, 458 (2011). See also Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD., 665, 687-688 (2011) (discussing recent cases in Europe where corporations have been defendants in suits claiming that the corporations are liable for environmental damage, human rights abuses and war crimes).

10. There are two issues that impact whether a financial institution is subject to suit. First, the question of whether corporations may be liable for ATS claims is the subject of a circuit split. Compare *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (holding that corporations may not be held liable under ATS), with *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (stating that corporations may be held liable under the ATS). The issue of corporate liability was the basis for the Supreme Court accepting the *Kiobel* petition. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (U.S. 2011). However, the Court did not resolve the corporate liability issue, instead affirming the Second Circuit’s ruling based on the presumption against extraterritoriality. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). The only reference to corporations was the Court’s statement in the context of whether the conduct sufficiently touches and concerns the U.S.—that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.” *Kiobel*, 133 S. Ct. at 1669. A reasonable inference from the sentence would be the Court is tacitly endorsing corporate liability. Moreover, notwithstanding the unsettled jurisprudence on corporate liability, the topic of this article remains relevant; even if a corporation is not liable under the ATS, the corporate officers and directors can be held liable for the underlying conduct. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 122 (2d Cir. 2010) (“nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law— including the employees, managers, officers, and directors of a corporation — as well as anyone who purposefully aids and abets a violation of customary international law.”). The second issue that bears on whether a financial institution is subject to suit is the Court’s ruling that the presumption against extraterritoriality is applicable to ATS claims. However, the issue of corporate liability remains relevant because many of the potential defendants will be U.S. companies and, moreover, even foreign defendants may be unable to invoke the extraterritoriality argument depending on the extent their conduct touches and concerns the U.S. See Joel Slawotsky, *Corporate Liability for Violating International Law Under The Alien Tort Statute: The Corporation Through the Lens of Globalization and Privatization*, INT’L REV. L. (2013), available at <http://dx.doi.org/10.5339/irl.2013.6> notes 117-120 and accompanying text.

constituting a violation of international law.<sup>11</sup> To be cognizable under the ATS, alleged conduct must violate the “law of nations.” To qualify, the conduct must be universally condemned, specific, and touch upon the mutual interests of the nations.<sup>12</sup> Torts that do not meet these requirements cannot form the basis of an ATS suit.<sup>13</sup>

ATS claims are generally framed in the context of egregious violations of human rights such as torture,<sup>14</sup> slavery,<sup>15</sup> war crimes<sup>16</sup> and crimes against humanity.<sup>17</sup> Traditionally, courts have rejected fraud claims, limiting the ATS’s scope to suits seeking compensation for human rights abuse-linked personal injuries.<sup>18</sup> However, to automatically reject financial crime as a basis for subject matter jurisdiction is incorrect for two reasons. One, any claim that international law is solely relegated to “human rights issues” is wrong. Initially, international law was not concerned with human rights. In fact, “the very notion of universal human rights was intellectually incompatible with the kind of systematic, large-scale exploitation routinely entailed by colonial rule.”<sup>19</sup> Thus, there is no basis for excluding financial crimes as a cognizable conduct. Two, international law was initially a reflection of commercially-based disputes, as opposed to being limited to the human rights context.<sup>20</sup> Therefore, commercially-based claims such as money laundering are closer to the original meaning of international law. Accordingly, the issue deserves attention, and the

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11. See *Kiobel*, 621 F.3d at 116 n.3 (“In this opinion we use the terms ‘law of nations’ and ‘customary international law’ interchangeably.”) (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003)).

12. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); 28 U.S.C. § 1350 (2006).

13. Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act*, 17 DUKE J. COMP. & INT’L L. 131, 150 (2006) (“Many torts have been rejected as predicate offenses permitted under the ATCA.”). Not all violations of international law are cognizable under the ATS; only misconduct that exhibits a particularly identifiable and strong transnational dimension, which is also sufficiently egregious, is actionable pursuant to the ATS. See *id.* at 131–32 (2006) (explaining that only claims which implicate the “mutual concern of the nations of the world” are permitted under the statute).

14. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

15. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

16. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

17. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

18. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (holding that commercial theft is not cognizable).

19. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 834 (2012).

20. See Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 185 (1996) (“An ostensibly ‘private business deal’ entered between a United States multinational and a developing country government dissolved into a domestic legal dispute, then percolated upward into a public international dispute.”).

routine rejection of financial crime as a cognizable claim is unjustified.

Moreover, the ATS is a tort-based civil statute rather than a criminal one and contains no restrictive language with respect to the cognizable conduct. ATS suits may be based upon violations of international law in other contexts, such as the failure to obtain informed medical consent.<sup>21</sup> Thus, presuming the defendants cannot invoke the presumption against extraterritoriality argument, the only relevant inquiry in determining ATS jurisdiction is whether the financial crime satisfies the requirements of being universally condemned, specific, and of mutual interest.<sup>22</sup>

The question of whether global financial crime can serve as a basis for an ATS suit has garnered sparse academic attention.<sup>23</sup> However, given global developments in finance, interwoven international markets, and the enormous power of financial and investment banking entities, the question of whether financial crime is actionable likely will need to be addressed by courts sooner rather than later.<sup>24</sup> This article addresses the question and opines that compelling arguments exist in support of holding financial institutions liable for universally condemned, definable acts of financial crime<sup>25</sup> that touch upon the mutual interests of nations.<sup>26</sup>

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21. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (holding the failure to obtain informed medical consent violates international law).

22. Financial crime may take various forms; there is no single definition. See *Sanctions Board Decisions*, THE WORLD BANK, <http://go.worldbank.org/58RC7DVVW0> (last updated March 7, 2013) (debarment based upon acts of forgery, fraud and bribery).

23. A review of the literature reveals two previous articles: Slawotsky, *supra* note 13; and Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385 (2010).

24. These questions must be addressed because claims are proliferating. For example, a Turkish company recently filed suit against a South African company for alleged fraud and bribery in Iran. Tom Schoenberg & Indira A.R. Lakshmanan, *MTN Promised Iran Money, UN Votes for Phone Deal: Rival*, BLOOMBERG (Mar. 29, 2012), <http://www.bloomberg.com/news/2012-03-28/mtn-promised-money-weapons-un-votes-in-iran-rival-says.html>.

25. I am not referring to garden-variety fraud or financial crimes. The hurdle would be substantial and would be satisfied by the requirements of universality, specificity and mutual interest.

26. Neither the question of corporate liability nor the extraterritorial applicability of the ATS is addressed in this article. For a discussion of the corporate liability issue see Joel Slawotsky, *Corporate Liability for Violating International Law Under The Alien Tort Statute: The Corporation Through the Lens of Globalization and Privatization*, INT'L REV. L. (2013), available at <http://dx.doi.org/10.5339/irl.2013.6> notes 117-120 and accompanying text.

## I. FINANCIAL CRIME: A VITAL GLOBAL ISSUE

Financial crime is a proximate cause of national developmental failures.<sup>27</sup> Striking at the foundation of international economic and political stability and the operation of law, financial crime is destructive, impedes democracy, and severely damages the global economy.<sup>28</sup> “The accusations against Standard Chartered come as United States officials work to crack down on the flow of money to foreign countries, companies and individuals connected to terrorism, weapons of mass destruction and drug trafficking.”<sup>29</sup>

Financial crime’s effects vary but can be separated into three, sometimes overlapping, categories: (a) a marker of failed states enabling rogue leaders and regimes to loot national assets and engage in violations of human rights; (b) imperiling democratic development, good governance and economic growth; and (c) escalating the risk of disastrous economic consequences due to inter-linked financial markets. Each of these destructive consequences is examined below.

### A. *A Marker of Failed States and Enabler of Rogue Regimes, Drug Cartels and International Terrorists*

Financial crime is endemic and far from being victimless. Financial institutions are providing the financial support needed by enemies of mankind. As detailed below, a litany of global evils is financed through financial institutions and, unsurprisingly, a substantial amount of money is at play.

#### 1. Rogue Regimes and Leaders

A direct consequence of financial crimes is the support of rogue governments who have trampled upon their citizens’ rights. Corporate-

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27. See *Fixing a Broken World*, ECONOMIST (Jan. 29, 2009), <http://www.economist.com/node/13035718> (“[T]here is evidence that economic growth in countries next to failing states can be badly damaged. And if a poorly functioning but important oil-producing state like Nigeria were to fall apart, the economic fallout would be global. Moreover, weak governments may lack the wherewithal to identify and contain a pandemic that could spread globally.”).

28. Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT’L L. & BUS. 435, 470 (2001) (noting that businesses, governments, NGOs, individuals and society are adversely affected by fraud and corruption); see also Breuer, *supra* note 3 (“At a concrete level, roads are not built, schools lie in ruin and basic public services go unprovided. At a more abstract, but equally important, level, political institutions lose legitimacy, and people lose hope that they will ever be able to improve their lot.”).

29. Silver-Greenberg, *supra* note 4.

enabled financial crime facilitates money laundering,<sup>30</sup> the destabilization of nations,<sup>31</sup> and looting of national treasures.<sup>32</sup> Such misconduct is linked to human rights abuses and the strengthening of political and military dictatorships.<sup>33</sup>

For example, Iran has imprisoned and tortured political opponents and brutally crushed a popular uprising.<sup>34</sup> Another exemplar is the current leader of Syria, President Assad, who has engaged in a civil war with Syrian citizens producing an estimated death count in the thousands.<sup>35</sup> Other examples abound: North Korea imprisons perhaps 200,000 “criminals” and “opponents” in re-education camps where torture and starvation are the means of re-education,<sup>36</sup> and the former leaders of Egypt, Libya and Tunisia were well known for trampling upon the rights of their citizens.<sup>37</sup>

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30. See Evan Perez, *HSBC Nears Pact in Launder Probe*, WALL ST. J. (July 15, 2012), <http://online.wsj.com/article/SB10001424052702303612804577529160960052778.html> (discussing a Justice Department prosecution of HSBC bank officials' involvement in money laundering).

31. Stewart M. Patrick, *How Transnational Crime Hinders Development-and What To Do About It*, COUNCIL ON FOREIGN RELATIONS BLOG (June 26, 2012), <http://blogs.cfr.org/patrick/2012/06/26/how-transnational-crime-hinders-development-and-what-to-do-about-it/> (“At the macroeconomic level, as the IMF emphasizes, crime and money laundering undermine the stability of financial institutions, increase the volatility of capital flows, and dampen foreign direct investment. Crime drains resources from more productive economic activities, and can even destabilize neighboring countries, as the spillover of weapons, drug trafficking, migrant smuggling, and violent gangs across Central America attests.”).

32. Paul Richter, *As Libya Takes Stock, Moammar Kadafi's Hidden Riches Astound*, L.A. TIMES (Oct. 21, 2011), <http://articles.latimes.com/2011/oct/21/world/la-fg-kadafi-money-20111022> (discussing the Kadafi regime's plundering of national wealth).

33. See Silver-Greenberg, *supra* note 4, at A3 (Discussing accusations that banks “facilitate[e] illegal flows of money” from outside the United States to banks with terrorist ties or to “Iranians who wanted to circumvent United States sanctions.”); see also Evan Perez & Devlin Barrett, *Senate Probe Faults HSBC*, WALL ST. J. (Jul. 16, 2012), <http://online.wsj.com/article/SB10001424052702304388004577531330703359436.html#articleTabs%3Dcomments> (“The report also said that key data were stripped from transactions with Iran, North Korea and Sudan to evade U.S. sanctions and U.S. regulations. HSBC executives sought to stop doing business with a Saudi private bank over terrorism-financing concerns, according to Senate investigators, but then reversed themselves.”).

34. *UN: Expose Iran's Appalling Rights Record*, HUMAN RIGHTS WATCH (Sept. 21, 2011), <http://www.hrw.org/news/2011/09/21/un-expose-iran-s-appalling-rights-record>.

35. Ashley Fantz, *Syria Death Toll Probably at 70,000*, U.N. HUMAN RIGHTS OFFICIAL SAYS, CNN (Feb. 12, 2013, 9:07 PM), <http://www.cnn.com/2013/02/12/world/meast/syria-death-toll>.

36. *North Korea: Catastrophic human rights record overshadows 'Day of the Sun'*, AMNESTY INT'L (Apr. 12, 2012), <http://www.amnesty.org/en/news/north-korea-catastrophic-human-rights-record-overshadows-day-sun-2012-04-12>.

37. Shadi Mokhtari, *The Middle East and Human Rights: Inroads Towards Charting*



Another effect of financial crime is the looting of national wealth. Nations with large sums of national wealth are often plagued by chronic poverty and human rights violations.<sup>38</sup> This impoverishment is symbolized and perhaps in part caused by the immense transfer of national wealth abroad. The removal of large sums from the national treasury requires the sophisticated services of financial institutions. Without this outside help, the national rulers would not be able to rob their national treasuries. Patrick Keenan notes this phenomenon: “[t]he widespread emergence of [Libyan sovereign wealth funds] creates a risk that such rulers will further insulate themselves from political accountability by moving even more of the state’s resources outside the typical channels of domestic political control.”<sup>39</sup>

In Libya, for example, former leader Col. Kadafi diverted an astounding sum of \$200 billion into bank accounts, real estate, stock investments and businesses abroad.<sup>40</sup> The investments were held in the name of the Libyan sovereign wealth fund (“SWF”) and other national institutions but as the rogue leader, Kadafi and his family considered and treated those assets as their own personal wealth.<sup>41</sup> Financial crime undertaken by financial institutions aided and abetted this heist. The Libyan SWF is being investigated and attempts are being made to track down the plundered assets.<sup>42</sup> The asset transfer, investments and bank accounts were all accomplished by financial institutions who garnered large profits. It is difficult to believe these financial institutions and their compliance departments were unaware of the business and political relationship between Kadafi and the Libyan SWF.

Former Egyptian political leaders, family members and business

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*its Own Path*, 10 NW. J. INT’L HUM. RTS. 194 (2012).

38. ARVIND GANESAN, HUMAN RIGHTS WATCH, SOME TRANSPARENCY, NO ACCOUNTABILITY: THE USE OF OIL REVENUE IN ANGOLA AND ITS IMPACT ON HUMAN RIGHTS 16-17, (2004) (“Furthermore, the opaqueness of the government’s activity impedes Angola’s emerging civil society from exercising government oversight, educating the public, or critiquing government decision making, all of which are crucial for increased respect for human rights.”).

39. Patrick J. Keenan, *Sovereign Wealth Funds and Social Arrears: Should Debts to Citizens be Treated Differently than Debts to Other Creditors?*, 49 VA. J. INT’L L. 431, 434 (2008).

40. Richter, *supra* note 31 (“Moammar Kadafi secretly salted away more than \$200 billion in bank accounts, real estate and corporate investments around the world before he was killed . . .”).

41. *Id.*

42. Joe Palazzolo, *Libya Rebels Investigate Corruption at Sovereign Wealth Fund*, WALL ST. J. (Feb. 23, 2013), <http://blogs.wsj.com/corruption-currents/2011/08/25/libya-rebels-investigate-corruption-at-sovereign-fund/> (“The National Transitional Council has appointed a former technocrat with the Gadhafi regime to track down Libya’s foreign assets . . .”).

associates are being investigated by the new Egyptian government for a litany of financial crimes and asset transfers out of the country.<sup>43</sup>

According to the World Bank, the Egyptian prosecutor's office

has opened an investigation into thousands of reports against officials in the former regime for obtaining financial gain from corruption for themselves or others . . . . Because of the complex ties those persons had and the great power they wielded by virtue of their former prominent public functions, they were able to transfer vast sums of money gained from crimes of corruption out of the country, which impeded its development.<sup>44</sup>

In Tunisia, there is an attempt to repatriate national assets allegedly plundered by the previous ruler. A substantial amount of wealth was purportedly moved offshore to safe havens.<sup>45</sup> The amount is so vast that the \$30 million in private jets recovered is considered a minor percentage.<sup>46</sup>

## 2. Narcotics

International drug trafficking is enabled by access to financial institutions that reap enormous profits doing business with these illegal businesses. U.S. federal and state governments have launched investigations for potential violations of money laundering laws that may

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43. Liam Stack, *Mubarak's Sons Charged With Insider Trading*, N.Y. TIMES (May 30, 2012), <http://www.nytimes.com/2012/05/31/world/middleeast/mubaraks-sons-charged-with-insider-trading.html> ("State television reported that the Mubarak brothers and seven other men, including the co-chief executives of Egypt's most prominent investment bank, were charged with obtaining over \$400 million through corrupt practices in relation to the 2007 sale of Al Watany Bank. Gamal and Alaa have been in prison since last spring."); *Spain: Court Orders Mubarak Associate to Face Corruption Charges in Egypt*, N.Y. TIMES (Mar. 3, 2012), <http://www.nytimes.com/2012/03/03/world/europe/spain-court-orders-mubarak-associate-to-face-corruption-charges-in-egypt.html> ("Mr. Salem, a former Egyptian army and intelligence officer, was being held on suspicion of money laundering and corruption.").

44. STAR: STOLEN ASSET RECOVERY INITIATIVE, *Hosni Mubarak (various jurisdictions)*, <http://star.worldbank.org/corruption-cases/node/18509> (last visited May 4, 2013).

45. Mark V. Vlasic, *Getting Back the Bad Guy's Loot*, N.Y. TIMES (Jan. 19, 2012), <http://www.nytimes.com/2012/01/20/opinion/getting-back-the-bad-guys-loot.html> ("One year ago, the eyes of the world focused on Tunisia as its ruler, Zine el-Abidine Ben Ali, fled the country, allegedly with millions of dollars in gold and assets on his airplane. The government of Tunisia is now working with the international community to recover Ben Ali's ill-gotten gains.").

46. *Id.* ("Of course, the estimated \$30 million that these jets were worth is but a drop in the bucket when compared with the assets that the Ben Ali clan is alleged to have plundered. But asset recovery is not just about the money; it is also about the demonstration effect.").

have financed narcotics traffickers and terrorist organizations.<sup>47</sup> In one example, nearly \$400 billion of illegal drug generated profits were laundered through the banking system.<sup>48</sup> According to a U.S. federal prosecutor, “Wachovia’s blatant disregard for our banking laws gave international cocaine cartels a virtual carte blanche to finance their operations.”<sup>49</sup>

Per the former United Nations Drug Czar, international criminal gangs were not merely laundering money but were influencing the banking system as such funds were a huge source of cash during a liquidity crisis. According to Antonio Mario Costa, “[s]ome of the evidence put before his office indicated that gang money was used to save some banks from collapse when lending seized up” raising troubling questions about crime’s influence on the economic system at times of crisis.<sup>50</sup>

### 3. Terrorism

Terrorism is a business and terrorist groups may in fact be organized as corporate affiliates. The business of terrorism requires access to financial markets for money laundering purposes, wiring abilities and funds available for investments require money management skills. All of these services are fee generators.

Money is the lifeblood of terrorist and narcotics organizations, and while banks that launder money for terrorists and narco-traffickers may be located abroad, recent announcement demonstrates that those banks and their assets are not beyond our reach.<sup>51</sup>

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47. Jessica Silver-Greenberg & Ben Protess, *Money-Laundering Inquiry Is Said to Aim at U.S. Banks*, N.Y. TIMES (Sept. 14, 2012), [http://www.nytimes.com/2012/09/15/business/money-laundering-inquiry-said-to-target-us-banks.html?pagewanted=1&\\_r=0&src=recg](http://www.nytimes.com/2012/09/15/business/money-laundering-inquiry-said-to-target-us-banks.html?pagewanted=1&_r=0&src=recg) (“Federal and state authorities are investigating a handful of major American banks for failing to monitor cash transactions in and out of their branches, a lapse that may have enabled drug dealers and terrorists to launder tainted money . . .”).

48. Ed Vulliamy, *How A Big US Bank Laundered Billions from Mexico’s Murderous Drug Gangs*, THE GUARDIAN (Apr. 2, 2011), <http://www.guardian.co.uk/world/2011/apr/03/us-bank-mexico-drug-gangs> (“[T]he bank was sanctioned for failing to apply the proper anti-laundering strictures to the transfer of \$378.4bn – a sum equivalent to one-third of Mexico’s gross national product – into dollar accounts from so-called *casas de cambio* (CDCs) in Mexico, currency exchange houses with which the bank did business.”).

49. *Id.*

50. Rajeev Syal, *Drug Money Saved Banks in Global Crisis, Claims UN Advisor*, THE GUARDIAN (Dec. 12, 2009), <http://www.guardian.co.uk/global/2009/dec/13/drug-money-banks-saved-un-ctief-claims>.

51. Christie Smythe & Patricia Hurtado, *Feds Grab \$150 Million Tied to Hezbollah Money-Laundering*, BLOOMBERG (Aug. 20, 2012), <http://www.bloomberg.com/news/2012->

Money laundering facilitates terrorism because monetary backing is the key to terrorist activity. “Money laundering is the process of disguising criminal proceeds and may include the movement of clean money through the United States with the intent to commit a crime in the future (e.g., terrorism).”<sup>52</sup> Banks are central to money laundering.<sup>53</sup> Both federal and state government agencies are investigating several large American financial institutions “for failing to monitor cash transactions in and out of their branches, a lapse that may have enabled drug dealers and terrorists to launder tainted money . . . .”<sup>54</sup>

As avenues of revenue, terrorist groups may be highly desirable and lucrative clients of financial institutions since these groups deal in large sums of cash that needs to be laundered.<sup>55</sup>

*B. National Developmental Failures: Damage to Democracy, Good Governance, and Economic Growth*

The principles of human rights are often cast aside in nations with rampant fraud and corruption,<sup>56</sup> adversely affecting the rule of law, government, and society. In countries with high levels of corruption, the peaceful resolution of conflicts is impeded, and military intervention and the use of force against civilians becomes more common.<sup>57</sup> Numerous studies have established the “devastating effects of corruption on economics, political stability, and human rights . . . .”<sup>58</sup> States plagued with

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08-20/feds-grab-150-million-tied-to-hezbollah-money-laundering.html (quoting Manhattan U.S. Attorney Preet Bharara).

52. I.R.C. § 9.5.5.1 (Feb. 15, 2008), available at [http://www.irs.gov/irm/part9/irm\\_09-005-005.html](http://www.irs.gov/irm/part9/irm_09-005-005.html).

53. See, e.g., *Money Laundering at Lebanese Bank*, N.Y. TIMES (Dec. 13, 2011), <http://www.nytimes.com/interactive/2011/12/13/world/middleeast/lebanese-money-laundering.html> (“According to American officials, the Lebanese Canadian Bank was the hub of an international drug money laundering operation with ties to Hezbollah. Used car and other consumer goods sales revenues had been used to mask the proceeds of illegal drug trade.”).

54. Silver-Greenberg & Protes, *supra* note 47.

55. See Smythe & Hurtado, *supra* note 51 (The U.S. Attorney’s office in Manhattan stated that “[t]he U.S. seized \$150 million in connection with a Hezbollah-related money laundering scheme that involved the defunct Lebanese Canadian Bank . . . .”).

56. See Ndiva Kofele-Kale, *Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT’L L. REV. 697, 743 (2006) (finding a positive correlation between corruption and human rights violations).

57. See Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT’L L. 389, 394-98 (2002) (noting a negative correlation between levels of corruption and peaceful resolution of disputes).

58. Benjamin B. Wagner & Leslie Gielow Jacobs, *Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for*

financial crime do not properly serve their citizens, and the cost to the world economy is staggering.<sup>59</sup>

Sometimes the amount of money stolen and transferred to elites and “connected” individuals is almost incomprehensible. In Africa, it is estimated that over \$100 billion is annually lost to theft, fraud and corruption.<sup>60</sup> Businesses also bear direct and indirect costs when operating in corrupt nations.<sup>61</sup> Financial crime “directly affects the lives and well-being of billions of people and thousands of organizations.”<sup>62</sup> Bad governments make poor decisions vis-à-vis their citizenry—the people the government should be serving—and the economy suffers. The economic toll results in:

- (1) reduction in productive investment and growth;
- (2) macro-fiscal costs, in particular the “loss of massive amounts of public revenues from taxes, customs duties, and privatization programs”;
- (3) redistributive/social costs;
- (4) economic inefficiency, particularly through the protection of affined firms and the discouragement of entrepreneurs and competitor firms;
- and (5) distortion or loss of foreign aid and debt relief programs.<sup>63</sup>

Fraud and corruption can result in badly designed and poorly implemented infrastructure, inferior goods and services, and dysfunctional financial aid programs.<sup>64</sup> Corruption can proximately cause or worsen mass scale poverty and starvation. In India, “350 million families liv[e] below India’s poverty line of 50 cents a day.”<sup>65</sup> While financial aid to lessen the poverty exists, this money can be siphoned off:

[A]s much as \$14.5 billion in food was looted by corrupt politicians and their criminal syndicates over the past decade in Kishen’s home state of Uttar Pradesh alone, according to data

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*Indonesia and Other Nations*, 30 U. PA. J. INT’L L. 183, 191 (2008).

59. Philip Nichols, *The Psychic Costs of Violating Corruption Laws*, 45 VAND. J. TRANSNAT’L L. 145, 161 (2012) (noting loss of tax revenue, lower economic growth, reduction in investment and general economic inefficiency).

60. Arnold Beichman, *Corruption in Africa*, WASH. TIMES (Nov. 4, 2006), <http://www.washingtontimes.com/news/2006/nov/4/20061104-103213-2259r/>.

61. These relate to the paying of bribes as well as doing business in a slow moving bureaucratic environment with poor infrastructure. David Hess, *Combating Corruption Through Corporate Transparency*, 21 MINN. J. INT’L L. 42, 47 n.23 (2011).

62. Nichols, *supra* note 59, at 155.

63. *Id.* at 161.

64. *Id.* at 159-160.

65. Mehul Srivastava & Andrew MacAskill, *Poor in India Starve as Politicians Steal \$14.5 Billion of Food*, BLOOMBERG (Aug. 28, 2012), <http://www.bloomberg.com/news/2012-08-28/poor-in-india-starve-as-politicians-steal-14-5-billion-of-food.html>.

compiled by Bloomberg. The theft blunted the country's only weapon against widespread starvation — a five-decade-old public distribution system that has failed to deliver record harvests to the plates of India's hungriest.<sup>66</sup>

Moreover, governments and elites in resource-rich nations may enjoy immense wealth while the general public remains in dire need of foreign financial aid. These nations are corruptly managed for the benefit of select elites who allow their national infrastructure to decay; health and education systems to remain chronically outdated; and their citizens' standard of living to languish.<sup>67</sup>

Ironically, many of these nations receive international welfare despite being "rich" (as proven by their SWFs):<sup>68</sup>

To illustrate the problem, consider that some states with large SWFs are also the recipients of development assistance from other states. For example, in 2006, Algeria received just over \$208 million in development assistance from foreign governments. During the same period, the government of Algeria controlled an SWF worth \$47 billion. In 2006, Libya also received \$37 million in development assistance while controlling an SWF worth \$50 billion, and Nigeria received \$11 billion in development assistance and controlled an SWF worth \$17 billion.<sup>69</sup>

The wealth of some nations is concentrated while their political leaders bear no accountability:

For example, in Angola, a small coterie of elites receives and has almost complete control over that country's vast oil wealth. The second condition depends in part on the first: those who control the wealth are not politically accountable to an engaged, informed electorate. In some states, the lack of political accountability is both a cause and an effect of unconditioned wealth. In states where the only way to accumulate wealth is through politics, unconditioned wealth can provide politicians with the resources they need to hold onto power against their challengers. Third, unconditioned wealth is not subject to the discipline that the financial markets impose on other forms of

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66. *Id.*

67. *See* Keenan, *supra* note 39 at 439-40 ("States whose citizens need development and humanitarian assistance even while their leaders invest abroad via SWFs highlights the gulf that often lies between those in power and citizens in poor states.").

68. *See id.* at 440 ("A number of states both receive official development assistance and, at the same time, possess millions or billions of dollars in their SWFs.").

69. *Id.* at 435.

wealth.<sup>70</sup>

Endemic fraud results in poor governmental decisions wherein the citizens are impoverished and lack basic infrastructure, educational opportunity, and personal security, among other unmet needs.<sup>71</sup> Fraud and corruption reduce the available number of skilled government workers, discourage tax compliance, cause government expenditures to be inflated, and result in wholly undemocratic ways of governance and doing business.<sup>72</sup>

### C. *The Risk of Severe Economic Loss Due To Contagion*

Global economic growth depends upon predictability and fairness, and the proliferation of interconnected financial markets is a hallmark of an increasingly global society. The interconnected nature of global markets is indisputable.<sup>73</sup> Economies are also adversely affected by financial crime.<sup>74</sup> Thus, contagion poses the real and significant risk that financial fraud could have disastrous international effects.<sup>75</sup>

Indeed, the LIBOR scandal where major banks allegedly acted fraudulently to enlarge their lending profits exemplifies how global financial institutions' misconduct can have repercussions world-wide.<sup>76</sup> U.S. Department of Justice Assistant Attorney General Breuer noted:

LIBOR and EURIBOR are critically important benchmark interest rates . . . . Because mortgages, student loans, financial derivatives, and other financial products rely on LIBOR and EURIBOR as reference rates, the manipulation of submissions used to calculate those rates can have significant negative effects

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70. *Id.* at 439.

71. Nichols, *supra* note 59, at 150-55 (providing examples of endemically corrupt nations).

72. *Id.* at 156-157.

73. See Matthew J. Wilson, *Demystifying The Determination of Foreign Law in U.S. Courts*, 46 WAKE FOREST L. REV. 887 (2012) (discussing the interconnected nature of the global economy as highlighted by the international effect of the U.S. subprime market meltdown).

74. Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681 (1995).

75. See Prasanna Gai & Sujit Kapadia, *Contagion in Financial Networks* (Bank of England Working Paper Series, Working Paper No. 383, 2010), available at <http://www.bankofengland.co.uk/publications/Documents/workingpapers/wp383.pdf> (commenting on the risk to international markets because of contagion).

76. See Christopher Alessi, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN RELATIONS (Feb. 6, 2013), <http://www.cfr.org/uk/understanding-libor-scandal/p28729#p5> (noting various effects of the LIBOR scandal such as reduced ability of banks to retain deposits due to lack of trust, potential legal liability and losses to consumers of credit on LIBOR based interest rates).

on consumers and financial markets worldwide.<sup>77</sup>

This is not surprising as LIBOR is an example how global markets are interconnected. “Futures, options, swaps, and other derivative financial instruments traded in the over-the-counter market and on exchanges worldwide are settled based on LIBOR.”<sup>78</sup>

The interrelated relationship between debt and equity markets is entrenched.<sup>79</sup> Coupled in particular with the numerous financial institutions and investment banks conducting business across the globe, the risk that misconduct can lead to great loss is high. However, contagion dwarfs the mere globalization of business and investments. Debt contagion arises from the overlapping investments in each nation’s debt. If one nation defaults, that default may cause other nations to default as the latter’s ability to repay their debts is eviscerated. For example, the 2011 EU debt crisis “strained banking institutions in Europe and around the world that hold large amounts of government and private debt. With Italy teetering, France’s banks, which are among the largest holders of Italian debt, are now under pressure.”<sup>80</sup>

Banks are at great risk as these entities own large amounts of debt and profit from the yield disparity between what they pay to obtain capital and the interest earned on investments.

“Europe’s banking sector has the potential to collapse if contagion gets out of hand . . . .”<sup>81</sup> Since the markets are interwoven, the risk that defaults and collapses will spread is relatively high.

The interconnectedness of Europe’s financial system illustrates the risks of contagion. Fear over Greece, along with an ailing banking sector in Spain, pushed up Spanish and Italian bond yields, hurting banks that hold these assets.

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77. Press Release, U.S. Dep’t of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), *available at* <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>.

78. *Id.*

79. See INT’L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: CONTAINING SYSTEMIC RISKS AND RESTORING FINANCIAL SOUNDNESS (2008), *available at* <http://www.imf.org/external/pubs/ft/gfsr/2008/01/pdf/text.pdf> (the “crisis that originated in a small segment of the U.S. mortgage markets has spread to broader cross-border credit and funding markets . . .”).

80. *The Danger of Contagion from Europe*, N.Y. TIMES (Nov. 10, 2011), <http://www.nytimes.com/interactive/2011/11/10/world/europe/the-risk-to-banks-of-europes-debt-problems.html>.

81. Agustino Fontevicchia, *Dangers of Contagion: EU Banks Sitting on a Lot of European Bonds*, FORBES (May 29, 2012), <http://www.forbes.com/sites/afontevicchia/2012/05/29/dangers-of-contagion-eu-banks-sitting-on-a-lot-of-european-bonds/>.



Jumping across the Atlantic, major U.S. banks hold big positions overseas as well. Citigroup leads the way when it comes to net exposure to non-U.S. sovereign governments, with a little more than €14 billion (\$17.5 billion) on their balance sheet. JPMorgan Chase comes in second, with about €8 billion (\$10 billion), while Morgan Stanley completes the podium with €5 billion (\$6.2 billion); Goldman Sachs holds about €4 billion (\$5 billion) in non-U.S. sovereigns.<sup>82</sup>

Derivatives pose a serious multiplication of risk. Derivatives are financial bets that a market or some other variable will move in a certain way and large profits or losses can result.<sup>83</sup> JPMorgan Chase is estimated to have lost as much as \$5-\$10 billion<sup>84</sup> in a derivative bet. To date, the actual loss is unknown.

The collapse of MF Global and the resultant losses are illustrative of the danger from derivatives. MF Global engaged in derivative betting and lost a substantial amount of money, causing its bankruptcy.<sup>85</sup> The firm placed a “\$6.3 billion bet on European debt — a wager big enough to wipe out the firm five times over if it went bad.”<sup>86</sup> The firm lost its bet and the financial losses were harsh:

The consequences of the firm’s collapse have been severe: Some \$1 billion in customer money remains missing and thousands of clients, including both small farmers in Kansas and hedge funds in Connecticut, still do not have nearly a third of their funds. Some of that money may never be recovered if, as some regulators now fear, MF Global used it to cover trading losses and replenish overdrawn bank accounts.<sup>87</sup>

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82. *Id.*

83. See Michael Mackenzie, Nicole Bullock & Telis Demos, *JPMorgan Loss Exposes Derivative Dangers*, FINANCIAL TIMES (May 15, 2012), <http://www.ft.com/intl/cms/s/0/d0ca4bae-9dda-11e1-9456-00144feabdc0.html#axzz250kZFUax> (explaining that derivatives magnify exponentially the risk in financial markets).

84. See Jessica Silver-Greenberg & Susanne Craig, *JPMorgan Trading Loss May Reach \$9 Billion*, N.Y. TIMES (June 28, 2012), <http://dealbook.nytimes.com/2012/06/28/jpmorgan-trading-loss-may-reach-9-billion/> (“Losses on JPMorgan Chase’s bungled trade could total as much as \$9 billion, far exceeding earlier public estimates, according to people who have been briefed on the situation.”); Peter Eavis, *JPMorgan’s Mystery Number in Derivatives*, N.Y. TIMES (Aug. 9, 2012), <http://dealbook.nytimes.com/2012/08/09/jpmorgans-mystery-number-in-derivatives/> (“In July, the bank said that losses on its botched trades had reached \$5.8 billion and could grow.”).

85. See Azam Ahmed, Ben Protess & Susanne Craig, *A Romance with Risk that Brought On a Panic*, N.Y. TIMES (Dec. 11, 2011), <http://dealbook.nytimes.com/2011/12/11/a-romance-with-risk-that-brought-on-a-panic/>.

86. *Id.*

87. *Id.*

The amount of notional derivate positions is staggering - hundreds of trillions of dollars.<sup>88</sup> While a substantial majority of these positions are hedged, there remains a significant amount of net open positions, which of course may result in spectacular profits or stunning losses.<sup>89</sup> Moreover, because of the interconnected nature of our financial markets, the potential of contagion is real, which could lead to a synchronized collapse.<sup>90</sup> This hazard, known as “systemic risk”, is embedded in the financial system due to the derivate bets. According to the Deutsche Bundesbank:

As the global financial crisis unfolded, one particularly noteworthy feature was the strong comovement of financial institutions’ credit spreads. The magnitude and speed of these comovements caught many observers off guard and highlighted the fact that contagion can be an important amplifier of systemic risk. Moreover, comovements were not limited to national financial systems but quickly spread across borders, affecting single institutions and entire financial systems. The global financial crisis thus signaled the need to develop a framework for the surveillance of systemic risks.<sup>91</sup>

Therefore, fraudulent conduct is not merely the concern of a nation or particular region. Fraudulent conduct contains the real risk that fraud may result in widespread loss. Furthermore, because of derivatives, and the ensuing multiplication of potential loss, the danger of systemic risk is

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88. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC’S QUARTERLY REPORT ON BANK TRADING AND DERIVATIVES ACTIVITIES SECOND QUARTER 2011 (2011), available at <http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/dq211.pdf> (noting that “[t]he notional amount of derivatives held by insured U.S. commercial banks increased \$5.3 trillion, or 2.2%, from the first quarter of 2011 to \$249 trillion. Notional derivatives are 11.6% higher than a year ago.”).

89. According to the Bank of International Settlements, the reason AIG almost failed in 2009 was a large unhedged position. See Stephen G. Cecchetti, Jacob Gyntelberg & Marc Hollanders, *BIS Quarterly Review: Central Counterparties for Over-the-Counter Derivatives*, BANK FOR INTERNATIONAL SETTLEMENTS 45 (Sept. 2009), [http://www.bis.org/publ/qtrpdf/r\\_qt0909f.pdf](http://www.bis.org/publ/qtrpdf/r_qt0909f.pdf) (“AIG’s unhedged sales of nearly half a trillion dollars of insurance represented a significant concentration of credit risk in a market participant that ultimately did not have the necessary loss absorption capacity. The widespread bond defaults during the recent crisis imposed substantial losses on AIG and other sellers of credit risk insurance.”).

90. See Natalia Pdlich & Michael Wedow, *Credit Contagion Between Financial Systems* (Deutsche Bundesbank Eurosystem Discussion Papers Series 2: Banking and Financial Studies, No. 15, 2011), available at [http://www.bundesbank.de/Redaktion/EN/Downloads/Publications/Discussion\\_Paper\\_2/2011\\_12\\_30\\_dkp\\_15.pdf?\\_\\_blob=publicationFile](http://www.bundesbank.de/Redaktion/EN/Downloads/Publications/Discussion_Paper_2/2011_12_30_dkp_15.pdf?__blob=publicationFile) (“The crisis has demonstrated that systemic events can rapidly spill over across borders and to markets, gathering strength and augmenting systemic risk. The vulnerability of financial institutions to contagious effects has placed this issue on top of the agenda of financial stability regulation.”).

91. *Id.* (footnote omitted) (citations omitted).

substantial.

## II. THE ROLE OF FINANCIAL INSTITUTIONS IN FINANCIAL CRIME

The endemic role of financial institutions in facilitating the financial interests of rogue nations and leaders is indisputable. Without such financial services, these regimes and leaders would not be in a position to allow mass incarceration, starvation, murder of political opponents or engage in acts designed to crush opposition. Revelations that large banking houses have done business with rogue regimes are not surprising.<sup>92</sup> Large profits can be made by working with, managing the assets of, and providing financial services to rogue regimes.<sup>93</sup> Fees and commissions can serve as a lucrative temptation to large financial institutions to do business with oil-rich failed states, well-financed terrorists, and cash-rich drug cartels.<sup>94</sup>

The potential profits serve as a keen incentive for global banking powerhouses to conduct business with rogue nations:

Since 2009, the Justice Department, the Treasury Department and the Manhattan district attorney's office, working largely in concert, have brought charges against five foreign banks, contending they moved billions of dollars through their American subsidiaries on behalf of Iran, Cuba and North Korea, sponsors of terrorism and drug cartels.<sup>95</sup>

The specter of earning significant profits is powerful and can serve as incentive for financial institutions to violate the law. "In 2007, Deutsche

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92. See Jessica Silver-Greenberg, *Deutsche Bank's Business with Sanctioned Nations Under Scrutiny*, N.Y. TIMES, Aug. 17, 2012, at B1, available at <http://www.nytimes.com/2012/08/18/business/deutsche-banks-business-with-sanctioned-nations-under-scrutiny.html?pagewanted=all> ("Federal and state prosecutors are investigating Deutsche Bank and several other global banks over accusations that they funneled billions of dollars through their American branches for Iran, Sudan and other sanctioned nations, according to law enforcement officials with knowledge of the cases.").

93. See Silver-Greenberg, *supra* note 4, at A1 ("The New York State Department of Financial Services accused Standard Chartered, which the agency called a 'rogue institution,' of masking more than 60,000 transactions for Iranian banks and corporations, motivated by the millions of dollars it reaped in fees.").

94. MAJORITY AND MINORITY STAFF REPORT OF COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS PERMANENT S. SUBCOMM. ON INVESTIGATIONS, KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES (2010), available at <http://www.hsgac.senate.gov/download/psi-staff-report-keeping-foreign-corruption-out-of-the-us> (showing four examples of financial crimes containing hundreds of individual transactions, many in the amounts of tens of millions of dollars, which surely generate hefty account fees.).

95. Silver-Greenberg, *supra* note 4.

Bank decided to ‘not engage in new business with counterparties such as Iran, Syria, and North Korea . . . according to a 2008 securities filing.’<sup>96</sup> However, such business associations are both profitable and enduring:

At least several European banks that vowed to stop doing business with Iran have kept handling billions of euros in transactions for Iranian entities and foreign companies with operations there, a review of regulatory filings and other documents by The Wall Street Journal shows. . . .

Exact figures on the volume of transactions aren't publicly known, but the Journal's review shows that European banks have billions of euros in long-term trade-finance contracts in Iran. The dealings are a sign of Iran's continued access to the global financial system despite U.S. efforts to isolate Iran, and go against a perception among some observers that the banks have cut ties to Iran completely.<sup>97</sup>

Even modestly wealthy clients can generate large fees.<sup>98</sup> Deep-pocketed and resource-rich nations provide a source of lucrative and highly profitable clients, whose crooked leaders often amassed their fortunes by plundering their citizenry.<sup>99</sup> The wealth is staggering and the fee generation possibilities tantalizing:

In Kenya, \$4 billion disappeared during the presidency of Daniel Arap Moi's 24 years in power. . . . The country's Central Bank was looted, money was stolen by making fictitious payments on foreign debt, kickbacks were collected on all public contracts and when that didn't supply enough cash, politicians awarded themselves phony contracts.<sup>100</sup>

According to Transparency International's former director Jerome Pope:

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96. David Crawford & Laura Stevens, *European Lenders Keep Ties to Iran*, WALL ST. J. (Sept. 13, 2012), [http://online.wsj.com/article/SB10000872396390443696604577644781261934626.html?mod=WSJEurope\\_hpp\\_LEFTTopStories](http://online.wsj.com/article/SB10000872396390443696604577644781261934626.html?mod=WSJEurope_hpp_LEFTTopStories).

97. *Id.*

98. See, e.g., Terence O'Hara & Carrie Johnson, *Tax Shelter Cases Shed Light on Banks' Role*, WASH. POST (Aug. 31, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/30/AR2005083001915.html> (“The fees for providing such tax-avoidance strategies were substantial. Berce paid Bank One and the co-promoters of Homer—Jenkins & Gilchrist PC and Deutsche Bank AG, the German bank that made billions of dollars of ‘loans’ to make the deals work—\$350,000 in fees.”).

99. See Richter, *supra* note 32 (discussing the Kadafi regime's plundering of sovereign wealth of Libya).

100. Arnold Beichman, *Corruption in Africa*, WASH. TIMES (Nov. 4, 2006), <http://www.washingtontimes.com/news/2006/nov/4/20061104-103213-2259r/> (internal quotations omitted).

The international banks, the western businessmen who bribe to get the contract, those who are in cahoots with all the millionaires, they are all up to their eyeballs in what is taking place. When it comes to moral standing, everybody belongs in the gutter together.<sup>101</sup>

The United States Senate Investigation on financial crime is instructive. The investigation revealed a wide array of global financial institutions that have aided and abetted the plundering of national wealth.<sup>102</sup> The Senate Report unequivocally states that banks are the facilitators of asset transfers and money laundering. In one instance, “Mr. Obiang,” a political strongman ruling out of Equatorial Guinea, transferred large sums out of the country:

[O]ver a two-month period in 2006, Mr. Obiang was able to move \$73 million from Equatorial Guinea into the United States using wire transfer systems operated by Wachovia Bank; and over a four-year period from 2002 to 2006, he was able to move \$37 million through wire transfer systems operated by Citibank.<sup>103</sup>

The Senate Report further notes:

This case history shows how a controversial political figure, from the ruling family of a country plagued by corruption, moved vast amounts of wealth into the U.S. financial system, by employing American professionals such as attorneys, real estate and escrow agents to help him bypass U.S. AML and PEP controls, and by taking advantage of U.S. wire systems unequipped to screen out high-dollar transfers sent by PEPs from high-risk countries. Over a four year period, from 2004 to 2008, Teodoro Obiang was able to move over \$100 million in suspect funds into or through the U.S. financial system.<sup>104</sup>

Another section of the report added:

Federal law requires U.S. financial institutions to identify the name and address of the originator of each wire transfer, in part as an AML safeguard. Yet from 1999 to 2003, Bank of America allowed accounts for Pierre, Sonia, and Vincente Falcone to receive over \$3.6 million in wire transfers from unnamed clients using accounts in such known secrecy jurisdictions as the Cayman Islands, Luxembourg, and Switzerland. From September 2001 to December 2003, the Monthigne account also

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101. *Id.*

102. MAJORITY AND MINORITY STAFF REPORT, *supra* note 94.

103. *Id.* at 98.

104. *Id.* at 105.

received a series of payments from hidden “clients,” ranging from \$100,000 to \$400,000 at a time, most often from “one of our clients” using a UBS account in Singapore. In just over two years, the payments to Monthigne added up to nearly \$2.5 million.<sup>105</sup>

The Senate investigation on the relationship between financial institutions and former Chilean dictator Augusto Pinochet<sup>106</sup> is equally compelling:

Riggs Bank had secretly opened accounts for the former President of Chile, Augusto Pinochet, created offshore corporations for him, accepted about \$8 million in suspect deposits, and secretly couriered millions of dollars in cashiers checks to him in Chile. In 2005, a supplemental report by the Subcommittee showed that Mr. Pinochet and his family members had opened a secret network of over 125 accounts under a variety of names at financial institutions operating in the United States.<sup>107</sup>

According to Senator Carl Levin, “Some banks actively helped [Pinochet] hide his funds, others failed to comply with U.S. regulations requiring banks to know their customers.”<sup>108</sup>

Another example includes El Hadj Omar Bongo, the former dictator of Gabon, who looted and transferred money from his nation. With the assistance of financial institutions, this wealth was transferred into the United States, generating fees for those institutions.<sup>109</sup>

Nigerian President Sani Abacha was yet another rogue leader who plundered his nation’s wealth. Following his death, a large amount of his stolen money was found in banks around the world.<sup>110</sup> Evidently, billions

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105. *Id.* at 256.

106. See Jonathan Kandell, *Augusto Pinochet, Dictator Who Ruled by Terror in Chile, Dies at 91*, N.Y. TIMES (Dec. 11, 2006), <http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html?pagewanted=all> (“Gen. Augusto Pinochet Ugarte [was a] brutal dictator who repressed and reshaped Chile for nearly two decades and became a notorious symbol of human rights abuse and corruption . . .”).

107. MAJORITY AND MINORITY STAFF REPORT, *supra* note 94, at 9-10.

108. *Chile’s Pinochet Hid Millions in Secret Accounts*, FINANCIAL TIMES (Mar. 16, 2005), <http://www.ft.com/intl/cms/s/0/d2c1ba5a-9626-11d9-ae9d-00000e2511c8.html#axzz25mXw5HEN>.

109. David Randall & Greg Walton, *Africa’s Illicit Money Sent to Western Banks*, THE INDEP. (Feb. 7, 2010), <http://www.independent.co.uk/news/world/africa/africas-illicit-money-sent-to-western-banks-1891512.html> (“Once on US soil, the cash was deposited by his daughter, Yamilee Bongo-Astier, in a safe deposit box at a New York bank. . . . between 2000 and 2007, other accounts controlled by this unemployed student were the conduit for considerable sums of money.”).

110. See, e.g., *Swiss Banks Rapped over Abacha Loot*, BBC NEWS (Sept. 4, 2000), <http://news.bbc.co.uk/2/hi/africa/909972.stm> (“Several leading banks in Switzerland have

of dollars were stolen by Abacha and several family members.<sup>111</sup> The Chairman of the Swiss Banking Commission noted that “[t]he mere fact that significant assets of dubious origin, from people close to former Nigerian President Sani Abacha, were deposited at Swiss banks is highly unsatisfactory and damages the image of Switzerland as a financial centre.”<sup>112</sup> Abacha believed in diversification and spread his billions into numerous additional locales, enabling many banks to profit from the looting.<sup>113</sup> “Britain’s financial watchdog, the Financial Services Authority, revealed that 23 London banks had handled \$1.3bn belonging to family and friends of General Abacha.”<sup>114</sup> Among the other looting profiteers were “Germany’s Deutsche Bank and Commerzbank, France’s BNP Paribas and Credit Agricole as well as Switzerland’s leading banks, Credit Suisse and UBS. . . . HSBC, Barclays and NatWest. American banks Goldman Sachs, Merrill Lynch and Citibank also feature in the list seen by the FT alongside several Nigerian banks.”<sup>115</sup>

As demonstrated, global banks have profited handsomely from conducting business with human rights abusers, dictators, political elites and rogue regimes. The financial institutions were indispensable in facilitating theft of literally billions of dollars in various nations. Without the aid of these global titans of capitalism, the fraud and money laundering could not be accomplished. The next section discusses the ATS and how historically, commercial fraud was not considered a violation of international law.

### III. THE ALIEN TORT STATUTE

#### *A. The Statute and Litigation*

The Alien Tort Statute provides that: “[t]he 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

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been criticised by the country’s regulators for accepting money from the family of the late Nigerian military ruler, Sani Abacha.”).

111. *Id.*

112. *Id.*

113. See Elizabeth Olson, *Swiss Freeze A Dictator’s Giant Cache*, N.Y. TIMES (Jan. 26, 2000), [http://www.nytimes.com/2000/01/26/news/26iht-swiss.2.t\\_3.html](http://www.nytimes.com/2000/01/26/news/26iht-swiss.2.t_3.html) (implicating the two largest commercial Swiss banks and several prestigious private banks).

114. *Britain Goes after Abacha Millions*, BBC NEWS (Oct. 18, 2001), <http://news.bbc.co.uk/2/hi/africa/1606565.stm>.

115. Greg Morsbach, *‘Abacha Accounts’ to be Frozen*, BBC NEWS (Oct. 3, 2001), <http://news.bbc.co.uk/2/hi/africa/1576527.stm>.

States.”<sup>116</sup>

The statute allows non-U.S. citizens to sue defendants<sup>117</sup> in federal court for tortious conduct constituting a violation of the law of nations, i.e., international law,<sup>118</sup> or a treaty. To be cognizable under the ATS, the conduct violates the “law of nations” if it contravenes well-established recognized norms of international law that involve the mutual interests of nations and have the specter of global relationship impact.<sup>119</sup> Torts that do not meet these requirements cannot form the basis of an ATS suit.<sup>120</sup> Claims are generally framed in the context of egregious violations of human rights such as slavery,<sup>121</sup> war crimes<sup>122</sup> and crimes against humanity.<sup>123</sup> However, the statute contains no restrictive language and while international law is often framed in a criminal context, suits may be based upon violations of international law in other contexts.<sup>124</sup> Some have argued that commercial bribery and egregious corporate fraud may also be subject to ATS suits.<sup>125</sup> Given that transnational corporations are engaging in misconduct outside the strict limit of human rights violations, such as creating environmental hazards<sup>126</sup> and violating anti-corruption laws,<sup>127</sup> it may only be a matter of time before such non human rights context conduct

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116. 28 U.S.C. § 1350 (2006).

117. Subject to the court’s ability to exercise jurisdiction. *Supra* n. 10.

118. *See Kiobel*, 621 F.3d 111, 116 n.3 (“In this opinion we use the terms ‘law of nations’ and ‘customary international law’ interchangeably.”).

119. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (“[C]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”).

120. *See Slawotsky*, *supra* note 14, at 150 (“Many torts have been rejected as predicate offenses permitted under the ATCA.”).

121. *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

122. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

123. *Doe v. ExxonMobil*, 654 F.3d 11 (D.C. Cir. 2011).

124. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (discussing informed medical consent).

125. *See Slawotsky*, *supra* note 14 (arguing that severe cases of international business fraud should fall within the purview of the ATCA); *Vega*, *supra* note 23, at 393–95 (discussing how foreign bribery is actionable under the ATCA).

126. *See Edwards Angell Palmer Dodge LLP, U.S. Lawsuits Based Upon Foreign Toxic Tort Liability: A Growing Threat?*, MARTINDALE (June 23, 2010), [http://www.martindale.com/environmental-law/article\\_Edwards-Angell-Palmer-Dodge-LLP\\_1062278.htm](http://www.martindale.com/environmental-law/article_Edwards-Angell-Palmer-Dodge-LLP_1062278.htm) (discussing suit against duPont for allegedly exposing textile workers to asbestos in the 1990s in Argentina).

127. *See Siri Schubert & T. Christian Miller, At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (December 20, 2008), <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=all> (“But the Siemens case is notable for its breadth, the sums of money involved, and the raw organizational zeal with which the company deployed bribes to secure contracts. It is also a model of something that was once extremely rare: cross-border cooperation among law enforcement officials.”).



triggers ATS litigation.<sup>128</sup>

For nearly 200 years, relatively few cases were filed pursuant to the Alien Tort Statute.<sup>129</sup> This relative dormancy ended when, in *Filartiga v. Pena-Irala*, the Second Circuit issued a landmark ruling that state sponsored torture was actionable under the statute.<sup>130</sup> The issue in *Filartiga* was whether torture constituted a “violation of the law of nations” and was thus cognizable under the ATS.<sup>131</sup> To be actionable, plaintiffs needed to establish there was an international consensus with respect to torture being a violation of international law.<sup>132</sup> According to the Second Circuit: “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].”<sup>133</sup>

*Filartiga* held that in determining whether specific conduct constituted a violation of international law, a court was to examine judicial opinions, scholarly works, and custom.<sup>134</sup> Significantly, the court stated that international law had to be applied as it is used “today” and not as it was understood 200 hundred years prior,<sup>135</sup> noting that international law evolves over time.<sup>136</sup> The Second Circuit found that torture was violative of a “well-established, universally recognized norm . . . of international law” which was cognizable under the statute.<sup>137</sup>

After *Filartiga*, plaintiffs began vigorously filing ATS cases. Such cases included ones against government officials alleging various human rights abuses.<sup>138</sup> Plaintiffs also began suing corporations, often alleging these defendants aided and abetted the governments or officials in violating international law.<sup>139</sup>

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128. For example, a Turkish company recently filed a case against a South African company for allegedly bribing Iranian officials to procure lucrative contracts. See Schoenberg & Lakshmanan, *supra* note 24 (discussing litigation between Turkcell Iletisim Hizmetleri AS (TCELL), a Turkish company, and its Johannesburg-based rival).

129. See *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (noting the temporary dearth of ATCA cases).

130. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

131. *Id.* at 878.

132. *Id.* at 888.

133. *Id.*

134. *Id.* at 880-81.

135. *Id.* at 887.

136. *Id.*

137. *Id.* at 888.

138. See *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (pertaining to a situation where families of victims of torture, summary execution and disappearance sued the former president of the Philippines).

139. See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part* 395 F.3d 932 (9th Cir. 2002) (describing an incident where plaintiffs brought suit

In *Sosa v. Alvarez*, the Supreme Court addressed the ATS and held that the statute is jurisdictional,<sup>140</sup> thus permitting federal courts to adjudicate cases brought by aliens for violations of international law, noting such law was part of federal common law.<sup>141</sup> The Court held the statute was initially intended to encompass the three primary violations of international law at the time of its enactment: piracy, offenses against ambassadors, and violations of safe passage.<sup>142</sup> However, the Court endorsed the *Filartiga* view that international law develops over time and held courts were available to entertain claims for violations of the “present-day law of nations.”<sup>143</sup> *Sosa* cited approvingly to *Filartiga*, stating that , “[t]he position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga*. . . .”<sup>144</sup> Simultaneously, the Court urged caution with respect to embracing the types of international law violations that should be cognizable. The Court provided some guidance, namely, to come within the ambit of the ATS, a violation should: “rest on a norm of international character accepted by the civilized world . . . [and] defined with a specificity comparable to the features of the 18<sup>th</sup> century paradigms.”<sup>145</sup>

Thus, subject to diligent gatekeeping, the federal courts are empowered to adjudicate cases brought by aliens for violations of international law other than the three original paradigm examples.<sup>146</sup>

### B. What Conduct is Actionable

1. *Sosa*: Cognizable conduct must be universally condemned, specific, and touch the mutual interest of nations.

Cognizable tortious conduct under international law is not unlimited. While the *Sosa* court embraced and approved of *Filartiga*’s “evolving international law” motif, the Court envisioned a limited number of cognizable torts. New torts could be recognized but the lower federal courts were to exercise restraint in permitting new claims. The Court

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against the government of Myanmar and several oil companies for human rights violations allegedly arising out of activities connected with the construction of an oil pipeline).

140. *Sosa v. Alvarez*, 542 U.S. 692, 713 (2004).

141. *Id.* at 720.

142. *Id.* at 724-725.

143. *Id.* at 725.

144. *Id.* at 731.

145. *Id.*

146. Courts remain subject to the ability to exercise jurisdiction over defendants. Foreign defendants may be able to defend such claims by raising the defense of extraterritoriality. *Supra* note 10.

stated: “[a]ny claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”<sup>147</sup>

The principle mechanism for screening out claims is the requirement that the conduct be the subject of universal condemnation, specific and of joint interest as opposed to the several interest of a single or just a few nations. *Sosa* held that qualifying conduct must constitute:

(1) . . . a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) . . . defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) . . . of mutual concern to States.<sup>148</sup>

The *Sosa* court wanted to ensure that lower courts do not entertain suits based upon conduct that was less serious than the paradigm offenses of “piracy, violations of safe passage and attacks on ambassadors.”<sup>149</sup> As detailed below, financial crime qualifies under the *Sosa* definition as offenses that are similar in nature to the archetype offenses.

*a. Universally Condemned*

Plaintiffs “must allege the violation of a norm of customary international law to which States universally subscribe.”<sup>150</sup> The Second Circuit, in ascertaining whether medical experimentation was universally condemned, stated that “[t]he prohibition on nonconsensual medical experimentation . . . is specific, focused and accepted by nations around the world without significant exception.”<sup>151</sup>

The question, therefore, is whether financial crime is conduct which is prohibited throughout the world. If financial crime is indeed held illegal to this extent, the first factor of the *Sosa* requirement is satisfied.

*b. Specific*

To be cognizable, the conduct must not be “less definite [in] content .

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147. *Sosa*, 542 U.S. at 725.

148. *Id.* at 725-28.

149. *Id.* at 694 (“[T]he ATS was intended to have practical effect . . . on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy.”).

150. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 177 (2d Cir. 2009).

151. *Id.*

. . . than the historical paradigms familiar when [the ATS] was enacted.”<sup>152</sup> With respect to this prong, the Second Circuit stated that it had “little trouble concluding that [the norm] . . . is every bit as concrete—indeed even more so—than the norm prohibiting piracy . . . or the interference with the right of safe conducts and the rights of ambassadors . . . .”<sup>153</sup> Aspirations or general goals are insufficient. For example, in *Flomo v. Firestone*, plaintiffs alleged that Firestone violated international law by using child labor.<sup>154</sup> The court rejected that claim. Plaintiffs relied upon the United Nations Convention on the Rights of the Child (1989) which states children have the right not to perform “any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.”<sup>155</sup> The *Flomo* court found this “too vague and encompassing to create an international legal norm.”<sup>156</sup>

The court similarly found plaintiffs' reliance on ILO Convention 138: Minimum Age Convention (1973) misplaced. The convention “provides that children should not be allowed to do other than ‘light work’ unless they're at least 14 years old.”<sup>157</sup> The court stated that “the concept of light work is vague, and it must vary a great deal across nations because of variance in social and economic conditions.”<sup>158</sup> Thus, in examining this part of the inquiry, the question is whether financial crime is prohibited by definite and concrete laws.

*c. Mutual interest*

The third benchmark in determining whether the conduct is actionable is examining whether the wrongdoing is of “mutual” concern to nations as opposed to “several” concern wherein nations are separately interested.<sup>159</sup> A significant component is whether the conduct in question is “capable of impairing international peace and security.”<sup>160</sup> Indicia of mutual concern are: whether nations have prohibited through domestic legislation the conduct and whether the conduct is the subject of condemnation through “express international accords”.<sup>161</sup>

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152. *Sosa*, 542 U.S. at 732.

153. *Pfizer*, 562 F.3d at 184.

154. *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

155. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 54.

156. *Flomo*, 643 F.3d at 1022.

157. *Id.*

158. *Id.*

159. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

160. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003).

161. *Filartiga*, 630 F.2d at 888.

Mutual interest has been defined as occurring when “the nations [of the world] have made it their business, both through international accords and unilateral action,” to express their mutual desire to thwart the misconduct.<sup>162</sup> Mutual interest can also be found when the conduct “poses a real threat to international peace and security.”<sup>163</sup>

The court was discussing whether the failure to obtain informed consent constituted conduct that was in the mutual interest of the nations. The court cited to media reports that the pharmaceutical company’s disastrous vaccination efforts impeded global efforts to eradicate polio. The court in *Pfizer* stated:

The Associated Press reported that the Trovan trials in Kano apparently engendered such distrust in the local population that it was a factor contributing to an eleven month-long, local boycott of a polio vaccination campaign in 2004, which impeded international and national efforts to vaccinate the population against a polio outbreak with catastrophic results.<sup>164</sup>

The Second Circuit noted that “administration of drug trials without informed consent on the scale alleged in the complaints directly threatens these efforts because such conduct fosters distrust and resistance to international drug trials, cutting edge medical innovation, and critical international public health initiatives in which pharmaceutical companies play a key role.”<sup>165</sup> The court’s ruling noted “the cross-border spread of contagious diseases . . . is a significant threat to international peace and stability.”<sup>166</sup>

The court also noted that “the administration of drug trials without informed consent also poses threats to national security by impairing our relations with other countries. . . [T]he failure to secure consent for human experimentation has the potential to generate substantial anti-American animus and hostility.”<sup>167</sup>

The requirements of condemnation, specificity and mutual interest are intended to ensure that only conduct of sufficient similarity to the three paradigm cardinal offenses are permitted to serve as a basis for an ATS suit.

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162. *Id.* at 889.

163. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 185 (2d Cir. 2009).

164. *Id.* at 186.

165. *Id.*

166. *Id.*

167. *Id.* at 187.

## 2. Personal Injuries Arising in the Context of Egregious Human Rights Violations

Post-*Sosa*, courts have applied the Supreme Court's admonition and have gauged the alleged conduct according to whether the benchmarks exist. Conduct must be a violation of a norm of international law that is defined and accepted comparatively with the three cardinal offenses. The archetype case involves some aspect of human rights abuses such as crimes against humanity, extra-judicial execution, war crimes, slavery and torture.<sup>168</sup>

Recent cases underscore this commonality. In *Exxon v. Doe*, plaintiffs alleged the defendant aided and abetted Indonesian security forces who murdered, tortured, and sexually assaulted villagers while protecting oil facilities.<sup>169</sup> The court referred to such conduct as "heinous".<sup>170</sup> In *Flomo v. Firestone Rubber*, plaintiffs alleged that child labor conditions were harsh and abusive.<sup>171</sup> In *Sarei v. Rio Tinto*, plaintiffs claimed the defendant aided and abetted the PNG military genocide and war crimes.<sup>172</sup>

While traditionally the cognizable conduct has been focused on human rights abuses and the subsequent personal injury associated with the misconduct, this is not a requirement of the statute. In *Pfizer*, the court held that a multinational pharmaceutical company violated international law.<sup>173</sup> Plaintiffs claimed that the defendant failed to obtain informed consent from the parents of children given a drug in response to meningitis. The drug was alleged to be unsafe and some of the children died and others received serious personal injuries. The court found that international law banned administering drugs without informed consent. This demonstrates ATS jurisdiction is not solely limited to violent misconduct such as slavery, torture, genocide, and crimes against humanity. There is no limitation as to the conduct—only that the conduct contravenes well-established norms of international law. As the next section discusses, to date, courts have been unprepared to find that financial fraud violates international law.

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168. See *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (alleging defendant visited plaintiff in an Chilean prison with a "caravan of death" and inflicted a brutal death on a civilian using a special knife designed to inflict a slow and agonizing death); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (accusing defendant of leading rape and forced impregnations on civilians during civil war in Yugoslavia); *Filartiga v. Pena-Irala*, 630 F.2d 876 (discussing the infliction of a tortuous death); *Iwanowa v. Ford*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (claiming defendant profited from slave labor during World War II).

169. *Doe v. ExxonMobil*, 654 F.3d 11 (D.C. Cir. 2011).

170. *Id.* at 15.

171. *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

172. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

173. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

### 3. Commercial Conduct

Courts have been unwilling to recognize commercial conduct as cognizable under the ATS. The rationale used by these courts is that the various financial crimes alleged do not constitute violations of international law.

In *Lopes v. Schroeder*, the plaintiff based his ATS suit upon the unseaworthiness of the defendant's vessel and the defendant's negligence.<sup>174</sup> The court framed the question as “whether the ‘tort [of unseaworthiness]’ was ‘committed in violation of the law of nations or a treaty of the United States.’”<sup>175</sup> The court held that the practice of awarding damages for injuries arising from unseaworthiness was a uniquely American concept and “the doctrine does not come from the law of nations nor from any treaty to which the United States is a party.”<sup>176</sup> Defining the law of nations as “a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se,”<sup>177</sup> the court rejected jurisdiction, finding that the allegations did not constitute a violation of the law of nations. While the specific allegation was not fraud, the *Lopes* ruling is important because most of the courts rejecting commercial fraud cite to *Lopes* and its question-framing in support of their rulings.

In *Valanga v. Metropolitan Life*, plaintiff alleged the defendant insurer violated international law, thus triggering ATS jurisdiction by refusing to pay a claim based upon the claimant's residence within the “Iron Curtain” of the former Soviet Union, despite being listed with such an address on the policy.<sup>178</sup> The court rejected plaintiff's contention holding, “[i]t is injected with overtones which impinge upon the standards which nations have established to control their relationships with one another.”<sup>179</sup>

The court added that qualifying conduct has to have an “international import” which could “constitute an affront to the power and dignity of the nation involved.”<sup>180</sup>

*IIT v. Vencap* did deal with commercial fraud with an “international import.”<sup>181</sup> In *Vencap*, plaintiff alleged defendant had engaged in

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174. *Lopes v. Schroeder*, 225 F. Supp. 292 (E.D.Pa. 1963).

175. *Id.* at 294.

176. *Id.* at 295.

177. *Id.* at 297.

178. *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D.Pa. 1966).

179. *Id.* at 328.

180. *Id.*

183. *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

international fraudulent conduct, resulting in substantial economic losses. Theories of liability explored in the case included making false and misleading statements in violation of SEC Rule 10-b; an inherently fraudulent scheme within the meaning of 10b-5(a); conspiracy to defraud; and defrauding of investors by defendant's improper diversion of funds to use as a private loan. In addressing plaintiff's ATS claim, the Second Circuit noted:

We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se."<sup>182</sup>

Thus, *Vencap* relied upon *Lopes*'s reasoning that actionable conduct must constitute a violation of a norm of international law. Since the fraudulent conduct was found not to encompass an international law violation, the court rejected fraud as the basis for an ATS claim.

In *Abiodun v. Martin Oil Service*, plaintiffs claimed defendants defrauded them by promising them executive jobs,<sup>183</sup> executive training in the United States, and subsequent employment with a large oil company in their native country.<sup>184</sup> The basis of their suit was fraud—they were trained to be service station attendants rather than corporate executives.<sup>185</sup> The court affirmed dismissal of the ATS suit, stating that although fraud is immoral and unlawful in many nations, the type of conduct alleged was simply not of an international character.<sup>186</sup>

In *Trans-Continental Investment Corp. v. Bank of the Commonwealth*, plaintiffs claimed defendants defrauded and breached fiduciary duties to them.<sup>187</sup> Specifically, plaintiffs claimed they deposited large amounts of money with defendant banks and were assured access to loans.<sup>188</sup> They alleged that, contrary to promises, they did not receive loans, and their

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182. *Id.* at 1015 (citing *Lopes*, 225 F. Supp. at 297).

183. *Abiodun v. Martin Oil Servs. Inc.*, 475 F.2d 142 (7th Cir. 1973).

184. *Id.* at 143.

185. *Id.* at 144.

186. *Id.* at 145.

187. *Trans-Cont'l Inv. Corp. v. Bank of the Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980).

188. *Id.* at 567.



deposited money was never returned to them.<sup>189</sup> The court rejected ATS jurisdiction, finding that the alleged fraud did not involve a universally-recognized norm.<sup>190</sup> The court, citing to *Vencap*, stated the conduct has to involve either state relations or relations from states to citizens in order to properly invoke ATS jurisdiction.<sup>191</sup>

In *Cohen v. Hartman*, the Fifth Circuit affirmed the dismissal of an ATS claim wherein the defendants were accused of embezzlement and money laundering.<sup>192</sup> The court stated that the complaint was properly dismissed as the claim was “in no way based on a violation of the ‘law of nations.’”<sup>193</sup> The court noted that if a dispute does not involve international relations there is no cognizable claim.<sup>194</sup> The court held that while every nation forbids robbery, this rule is not “part of the law of nations,”<sup>195</sup> and therefore no jurisdiction could be found.

In *Hamid v. Price Waterhouse*, defendants acquired banks in the United States, allegedly misappropriating funds and defrauding government regulators.<sup>196</sup> The plaintiffs alleged that “[b]y making the bank appear to be in better financial condition than it really was” and “using bribery and fraud” the bank was looted by “pirates . . . in business suits.”<sup>197</sup> Bank depositors lost money and loans made to bank insiders were never repaid, resulting in the bank’s collapse.<sup>198</sup>

The Ninth Circuit noted the claims were for “fraud, breach of duty and misappropriation of funds.”<sup>199</sup> The court rejected ATS jurisdiction holding, “[a]lthough the conduct was international in scope . . . [the] looting of a bank by its insiders, and misrepresentations about the bank’s financial condition, have never been in the traditional classification of international law.”<sup>200</sup>

The court cited to *Vencap* and found that the violations of domestic statutes and banking regulations did not constitute international law violations.<sup>201</sup> Again, the lynchpin in the court’s decision was the court’s finding that financial crime has “never been in the traditional classification

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189. *Id.* at 567-68.

190. *Id.* at 569.

191. *Id.* at 570.

192. *Cohen v. Hartman*, 634 F.2d 318 (5th Cir. 1981).

193. *Id.* at 319.

194. *Id.*

195. *Id.* at 320.

196. *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995).

197. *Id.* at 1414.

198. *Id.*

199. *Id.* at 1418.

200. *Id.* at 1411.

201. *Id.*

of international law.”<sup>202</sup>

In *Arndt v. UBS*, plaintiffs alleged the defendant was liable for fraud and conversion.<sup>203</sup> The court held the proper inquiry was to determine whether the conduct was the subject of mutual concern and expressed in international agreements.<sup>204</sup> Since the conduct failed to meet this requirement the court rejected ATS jurisdiction.<sup>205</sup> The *UBS* decision represented the first time in which a court opened the possibility of entertaining such a claim. While it ultimately rejected the suit, the court based its ruling on a lack of evidence that the fraud was an issue of mutual concern. In its decision, the court left open the possibility that, had such evidence existed or presented, the court would presumably have found jurisdiction to be proper.

While the above-referenced opinions denied ATS jurisdiction based on the absence of international law violations, in each of these decisions the respective courts suggested that to be cognizable, the conduct in question must violate an international law norm, holding that financial crimes were simply not within the traditional realm of international law. This second assertion stems from the decision in *Price Waterhouse*, which stands for the proposition that financial crime is not associated with violations of international law.<sup>206</sup> The *UBS* ruling corroborates this principle, basing its holding on a substantial lack of evidence that financial crime is the subject of international agreement that touches upon the mutual interest of nations.

Notwithstanding these rulings, financial crime does, in fact, affect the nations of the world. As the world has changed, such conduct can no longer be characterized as outside the ambit of international law. As the global financial system is interrelated, criminal activity such as money laundering has emerged as a critical concern within the realm of international law. As the next section details, international conventions, laws, and other sources demonstrate that the international community widely condemns such conduct. Further, the financial crimes the global community condemns are not vague, but specific and definable misconduct that affects the mutual interests of nations. Indeed, by virtue of our globalized and interconnected markets, financial crime affects nearly every nation, making it one of the most pressing issues facing the international community.

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202. *Id.* at 1418.

203. *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004).

204. *Id.* at 141

205. *Id.*

206. *Price Waterhouse*, 51 F.3d at 1418.

## IV. SHOULD FINANCIAL CRIMES BE COGNIZABLE?

The global community now recognizes the significance of corruption, fraud and money laundering.<sup>207</sup> Such misconduct is almost unanimously acknowledged as destructive and is condemned across the world. The struggle against financial crime is a global fight enjoying the support of the vast majority, if not the unanimous agreement, of civilized nations. As the United Nations stated, “[t]here is a collective responsibility now, worldwide, to track stolen money, to share intelligence . . . .”<sup>208</sup>

The OECD noted that the Anti-Bribery Convention was significant because it represented an international, united front against global financial crime, stating, “[the] Anti-Bribery Convention [] provides the framework for a united stand against corruption by the international community.”<sup>209</sup>

The global condemnation of financial crime arose from compelling motivations. In today’s interconnected financial markets, lawbreakers can move huge amounts of money instantaneously, and safely store proceeds of misconduct in a far away land. A dictator or financial tyrant can loot a nation’s assets, pillage national treasuries, and impoverish the citizenry by diverting wealth abroad. Rogue leaders can enlist large global corporations to launder money and facilitate transfers of wealth.

Moreover, fraudsters can engage in schemes with far reaching effects. Indeed, fraud even can have global implications. As the United States SEC’s OIA states:

Technological advances have facilitated the movement of capital across borders and increased investment opportunities for investors. However, these same advances also have enhanced the ability of those who prey on investors to transfer assets abroad or base their scams and fraudulent activities overseas in an effort to avoid detection and prosecution. As a consequence, securities regulators and other law enforcement and governmental agencies

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207. In a 2011 speech, Assistant Attorney General Lanny A. Breuer noted that:

[I]t has become increasingly clear over the past year that the trend across the globe is toward criminalization of foreign bribery. The U.K. Bribery Act took effect in July. Russia recently passed an anti-bribery law; has ratified the U.N. Convention against Corruption; and is expected soon to accede to the OECD Anti-Bribery Convention. China, too, recently passed an anti-bribery law and is an observer at the OECD’s Working Group on Bribery.

Breuer, *supra* note 3.

208. Press Release, Dept. of Pub. Information, Convention Against Corruption Ratified by 30th State, U.N. Press Release L/T/4389 (Sept. 15, 2005), *available at* <http://www.un.org/News/Press/docs/2005/lt4389.doc.htm>.

209. Does the OECD Convention Work?, OECD OBSERVER (Dec. 2004-Jan.2005), *available at* <http://www.oecdobserver.org/news/fullstory.php/aid/1509>.

may find that reliance on domestic enforcement abilities is no longer sufficient to combat cross-border securities fraud. Strong international cooperation is vital to the quick, effective and appropriate resolution of international enforcement investigations.<sup>210</sup>

*A. The effects of financial fraud are felt far and wide.*

Linked markets can spread fraud like a contagion and the explosive rise in derivatives can multiply its consequences. Therefore, based upon their mutual interests, states have banded together to condemn, criminalize, prosecute fraud, money laundering and corruption, and to retrieve the ill-gotten gains arising from such conduct. As detailed in the following section, the United Nations Convention Against Corruption; the OECD Convention on Combating Bribery, various laws enacted, and the World Bank's sanctions against entities engaged in fraud all demonstrate that fraud, bribery, and money laundering are contemptible acts condemned by the vast majority of civilized nations.

*B. The Overwhelming International Condemnation of Financial Crime*

1. The United Nations Convention Against Corruption

Nearly 150 nations have signed The United Nations Convention Against Corruption (UNCAC). The purposes of the UNCAC include combating corruption, promoting integrity, and increasing international cooperation.<sup>211</sup> The convention obligates parties to enact laws and prosecute misconduct, including the bribery of national and foreign public officials, as well as officials of public international organizations; the embezzlement, misappropriation or other diversion of either public or private funds by a public official to whom the funds have been entrusted; and the laundering of proceeds of crime.<sup>212</sup>

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210. *International Enforcement Assistance*, U.S. SEC. AND EXCH. COMM'N, [http://www.sec.gov/about/offices/oia/oia\\_crossborder.shtml](http://www.sec.gov/about/offices/oia/oia_crossborder.shtml) (last modified Nov. 13, 2012).

211. United Nations Convention Against Corruption, U.N. Doc A/58/422 (Oct. 31, 2003), available at <http://www.unhcr.org/refworld/docid/4374b9524.html>.

212. *Id.* at 17.

## 2. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides further evidence of universal condemnation. Approximately 40 nations have signed the OECD Convention, which obligates parties to enact laws making money laundering, as well as the bribery of foreign officials in international business, illegal.<sup>213</sup> The OECD Convention urges international cooperation on these issues, obligating signatory countries to enact domestic anti-bribery laws criminalizing bribery of foreign officials.<sup>214</sup>

## 3. World Bank Sanctions Board

Another indication of the global condemnation of financial fraud is the World Bank Sanctions Board, which debars parties found to have engaged in fraud from conducting business with the World Bank and other developmental banks.<sup>215</sup> Recently, the World Bank decided to publish its debarment rulings. Their decision is significant in itself by providing powerful evidence that they take financial crime seriously. The World Bank demonstrates its condemnation of financial crimes such as forgery, bribery, and fraud in its recently published decisions.<sup>216</sup>

## 4. UN Convention Against Narcotics Trafficking

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides a thorough description of the precise elements that constitute each offense described in the convention. As stated by the agreement:

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213. *List of OECD Member Countries – Ratification of the Convention on the OECD*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <http://www.oecd.org/general/listofocedmembercountries-ratificationoftheconventionontheoecd.htm> (last visited May 4, 2013).

214. OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, art. 1, Nov. 21, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1.

215. Pursuant to a cross-debarment agreement, these other banks agree to debar such parties as well. *See Cross-Debarment Accord Steps Up Fight Against Corruption*, THE WORLD BANK (Apr. 10, 2010), <http://go.worldbank.org/B699B73Q00> (listing cooperating multilateral development banks including the World Bank Group, African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development and Inter-American Development Bank Group).

216. *See* Sanctions Board Decisions, *supra* note 22 (linking to numerous World Bank Sanction Board Decisions condemning financial crimes).

Each Party shall adopt such measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally:

. . . the conversion or transfer of property, knowing that such a property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences, for purposes of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of his actions. . . .

The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences . . .<sup>217</sup>

The Treaty states that each state party should render as criminal: “[t]he acquisition, possession or use of property, knowing at the time of the receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences.”<sup>218</sup>

The Treaty also emphasizes and obligates states to cooperate in identifying and seizing assets that are the results of the drug-related activity, and that each party should take measures “to identify, trace, seize, freeze or forfeit property or proceeds located in the requested states, where property was allegedly derived from or used in drug trafficking and drug money laundering in violation of laws of the requesting state.”<sup>219</sup>

The Treaty makes money laundering an extraditable offense. Because all parties are obliged to establish article 3(1) offences as criminal offences in the domestic law, any requirements of dual criminality in a party's extradition, that is, the offence is criminal in both jurisdictions, should be met.<sup>220</sup>

The importance of this latter provision cannot be understated.

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217. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1)(b), Dec. 20, 1988, 1582 U.N.T.S. 95.

218. *Id.* at art. 3(1)(c).

219. *Id.* at art. 5.

220. *Id.* at art. 3(1).

Pursuant to the Treaty, drug-related money laundering is a universally-recognized, extraditable offense.

5. United Nations Convention Against Organized Transnational Crime in Palermo, Italy

The United Nations Convention against Organized Transnational Crime obligates nations to enact anti-money laundering laws.<sup>221</sup> Each member state must: criminalize money laundering,<sup>222</sup> enact regulatory mechanisms to discover and prevent all money laundering (such as customer identification, record keeping, and reporting of suspicious transactions)<sup>223</sup> and states must approve international co-operation between regulatory and law enforcement agencies.<sup>224</sup>

6. The Financial Action Task Force

The G-7 founded the FATF in 1989 in response to the international problem of money laundering.<sup>225</sup> The motivation for creating the FATF was international concern with “combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system.”<sup>226</sup> Stability of the global financial system is a key goal of the FATF as it aims to protect the international financial system from misuse.<sup>227</sup>

In conjunction with the United Nations, the IMF and World Bank, the FATF has developed specific recommendations to combat financial crime.<sup>228</sup> According to the FATF, the definition of money laundering is broad; “[c]ountries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.”<sup>229</sup> The FATF calls for nations to identify, trace and confiscate

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221. United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25 (Jan. 8, 2001).

222. *Id.* at art. 6.

223. *Id.* at art. 7.

224. *Id.* at art. 7(1)(b).

225. *About Us*, FINANCIAL ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/> (last visited May 4, 2013).

226. *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 7*, FINANCIAL ACTION TASK FORCE (Feb. 15, 2012), [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (last visited, May 4, 2013).

227. *Id.*

228. *Id.* at 8.

229. *Id.* at 12 (Recommendation 3).

money laundering proceeds.<sup>230</sup> Moreover, financial institutions are to “know the customer” and identify owners and beneficial owners.<sup>231</sup> Global cooperation is called for on investigating, seizing and returning assets.<sup>232</sup>

Special focus is on the potential for political elites to plunder their national assets for personal gain. To prevent the proceeds of financial crime from being enjoyed, a Recommendation is specifically applicable to politically “exposed” individuals. Financial institutions are obligated, with respect to foreign PEPs (politically exposed persons), to:

- (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;
- (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
- (c) take reasonable measures to establish the source of wealth and source of funds; and
- (d) conduct enhanced ongoing monitoring of the business relationship.<sup>233</sup>

These requirements apply not only to the leaders themselves but “also apply to family members or close associates of such PEPs.”<sup>234</sup>

The FATF Recommendations provide another powerful example of global condemnation of financial crime. They signify a global effort at criminalizing financial crime with a specific emphasis on preventing political leaders from plundering their citizens’ wealth through transactions with financial institutions.

## 7. The United Nations Security Council

The World Trade Center attack on September 11, 2001 engendered renewed concern regarding financing of terrorism. In response, the United Nations enacted Resolution 1373 to be carried out by all states. Resolution 1373 addresses global finance norms in the context of crimes and, specifically terrorism, ordering nations to:

[T]hwart and stem the financing of terrorist acts; criminalize operations linked with the financing of terrorism; freeze assets related to terrorism; prevent funds being made available to individuals linked to terrorism; reject sanctuary to individuals who finance terrorism and prevent them from entering their territoriality.<sup>235</sup>

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230. *Id.* (Recommendation 4).

231. *Id.* at 14 (Recommendation 10).

232. *Id.* at 26-30 (Recommendations 36-40).

233. *Id.* at 16 (Recommendation 12).

234. *Id.*

235. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).



The resolution notes the link between global crime and money laundering.<sup>236</sup>

There is near universal denunciation of financial crime such as corruption, money laundering, and fraud. These condemnations are not merely vague goals or general aspirations. They have led to specific and definable laws.

### C. *Specific and Definable*

The second requirement of an ATS cognizable international law violation is that the conduct be definable and specific. Vague standards are not sufficient to vest ATS plaintiffs with rights. The hallmark of fulfilling this requirement is that the norm of conduct be specific and definable, mere aspersions and general claims are inadequate. Courts have rejected suits that based solely upon “the right to health” and the “right to liberty.” Rejecting the generic and unspecific “universal rights” claims is justifiable and in keeping with *Sosa*’s admonition. If courts were to allow such claims it would be a slippery slope. Under this standard, one could claim violations of “education rights”, “the right to vote,” or “universal healthcare.” Such claims are general, vague, and lack international consensus on the definition of “rights.”

Nations have enacted laws dealing specifically with financial crimes. As one scholar noted, “[g]lobal efforts to stem bribery of foreign officials in international business transactions are accelerating. Anti-bribery criminal enforcement by many different nations increased significantly in the last decade. The United Kingdom’s new Bribery Act took effect in July, 2011. Russia enacted new anti-bribery legislation restraining its businesses’ conduct abroad.”<sup>237</sup>

Even China has joined the anti-corruption crusade and has condemned and criminalized corruption.<sup>238</sup> These laws define various financial crimes in detail. While the many domestic laws are tailored to the specific domestic legal system, culture and language, the definitions of what constitutes the offenses are by and large quite similar. This similarity reinforces the universal nature of the condemnation and is no doubt influenced by the conventions and above-mentioned treaties.

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236. *Id.*

237. Elizabeth K. Spahn, *Local Law Provisions Under the OECD Anti-Bribery Convention*, 39 SYRACUSE J. INT’L L. & COM., 249, 250-51 (2012); *see also* Elizabeth K. Spahn, *Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT’L L. 1 (2012) (discussing the universal outcry and criminalization of bribery).

238. Spahn, *Local Law Provisions*, *supra* note 237 at 252.

### 1. United States

Enacted in 1977, the Federal Corrupt Practices Act (“FCPA”) outlaws corruption of foreign officials and fraudulent record keeping.<sup>239</sup> The statute is both criminal and civil and prohibits U.S. citizens and corporations paying something of “value” with corrupt intent made in order to obtain a business advantage.<sup>240</sup> The bookkeeping provision obligates businesses to properly maintain books and records and internal controls to track transactions and dispositions of assets.<sup>241</sup> Non-U.S. nationals and businesses are also subject to the FCPA’s bribery section if present in the U.S. and to “issuers”<sup>242</sup> as well as foreign ADR listers.<sup>243</sup> Criminal imprisonment is available up to 5 years per bribery violation and 20 years for books and records violations.<sup>244</sup> The FCPA is interpreted broadly and prosecutors pursue cases where the conduct “concerns” the U.S. and directors/officers may be liable under a control person theory.<sup>245</sup> Numerous companies have been heavily fined.<sup>246</sup> Siemens paid a large fine in 2008.<sup>247</sup>

The United States has various anti-money laundering laws. For example, the Money Laundering Control Act 1986 (MLCA)<sup>248</sup> imposes criminal liability on anyone who knowingly uses or attempts to use the proceeds of some unlawful activity in some form of financial transaction

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239. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (1999)).

240. 15 U.S.C. § 78dd-1(a) (2006). There are exceptions and defenses such as the payments being legal under the local written law, reasonable expenditures to promote and market and facilitating payments to expedite routine governmental functions. *See generally A Resource Guide to the U.S. Foreign Corrupt Practices Act*, CRIMINAL DIV. OF U.S. DEP’T OF JUSTICE AND ENFORCEMENT DIV. OF U.S. SEC. AND EXCH. COMM’N (Nov. 14, 2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (outlining the SEC and DOJ approach to compliance with the FCPA).

241. 15 U.S.C. § 78m(b)(2)(A)-(B) (2006).

242. 15 U.S.C. § 78dd-1 (2006).

243. 15 U.S.C. § 78dd-3 (2006).

244. 15 U.S.C. § 78dd-2(g)(2)(A) (2006); 15 U.S.C. § 78dd-3(e)(2)(A) (2006); 15 U.S.C. § 78ff(a) (2006).

245. *See* Press Release, SEC Charges Three Oil Services Executives With Bribing Customs Officials in Nigeria (Feb. 24, 2012), <http://www.sec.gov/news/press/2012/2012-32.htm> (“He also is liable as a control person under Section 20(a) of the Exchange Act for violations of the anti-bribery, books and records, and internal controls provisions.”)

246. In 2011 many companies were fined. Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 4-8 (2012).

247. Press Release, Sec. & Exch. Comm’n Litig. Release No. 20829, SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over \$1.6 Billion (Dec. 15, 2008), <http://www.sec.gov/litigation/litreleases/2008/lr20829.htm>.

248. 18 U.S.C. §§ 1956-1957 (2006).

with the intent to either promote the carrying on of a “specified” unlawful activity (SUA) or engages in a transaction designed to disguise or conceal the nature, location, source, ownership, or control of the funds.

## 2. United Kingdom

The UK law – the UK Bribery Act – is similar but stricter than the FCPA:

Specifically, the first general offense under the UK Bribery Act 2010 is offering, promising, or giving a financial or other advantage in any of the three following circumstances: (1) to induce a person to improperly perform a relevant function or duty; (2) to reward a person for such improper activity; or (3) to know or believe that the acceptance of the advantage would itself be an improper performance of a function or duty.<sup>249</sup>

Unlike the FCPA, the U.K. law is applicable to private parties.<sup>250</sup> The U.K. law also criminalizes the act of receiving the bribe and failing to prevent the bribery.<sup>251</sup> Under the U.K. law, the sole defense to “failure to prevent” prosecution is demonstrating that the business had “adequate procedures” in place to prevent the persons associated with it from undertaking bribery.

The U.K. law’s extraterritorial jurisdictional effect is far-reaching. Individuals or companies that are nationals, and companies that conduct some part of their business within the U.K., are all subject to the law, regardless of where the act was committed.<sup>252</sup> Both civil and criminal penalties are available.<sup>253</sup>

The U.K. criminalizes money laundering.<sup>254</sup> The law is very similar to most national anti-money laundering statutes including verification of customer requirements, mandatory reporting of suspicious activity and providing both civil and criminal penalties.<sup>255</sup>

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249. Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 441 (2011).

250. Bribery Act, 2010, c. 23, § 6 (U.K.).

251. *Id.* at § 7.

252. *Id.* at § 12.

253. *Id.* at § 11.

254. See Money Laundering Regulations, 2007, S.I. 2157, art. 5, ¶ 45 (calling one who violates the regulations “guilty of an offence” and listing potential consequences, including imprisonment).

255. *Id.*

*D. Other National Laws*

Across the globe, many nations have enacted specific regulations and laws criminalizing financial crime.<sup>256</sup> Vietnam's anti-money laundering law obligates reporting of suspicious activities and blocking accounts.<sup>257</sup> Thailand also requires reporting of suspicious transactions.<sup>258</sup> Under a 2011 amendment, the laws became stricter and now apply to wire transfers and financial institutions such as futures dealers.

China has laws criminalizing both money laundering<sup>259</sup> and corruption.<sup>260</sup> Chinese money laundering laws are similar to other nations' laws, and their bribery prohibition relates to both governmental and commercial bribery.<sup>261</sup> China is actively prosecuting such crimes.<sup>262</sup> Russian laws criminalize money laundering and comport with international standards of identifying customers, reporting suspicious activity and prosecuting offenders.<sup>263</sup>

Israel has enacted anti-money laundering laws similar to international standards.<sup>264</sup> The law requires banks to know their customer, report

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256. See OECD Anti-Bribery Convention: National Implementing Legislation, Organisation for Economic Co-operation and Development, <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/oecdanti-briberyconventionnationalimplementinglegislation.html> (listing countries with laws implementing the anti-bribery convention).

257. Penal Code, Decree 74 (2005) (Viet.).

258. Anti-Money Laundering Act, B.E. 2542 (No.3), B.E. 2552 (2009) (Thai.), available at [http://www.lawreform.go.th/lawreform/images/th/content/th/500/c500\\_2.pdf](http://www.lawreform.go.th/lawreform/images/th/content/th/500/c500_2.pdf) (unofficial English translation).

259. Anti-Money Laundering Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007) (China).

260. Comparison of the FCPA and Chinese Antibribery Laws and Regulations as of March 2012 and Japanese and United Kingdom Antibribery Laws and Regulations as of March 2011, SQUIRE SANDERS (Mar. 2012), [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2012/05/international\\_labor\\_employment\\_law\\_committee\\_midyear\\_meeting/mw2012int\\_millstone-1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2012/05/international_labor_employment_law_committee_midyear_meeting/mw2012int_millstone-1.authcheckdam.pdf).

261. *Id.*

262. See, e.g., David Barboza, *China Sentences Rio Tinto Employees in Bribe Case*, N.Y. TIMES (Mar. 29, 2010), <http://www.nytimes.com/2010/03/30/business/global/30riotinto.html> (discussing China's prosecution of "[f]our employees of the British-Australian mining giant Rio Tinto, including an Australian citizen," who "were found guilty . . . of accepting millions of dollars in bribes and stealing commercial secrets. They were given sentences of 7 years to 14 years in prison, and were later dismissed by their employer.").

263. See Julia Fedorova, *Money Laundering | Russia*, CMS (Mar. 21, 2011), <http://www.cmslegal.ru/Money-Laundering—Russia-03-21-2011> (noting that the law reflects "global developments" in combating money laundering and the financing of terrorism).

264. See Prohibition on Money Laundering Law, 2000, SH No. 1753 (Isr.) (generally

suspicious activities and various civil and criminal penalties are available.<sup>265</sup> Israel also criminalizes bribery.<sup>266</sup>

The Saudi Arabian Combating Bribery Law was issued in 1992 by the Council of Ministries.<sup>267</sup> The anti-bribery law outlaws bribes to public officials, private persons, and companies. The law prevents paying money or using intimidation or force to obtain a benefit.<sup>268</sup> Violators risk both monetary penalties and imprisonment while government officials are to be fired.<sup>269</sup> The ill-gotten gains are to be impounded.<sup>270</sup>

Qatar also has anti-corruption laws to combat financial crime.<sup>271</sup> These laws make illegal money laundering and fraud but also extend to commercial acts such as market manipulation.<sup>272</sup> Impressively, Qatari anti-corruption law also requires continuous examination of financial institutional transactions and makes illegal the failure to implement risk management systems and the opening or facilitating the opening of an anonymous account.<sup>273</sup>

New Zealand is another example of a state with anti-money laundering and bribery laws. Under New Zealand law, money laundering laws are also similar to the international standard with ‘know your customer’ requirements, mandatory reporting of suspicious activity, and civil and criminal penalties.<sup>274</sup>

The above section detailed the specific and definite nature of the laws making financial criminal acts illegal. The next section discusses that financial crime is the mutual interests of most if not virtually all nations.

#### *E. Financial Crime Touches the Mutual Interest of the Majority of*

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defining “money laundering” under Israeli law).

265. *Id.*

266. See Penal Law 5737-1977, LSI (1978) Special Volume 291A (Isr.) (criminalizing bribery).

267. Alharbi Ali Khalaf S., *An Overview of the Saudi Arabian Criminal Justice Procedures Against Corruption in the Public Sector* 124, 138th International Senior Seminar Participant’s Papers, 123, 124, available at [http://www.unafei.or.jp/english/pdf/RS\\_No77/No77\\_14PA\\_Khalaf.pdf](http://www.unafei.or.jp/english/pdf/RS_No77/No77_14PA_Khalaf.pdf).

268. *Id.*

269. *Id.*

270. *Id.*

271. Law of Combating Money Laundering and Terrorism Financing (Law No. 4 of 2010) (Qatar), available at

<http://www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=9668&lawId=2610&language=en>.

272. *Id.*

273. *Id.* at art. 3.

274. Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (N.Z.), available at

<http://www.legislation.govt.nz/act/public/2009/0035/latest/096be8ed80a0260e.pdf>.

*Nations.*

Financial fraud, money laundering, and bribery impact the mutual interests of nations. Out of national self-interest there is a global struggle against financial crime. Thus, there is a global interest in preventing financial crimes. International cooperation is growing through extensive international agreements.<sup>275</sup> Financial crime is already being prosecuted with the collaboration of international governmental regulators.<sup>276</sup> For example, the United States SEC has enforcement and regulatory cooperation with numerous countries, including Canada, Chile, Germany, Israel, Italy, Norway, Portugal, and the United Kingdom.<sup>277</sup> The SEC's Office of International Affairs ("OIA") cooperates with a "global network of securities regulators and law enforcement authorities to facilitate cross-border regulatory compliance and ensure that international borders are not used to escape detection and prosecution of fraudulent securities activities."<sup>278</sup>

This concerted global effort to recover stolen wealth is a significant improvement from the past, when rogue leaders ransacked the national treasuries; there is now a concerted global effort to recover stolen wealth, "[w]hen other past dictators, such as Jean-Claude 'Baby Doc' Duvalier of Haiti, fled their countries, they often retired in comfort, living off their plundered assets in French villas and estates. This time, the international community is working to ensure that such outrages are stories of the past."<sup>279</sup>

In *SEC v. Juno Mother Earth Asset Management*, the SEC claimed a

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275. OECD Convention on Combating Bribery, *supra* note 215; UN Convention against Illicit Traffic, *supra* note 218; UN Convention Against Corruption, *supra* note 212; U N Convention against Transnational Organized Crime, *supra* note 222.

276. See Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations And Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> (quoting Linda Chatman Thomsen, Director of the SEC's Division of Enforcement). ("Our success in bringing the company to justice is a testament to the close, coordinated working relationship among the SEC, the U.S. Department of Justice, and other U.S. and international law enforcement, particularly the Office of the Prosecutor General in Munich.")

277. See Cooperative Arrangements with Foreign Regulators, U.S. Securities and Exchange Commission Office of International Affairs, [http://www.sec.gov/about/offices/oia/oia\\_cooparrangements.shtml](http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml) (listing countries that cooperate with SEC enforcement and regulation).

278. Office of International Affairs, U.S. SEC. AND EXCH. COMM'N, <http://www.sec.gov/about/offices/oia.shtml>.

279. Mark V. Vlasic, *Getting Back the Bad Guy's Loot*, N.Y. TIMES (Jan. 19, 2012), <http://www.nytimes.com/2012/01/20/opinion/getting-back-the-bad-guys-loot.html>.

firm and its founders schemed to defraud investors and inflated assets, stole money and filed false reports.<sup>280</sup> Cooperation with non-U.S. securities regulators was crucial in bringing the suit; the SEC acknowledged “the assistance of the Cayman Islands Monetary Authority and the Financial Market Authority Liechtenstein.”<sup>281</sup>

In *SEC v. Provident Capital Indemnity*, the SEC filed (and the U.S. Justice Department filed a simultaneous criminal action) a complaint against a Costa Rican entity involved in a massive financial fraud.<sup>282</sup> The SEC thanked the “Costa Rican Unidad de Analisis Financiero, the Ontario Securities Commission, the Gibraltar Financial Services Commission.”<sup>283</sup>

Another example is *SEC v. Imperia Invest IBC*, wherein the SEC alleged the defendant defrauded 14,000 investors worldwide and pursued the case with “the assistance and cooperation of the State of Maine Office of Securities, the Securities Commission of the Bahamas, the Vanuatu Financial Services Commission and the Cyprus Securities and Exchange Commission.”<sup>284</sup>

#### CONCLUSION

Global financial crimes have real worldwide implications proximately causing lower economic growth, national impoverishment, empowerment of rogue leaders, civil war and terrorism. Such conduct is a hallmark of failed states and the looting of national treasuries. The vast majority of the nations of the world have concluded that it is in their self-interest to criminalize and sanction such conduct. As such, certain fraudulent acts have developed into violations of norms of international law. The ATS allows for suits based upon violations of well-established norms of international law. Therefore, the ATS should provide for jurisdiction of such conduct.

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280. *SEC Charges Hedge Fund Managers with Fraud*, U.S. SEC. AND EXCH. COMM’N (Mar. 15, 2011), <http://www.sec.gov/litigation/litreleases/2011/lr21886.htm>.

281. *Id.*

282. *SEC Charges Offshore Company with Massive Life Settlement Bonding Fraud*, U.S. SEC. AND EXCH. COMM’N (Jan. 19, 2011), <http://www.sec.gov/litigation/litreleases/2011/lr21818.htm>.

283. *Id.*

284. *SEC Obtains Temporary Restraining Order and Asset Freeze of Imperia Invest IBC Relating to Internet Based Offering Fraud*, U.S. SEC. AND EXCH. COMM’N (Oct. 7, 2010), <http://www.sec.gov/litigation/litreleases/2010/lr21686.htm>.