Presentation of Professor Beth Stephens

Good afternoon, and thank you very much for the opportunity to participate today.

For the past 25 years, I have worked with the Center for Constitutional Rights on lawsuits to hold accountable abusers of human rights, mostly using a U.S. statute, the Alien Tort Statute, or ATS. My plan today is to give you a brief overview of the ATS and corporate-defendant litigation and then to discuss what I believe are some of the lessons we can learn from the extensive ATS practice.

The ATS was enacted by the U.S. Congress in the late 18th century. It says that the U.S. federal courts have jurisdiction to hear a claim by an alien – that is, a non-citizen of the United States -- for a violation of international law. The statute was mostly ignored for almost 200 years, until it was used successfully in 1980 by the family of a young Paraguayan man, Joel Filartiga, who was tortured to death, in Paraguay, by a Paraguayan police officer. When the Filartigas discovered that the police officer was living in the United States, they sued him for damages, and won a $10 million judgment against him. Although they were unable to collect the damage award, the Filartigas took tremendous satisfaction from the judgment acknowledging the facts of what had happened and the responsibility of the perpetrator.

In the years after the Filartiga decision, victims and survivors of human rights abuses sued generals and other government leaders under the ATS, but only if the defendant was physically present in the United States.

In the mid 1990s, plaintiffs began to file human rights cases against corporations as well. Two of the early cases, both litigated by the Center for Constitutional Rights, offer good examples of how ATS corporate-defendant litigation provided remedies to survivors who had no other means of redress.

In Doe v. Unocal, Burmese plaintiffs sued an oil company that had worked with the Burmese military to rape, torture and kill villagers and to use them as forced labor. Unocal eventually settled the lawsuit for a reported $30 million dollars.

In Wiwa v. Royal Dutch Petroleum, Nigerians sued the Shell oil company for deaths and injuries inflicted by security forces paid and directed by oil company employees who were trying to stop opposition to environmental harms in the Niger Delta. That case settled for over $15 million dollars.

Not all cases against corporations were successful, but, as these examples illustrate, in a handful of cases, survivors of abuses were able to hold accountable the corporations that had caused egregious harms in their communities.

In each of these cases, a remedy in the place where the abuses took place was not possible. The U.S. litigation offered the only possible route for the survivors to obtain justice.

Over the past few years, however, the U.S. Supreme Court has severely limited ATS litigation in the United States, and particularly corporate-defendant cases. Most importantly, in a 2013 decision in Kiobel v. Royal Dutch Petroleum, the Court held that the ATS does not have extraterritorial application, and therefore applies only to cases that “touch and concern” the United States. The language in the Supreme Court decision is ambiguous, and we are still fighting to maintain some claims against U.S. corporations, but all of the pending claims against foreign corporations have been dismissed.

What lessons can we draw from the rise and fall of ATS corporate defendant litigation in the United States? Here are a few thoughts.

First, starting with a well-publicized appellate decision in the Unocal case in 2002, corporations took notice of these lawsuits. They criticized them bitterly in the press and lobbied politicians, trying – unsuccessfully – to repeal the ATS. But they also hired consultants and lawyers and attended seminars and trainings to understand the cases and how to manage their risks. Based on the dozen years between that Unocal decision and the Supreme Court’s decision in Kiobel, I can’t say whether corporations changed their behavior or whether they just worked harder to disguise it. But given their strong reaction to a very small number of cases, I am confident that a robust system of litigation, with a real possibility of lawsuits, would lead corporations to pay much closer attention to the harms they inflict in their operations. That is, lawsuits can work to deter human rights abuses.

Second, the successful lawsuits provided important satisfaction and redress to the plaintiffs. They had an opportunity to tell their stories on the world stage, to expose corporate behavior, and they received meaningful monetary compensation. None of that brought back their loved ones or rebuilt lives that had been shattered, but it was a significant accomplishment and an important step towards healing the wounds they had suffered.

These two points indicate that litigation in the home state of a corporation can be one useful mechanism among others to further corporate accountability, both by changing corporate behavior and providing redress to plaintiffs.

However, ATS litigation was unnecessarily lengthy and complex. Litigants spent years fighting over initial questions of jurisdiction and the content of human rights norms. They fought over access to evidence and protection of the lives of plaintiffs and witnesses. Corporate defense lawyers worked to make the litigation as time consuming and expensive as possible.

I draw two lessons for the treaty from this experience: the first is the importance of standardizing rules of jurisdiction and human rights norms, so that litigants don’t spend years on preliminary matters; and the second, is to address barriers to access to justice such as forum non conveniens, the corporate veil, bars on class actions, attorney’s fees, and lack of funding for litigation. I’ll just list these here because Richard Meeran discussed them at length yesterday afternoon.

This leads me to my final conservation about the rise and fall of corporate defendant ATS litigation and the way in which a treaty would have changed that history. The corporate community worked very, very hard to overturn the ATS litigation. And they largely succeeded, winning a Supreme Court decision that has stopped most of the corporate-defendant cases. One argument that they used was that it was unfair to subject corporations in only one state to these lawsuits. This argument would not have been possible if other states provided similar litigation opportunities. Moreover, the United States would not have been able to eliminate the litigation option if it were under a treaty obligation to allow corporate defendant litigation for human rights violation.

Despite the limits on the ATS, human rights claims continue under new legal theories in the United States and in legal systems around the world. Which leads me to my final observation: this worldwide movement to prevent corporate human rights, punish corporations for the abuses they commit, and provide remedies to the victims and impacted communities, will continue, powered by the combined energies of the survivors of corporate abuses and the activists who join them in their struggle.

Thank you.