Regulating Corporate Human Rights Abuses: Is Unocal the Answer?

Pia Zara Thadhani
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"International law is the normative expression of the international political system"¹ and as a result, international law governs the relations between states.² Within this international system, however, states are free to regulate their nationals, as well as the relations between their nationals and other states.³ A rational corollary to this is the right of a state to regulate a multinational corporation (MNC) incorporated within its territory.⁴ The steady growth in the overseas operations of MNCs, through their foreign subsidiaries, collaborations with alien corporations, and joint ventures, has complicated this traditional view of jurisdiction.⁵

The issue of jurisdiction over MNCs is further complicated by the fact that international law fails to provide a framework within

1. Louis Henkin, International Law: Politics and Values 4 (1995). The political entities that comprise the international political system are states, not individual human beings. See id. at 5.

2. See Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 4 (Sept. 7); see also H. Lauterpacht, International Law and Human Rights 6-7 (1968) (stating that the notion that states alone are the subject of international law was a firmly entrenched doctrine by the nineteenth century); Marek St. Korowicz, The Problem of the International Personality of Individuals, 50 Am. J. Int'l L. 533, 535, 541 (1956) (same).

3. See Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1986) [hereinafter Restatement (Third)]; see also Henkin, supra note 1, at 18 ("International law has accepted the authority of a state to represent its citizens-nationals, as well as its authority to regulate their activities abroad.").

4. See Restatement (Third), supra note 3, § 402 cmt. e (stating that the nationality of a corporation is that of the state under whose laws it is organized); Henkin, supra note 1, at 18, 236.

5. In recent years, there has been "some controversy over the uses of the concept of nationality to support jurisdiction over inter-corporate affiliates (the parent company, subsidiaries, branches) of an integrated multinational company, or over joint ventures of a national with one who is not a national." Henkin, supra note 1, at 232; see also Restatement (Third), supra note 3, § 414 cmt. a (reflecting the "recognition that multinational enterprises do not fit neatly into the traditional bases of jurisdiction . . . [because] such enterprises may not be nationals of one state only and their activities are not limited to one state's territory").

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which a corporate actor may act responsibly. Without an established framework, the courts are unclear as to the level of involvement and type of conduct that constitutes a violation of international law. Given the increasing importance of MNCs in the global market, these issues deserve better treatment than the current judicial stance provides.

Over the last two decades, the attention of international law has shifted from violations committed by governments to violations committed by private actors, especially MNCs. Corporate human rights violations have become the focus of social and judicial disapproval. U.S. courts have witnessed an increase in human rights suits brought by aliens against MNCs. In one such case, National Coalition Government of Burma v. Unocal Inc., a United States district court held that a corporation could be held liable for its overseas violations of international human rights. This decision reflects the growing trend in federal courts of holding private individuals accountable under the Alien Tort Claims Act (ATCA) for violations of international human rights law. Several courts

6. See infra notes 96-111 and accompanying text.


11. See id. at 348.


13. Recently, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999), adopted the Unocal rationale in a case involving a Belgian plaintiff who alleged that Ford Motor Co. and its German subsidiary, Ford Werke A.G., violated the law of nations under the ATCA. See id. The plaintiff and others had been forced to work in Ford's German factories under inhuman conditions and without compensation during World War II. See id. The court asserted that "no logical reason exists for allowing private individuals and corporations to
had already rejected the traditional view that only states could violate international law and held that individuals acting under "color of law" could also be liable.\(^4\) *Unocal*, however, went a step further and implied that a corporation's purely private actions could also be sanctioned under international law.\(^5\) *Unocal* and subsequent cases incorporating the *Unocal* approach are of concern because the standard set by these courts is unclear—there is no bright line rule regarding the type of conduct and the level of involvement necessary for a corporation to be held accountable for its human rights violations overseas.\(^6\)

This potential expansion of accountability, although laudable, raises a disturbing question: what are the implications of the *Unocal* decision for corporations, including alien corporate entities, if their questionable business practices are subject to sanctions under international law?

This Note analyzes *Unocal's* impact on corporations against the backdrop of customary international law as applied in U.S. courts through the ATCA. Part I discusses the concept of "law of nations," or customary international law and the place of human rights in this legal scheme. Part II examines the ATCA, specifically its use in international human rights suits in U.S. courts and the courts' interpretation of the ATCA. Part III analyzes *Unocal's* impact on U.S. and foreign corporations and proposes that a mandatory code of corporate conduct might ensure that the judiciary does not overreach its authority in crafting its definition of international law. Although there are other significant jurisdictional restraints on the power of federal forums to sanction foreign corporate activity, this does not give federal courts the authority to disregard the scope of international law.

This Note concludes that federal courts should be wary of sanctioning the conduct of corporations under the murky standard escape liability for universally condemned violations of international law merely because they were not acting under color of law." *Id.*

14. State action was initially deemed necessary before liability could attach under international law. For a discussion of the origin of this requirement and its role in international human rights litigation in U.S. courts, see *infra* notes 66-84 and accompanying text.


16. *See infra* notes 96-111 and accompanying text.
of international law. As a solution, this Note proposes the adoption of a mandatory code of corporate conduct similar to the corporate codes of conduct proposed by the United Nations, which were never formally adopted.\textsuperscript{17}

\textbf{CUSTOMARY INTERNATIONAL LAW- THE LAW OF NATIONS}

\textit{Origin of Customary International Law}

The earliest definition of the law of nations\textsuperscript{18} is found in Blackstone's Commentaries. According to Blackstone, the law of nations signifies "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."\textsuperscript{19} The law of nations referred to the body of rules binding upon civilized states in their relations with each other.\textsuperscript{20} Classical international law was predominantly statist: a law was binding on a state only by its consent and a state could refuse to accept a norm for itself.\textsuperscript{22} The norms that fell within this category embodied national interests and could be abrogated by

\begin{enumerate}
\item The terms "law of nations" and Customary International Law (CIL) are used interchangeably. See Siderman de Blake \textit{v.} Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (asserting that CIL is a direct descendant of the law of nations); Sanchez-Espinoza \textit{v.} Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985); Doe I \textit{v.} Islamic Salvation Front, 993 F. Supp. 3, 7 (D.D.C. 1998) ("The law of nations [is] currently known as international customary law... .").
\item 4 \textit{WILLIAM BLACKSTONE, COMMENTARIES} *66.
\item See 1 \textit{CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES} § 2, at 4 (1922).
\item By the nineteenth century, the view that states alone were the subjects of international law was firmly entrenched in doctrine and practice. See \textit{LAUTERPACHT, supra} note 2, at 6-7; Korowicz, \textit{supra} note 2, at 533, 535, 541. As noted in \textit{Lotus (Fr. v. Turk.)} 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7):
\begin{quote}
International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.
\end{quote}
\item See \textit{HENKIN, supra} note 1, at 27.
\end{enumerate}
treaty.\textsuperscript{23} International law, however, also recognized \textit{jus cogens}—another class of norms that binds all nations and cannot be preempted by treaty.\textsuperscript{24}

\textit{Jus Cogens Norms Defined}

A \textit{jus cogens} norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."\textsuperscript{25} The origins of \textit{jus cogens} are unclear, but since World War II it has developed as an exception to the classicist principle of state consent in determining international law.\textsuperscript{26} Its unconventional entry into the law has given \textit{jus cogens} the status of customary law.\textsuperscript{27} \textit{Jus cogens} norms, however, are distinguished from other customary norms on the grounds that they satisfy not merely the needs of individual states, but the "higher interest of the whole international community."\textsuperscript{28} These are norms that are "ordered to a transcendent common good of the international community."\textsuperscript{29} Determining \textit{jus cogens} requires a two-step approach: first, the establishment of a proposition as a "rule" of general international law, and second, the acceptance of that rule as a "peremptory" norm by the international community as a whole.\textsuperscript{30} This concept essentially recognizes certain norms under international law that cannot be modified by consent or treaty.\textsuperscript{31} Whatever its origins, the concept of \textit{jus cogens} is now accepted and allows norms without

\begin{itemize}
\item \textsuperscript{24} See HENKIN, supra note 1, at 38; Klein, supra note 23, at 350-51.
\item \textsuperscript{25} Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332, 344; RESTATEMENT(THIRD), supra note 3, § 102 cmt. k & reporter's note 6 (incorporating the Vienna Convention's definition of \textit{jus cogens} norms).
\item \textsuperscript{26} See HENKIN, supra note 1, at 38.
\item \textsuperscript{27} See id.; MALCOLM N. SHAW, INTERNATIONAL LAW 97 (4th ed. 1997).
\item \textsuperscript{28} Alfred Verdross, \textit{Jus Dispositivum and Jus Cogens in International Law}, 60 AM. J. INT'L L. 55, 58 (1966).
\item \textsuperscript{30} See SHAW, supra note 27, at 97.
\item \textsuperscript{31} See HENKIN, supra note 1, at 38; Klein, supra note 23, at 350-51.
\end{itemize}
unanimous state consent to attain the status of international law and bind all states.\textsuperscript{32}

The norms, although easy to define, are more difficult to identify.\textsuperscript{33} Violation of safe conducts, infringement of the rights of ambassadors, and piracy formed the initial \textit{jus cogens} violations.\textsuperscript{34} In essence, "certain acts specified as universally reprehensible [made] the perpetrator liable to capture and trial wherever he went."\textsuperscript{35} The violators of \textit{jus cogens} are classified as \textit{hostis humani generis}—enemies of all mankind.\textsuperscript{36} The common denominators underlying this classification were "the magnitude of the threat posed by the acts coupled with the universality of condemnation."\textsuperscript{37}

The universal condemnation standard suggests that the forum in which the violator is tried represents all humanity. As a consequence, a \textit{jus cogens} violator may be tried in any forum.\textsuperscript{38} This

\textsuperscript{32} See Louis Henkin, \textit{Notes from the President}, \textit{AM. SOC'Y INT'L L. NEWSL.}, Jan. 1994, at 1 ("We have developed the concept of \textit{jus cogens} ... binding on all states regardless of a particular state's consent ... a form of tacit communal law-making ... by general (not unanimous) consent.").

\textsuperscript{33} See IAN BROWNLIE, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 516-17 (5th ed. 1998) ("[M]ore authority exists for the category of \textit{jus cogens} than exists for its particular content and rules do not develop into customary law which readily correspond to new categories."); Brudner, supra note 29, at 250; Klein, supra note 23, at 355.

\textsuperscript{34} See 4 BLACKSTONE, supra note 19, at *68.


\textsuperscript{36} The doctrine was primarily applied to pirates because piracies usually occurred outside the territorial jurisdiction of any sovereign and posed a "heinous threat" to common safety. See Blum & Steinhardt, supra note 35, at 60; see also Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("Among the rights universally proclaimed by all nations ... is the right to be free of physical torture ... [T]he torturer has become like the pirate and slave trader before him-hostis humani generis, an enemy of all mankind.").

\textsuperscript{37} Blum & Steinhardt, supra note 35, at 61.

\textsuperscript{38} This concept is known as universal jurisdiction. See \textit{RESTATEMENT (THIRD), supra note 3, \S 404}; see also Robert J. Peterson, Comment, \textit{Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v. Unocal and the Alien Tort Claims Act}, 5 U. CHI. L. SCH. ROUNDTABLE 277, 283 (1998). Although universal jurisdiction has been exercised only in the context of criminal law, it is by no means limited to criminal law. See \textit{RESTATEMENT (THIRD), supra note 3, \S 404 cmt. b}. 
original list has grown to include genocide, slave trade, and torture among the violations of nonderogable norms.\textsuperscript{39}

Although important, \textit{jus cogens} norms are merely a narrow subset of norms that fall within the law of nations.\textsuperscript{40} A norm of customary international law (CIL) rises to the level of \textit{jus cogens} if the international community recognizes the norm as so fundamental that it is nonderogable.\textsuperscript{41} Other violations, though within the scope of CIL, do not reach the level of \textit{jus cogens} violations.\textsuperscript{42}

\textit{Distinguishing Customary International Law}

Although related, \textit{jus cogens} and CIL differ in one important respect.\textsuperscript{43} Unlike the somewhat fixed \textit{jus cogens} categories,\textsuperscript{44} CIL is more evolutionary in scope.\textsuperscript{45} Customary international norms are

\begin{itemize}
  \item \textsuperscript{39} See \textit{Restatement (Third)}, supra note 3, § 702. \textit{But see Shaw}, supra note 27, at 97 (claiming that no clear agreement manifested regarding the norms beyond the established categories of genocide, slave trading, and piracy).
  \item \textsuperscript{40} See Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); \textit{see also Brownlie}, supra note 33, at 514-17 (discussing the notion of \textit{jus cogens} as an overriding principle of international law); \textit{cf. Shaw}, supra note 27, at 544 (distinguishing between international crimes, which result from the breach of “essential” international obligations, and international delicts, which comprise all other internationally wrongful acts).
  \item \textsuperscript{41} \textit{See Reagan}, 859 F.2d at 940; \textit{Brownlie}, supra note 33, at 516.
  \item \textsuperscript{42} \textit{See Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398, 428 (1964); \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring); \textit{cf. Restatement (Third)}, supra note 3, § 404 (identifying a more limited category of violations of “universal concern” for which private actors may be held liable). \textit{But see Kadic v. Karadžić}, 70 F.3d 232, 241 (2d Cir. 1996) (stating the evolutionary nature of international law); \textit{Filartiga v. Pena-Irala}, 630 F.2d 876, 881 (2d Cir. 1986) (same).
  \item \textsuperscript{43} \textit{See Siderman de Blake v. Argentina}, 965 F.2d 699, 715 (9th Cir. 1992) (“\textit{jus cogens} and customary international law . . . differ in one important respect . . . . \textit{C}ustomary international law rests on the consent of states.”).
  \item \textsuperscript{44} \textit{See 4 Blackstone}, supra note 19, at *68 (listing the three principal offenses). \textit{But cf. Brownlie}, supra note 33, at 516-17 (arguing that the contents of \textit{jus cogens} are at issue); \textit{Shaw}, supra note 27, at 665 (same).
  \item \textsuperscript{45} \textit{See Filartiga}, 630 F.2d at 881 (explaining that international law should be interpreted “as it has evolved and exists among the nations of the world today”); \textit{Restatement (Third)}, supra note 3, § 102(2) (defining CIL as the law resulting from the “general and consistent practice of states followed by them from a sense of legal obligation”); \textit{Shaw}, supra note 27, at 97.
\end{itemize}
not permanently affixed and evolve to include new norms as they gain universal acceptance.\textsuperscript{46}

Contemporary international law is therefore best characterized as having an established core, the classical system which incorporates a predominantly statist view of international law, and a modern expansion at the periphery, corresponding to developments, largely in the human rights and environmental protection areas, which do not fit within the classical paradigm.\textsuperscript{47}

In the post-World War II era, the proliferation of human rights agreements expanded the scope of CIL to include international human rights.\textsuperscript{48} Section 702 of the Restatement (Third) categorizes the human rights abuses that constitute violations of CIL.\textsuperscript{49} Human rights abuses not currently listed may be included in the future if they achieve the status of customary law.\textsuperscript{50}

\textsuperscript{46} The “universal acceptance” standard is interpreted rigidly in defining the core CIL norms, which includes only “behavior which can be defined with enough clarity to be judicially manageable.” Blum & Steinhardt, supra note 35, at 93. This leaves open the possibility that courts will sanction morally reprehensible acts through an expansion of the definition of core norms even though such acts are not universally abhorred. See id. at 97. This should concern us, because if a court follows Unocal and stretches the definitional boundaries of \textit{jus cogens}, this expansive interpretation could result in the court imposing its own morality without regard for the “universality” of the norm. This is not what customary international law is designed to do and undermines the status of \textit{jus cogens} as “universally” applicable norms.

\textsuperscript{47} Id. at 64.

\textsuperscript{48} See Curtis A. Bradley & Jack L. Goldsmith, \textit{Customary International Law as Federal Common Law: A Critique of the Modern Position}, 110 HARV. L. REV. 815, 831-32 (1997); see generally Henkin, supra note 1, at 173 (stating that the CIL of human rights “found strong articulation only when war came and later, after the Allies were victorious”). But see Jordan J. Paust, \textit{The Complex Nature, Sources, and Evidences of Customary Human Rights}, 25 GA. J. INT’L & COMP. L. 147, 158-59 (1995/96) (stating that it is a “myth that human rights law did not begin until after the atrocities of World War II”). As is true with regard to CIL generally, customary human rights law is not derived from any single source. See Paust, supra, at 147. Nor is there a “single set of participants,” or any “arenas or institutional arrangements for the creation, invocation, application, change or termination of [customary human rights] law.” Id. “Despite its relatively amorphous nature, CIL has essentially the same binding force under international law as treaty law.” Bradley & Goldsmith, supra, at 818.

\textsuperscript{49} See \textit{RESTATEMENT (THIRD)}, supra note 3, § 702. The list of human rights violations includes genocide, slavery, torture, and other cruel and degrading punishment. See id.

\textsuperscript{50} See id. § 702 cmt. a.
This flexibility in the scope of CIL, although desirable, also creates the potential for abuse because courts can, and sometimes do, confuse the two categories and stretch the bounds of *jus cogens* to include norms that fall within a moral "gray area." Even when the universal applicability of these norms is unclear, the courts often characterize morally reprehensible acts as *jus cogens* norms. Although courts claim that ATCA jurisdiction extends *only* to *jus cogens* violations, they have interpreted the scope of *jus cogens* fairly broadly on occasion.

Courts' growing tendency to expand the scope of *jus cogens* has at times stretched the imagination. The most liberal view of private liability for a violation of the law of nations was taken by the Maryland district court in *Adra v. Clift*.

The *Adra* court held that passport fraud constituted a violation of CIL. Although undoubtedly a criminal act, fraud of this nature is by no means in the same category as piracy or slavery. Even though a violation may offend one's sense of natural justice, this does not necessarily elevate it to the level of a universally condemned act.

**CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS**

*Interpreting the Scope of Customary International Law*

The problem with the "evolving" nature of CIL is that the question of determining international norms is left open to the inconsistent views of scholars and courts. In the past, the courts


55. *See Adra*, 195 F. Supp. at 865.

56. The interpretive flexibility reflected by *Filartiga* and its progeny could be characteristic of the "evolutionary" nature of CIL, but this does not necessarily transform reprehensible acts into *jus cogens* violations.

57. *See Louis B. Sohn, Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 401 (1995/96) ("International law is made, not by states, but by 'silly' professors writing books . . . . [A]lmost, . . . international law is made by the legal advisers of Foreign Offices . . . .")
have relied on a plethora of sources to determine international law, including scholarly writings, other judicial decisions, and the general usage and practice of nations. The reliance on such sources to define international "law" should be analyzed carefully. Allowing an expansive interpretation of the "rational ideal of the good per se" creates the potential for domestic courts to impose their own morality under the guise of fundamental international norms. The adoption of an expansive interpretation of international law raises the specter of some courts subverting this transcendent good to impose their own morality.

There is no universal agreement as to the precise extent of human rights and fundamental freedoms guaranteed to all under CIL. As a result, in the absence of any ratification by states, courts run the risk of unilaterally imposing their own view of a "universally accepted norm" on foreign states and individuals, especially in the context of human rights abuses. As mandated by the court in Filartiga v. Pena-Irala, a rule must command the "general assent of civilized nations" before it becomes binding as international law. In the absence of such a requirement, "the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." Though international law must be interpreted as it evolves, this interpretation must conform to current international norms evidenced by something more than the writings of scholars. Jus depending very much on learned authors, not on a search of archives.

Similarly, the courts rely on academia: "[The courts do] not do the original research. They read the books, and cite the books ... ."  

58. See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).  

59. Klein, supra note 23, at 351.  

60. See Filartiga, 630 F.2d at 882. The dispute over the scope of "international law" was painfully obvious during the negotiations over the U.N. Code of Conduct for Transnational Corporations. See infra notes 123-35 and accompanying text. The negotiations revealed that universal norms, which were obvious to the developed world, were not as obvious to some of the developing and socialist countries. See UNCTC, supra note 17.  

61. Blum & Steinhardt, supra note 35, at 90 ("Many cherished Western values of civil liberties and political participation, although desirable as ideals, cannot become core norms because their contravention is not universally culpable. Core norms must be supported by general agreement that at least in principle their violation is wrong.").  

62. 630 F.2d 876 (2d Cir. 1980).  

63. Id. at 881.  

64. Id.
cogens should not be interpreted expansively to sanction conduct that might be morally reprehensible but fails to find international consensus.\textsuperscript{65}

The ATCA in Federal Courts—A Split Over Who May be Liable

The ATCA has been the primary tool for non-U.S. citizens to raise human rights violations in U.S. courts.\textsuperscript{66} It grants district courts original jurisdiction over civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States.\textsuperscript{67} The law of nations, as used in the ATCA, is understood to refer to CIL.\textsuperscript{68} The scope of international law aside, the definition of the category of actors liable under the ATCA also poses a problem.

The ATCA was a little-used provision until its resurrection in \textit{Filartiga v. Pena-Irala}. In \textit{Filartiga}, the court found that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”\textsuperscript{69} Even though the court did not impose state action as a requirement for ATCA jurisdiction, its reference to a violation by a “state official” created the dubious requirement of state action in suits involving CIL violations.\textsuperscript{70} This state action requirement for ATCA jurisdiction has been disputed in several cases since \textit{Filartiga}.

\textsuperscript{65} See id. at 888 (“It 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 [ATCA].” (emphasis added)); Klein, supra note 23, at 355 (“[C]ourts should be careful to construe [ius cogens] narrowly.”).


\textsuperscript{67} The analysis of violation of treaty obligations is beyond the scope of this Note.

\textsuperscript{68} See Arthur M. Weisburd, Customary International Law: The Problem of Treaties, 21 VAND. J. TRANSNAT’L L. 1, 3 (1988). \textit{But see} Filartiga, 630 F.2d at 881 (“The requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one.”).

\textsuperscript{69} Filartiga, 630 F.2d at 880.

Subsequent decisions interpreted *Filartiga* to require state action before liability could attach.\(^7\) In spite of the ATCA's silence on the subject, some courts read it to include a requirement for state action, at least where certain international torts were concerned. Several courts, however, adopted a more liberal policy and determined that state action was not necessary to invoke ATCA jurisdiction.\(^2\)

These contradictory holdings have resulted in a split among the circuits. Some circuits, including the Ninth Circuit, have limited liability under international human rights law to individuals acting under official authority or color of authority.\(^3\) Others, including the Second Circuit, have extended liability to purely private actions.\(^4\)

Absent an explicit mandate, the requirement of state action acts as a check on the ability of courts to sanction private conduct under the guise of sanctioning nonderogable international norms.\(^5\)

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71. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984). *Tel-Oren* involved a suit against the Palestine Liberation Organization for international terrorist activities in violation of the law of nations. See *id*. Decided after *Filartiga*, *Tel-Oren* held that the law of nations does not impose the same liability on nonstate actors as it does on individuals acting under color of law. See *id*. at 776 (Edwards, J., concurring). Unlike *Filartiga*, where the defendant was a state official, the defendant actors in *Tel-Oren* were nonstate actors, and therefore were not liable for international human rights violations. See *id*.; see also *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417-18 (9th Cir. 1995) (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) as authority for the proposition that the law of nations does not apply to private nonstate conduct).


74. See, e.g., *Kadic*, 70 F.3d at 239; *Filartiga*, 630 F.2d at 880; *Adra*, 195 F. Supp. at 865. Specifically, *Kadic* found that certain conduct such as genocide violates the law of nations whether committed by a state or a private actor. See *Kadic*, 70 F.3d at 245.

75. Cf. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 165 (H. Lauterpacht ed., 7th ed. 1948) (explaining that, although a state is vicariously responsible for official acts of administrative officials and the military, a state's vicarious responsibility for acts of private persons is limited to exercising due diligence to prevent internationally injurious acts on the part of private persons); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 476 (1989) (stating that "[i]n a limited number of instances... the smooth functioning of the international system required the explicit protection or proscription of individual activity," yet the bulk of international law
Further, this requirement is also in accord with the original understanding of the scope of international law and the actors who may be held liable for violations of such law. Even the courts that have adopted a more liberal approach to the requirement of state action caution that liability attaches only when the crimes are of "universal concern." Even the courts that have adopted a more liberal approach to the requirement of state action caution that liability attaches only when the crimes are of "universal concern." While there is a broad range of conduct that violates the law of nations, these violations are actionable only if committed by a state actor. "To allege state action, the challenged conduct must be attributable to the state . . . it must be official conduct." State action also comes into play when an individual acts under official authority or under "color of law.

Regardless of the position of different courts with regard to private liability, they usually have found that state action was involved. The courts in Unocal and Iwanowa v. Ford Motor Co., two of the stronger assertions of private liability under international law, sidestepped the issue by concluding that although private liability could attach, they did not need to decide the issue because the facts before them showed that the defendants

76. Originally, CIL referred to the general practice of states and could only be applied in the context of state action. See supra notes 20-24 and accompanying text.
77. See Kadic, 70 F.3d at 246; Filartiga, 630 F.2d at 885; National Coalition Gov't of Burma v. Unocal Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997); see also RESTATEMENT (THIRD), supra note 3, § 404.
78. See RESTATEMENT (THIRD), supra note 3, § 702 (listing genocide, slavery, and torture among the several acts by a state that constitute a violation of international law if practiced or encouraged as a matter of state policy). Genocide is the only violation that falls outside the state action requirement. See Kadic, 70 F.3d at 239; Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 373 (E.D. La. 1997) (holding that state action is necessary for nongenocide-related human rights violations).
79. Beanal, 969 F. Supp. at 374 (citing RESTATEMENT (THIRD), supra note 3, § 207 cmt. c). In Beanal, the court found that the requirement of state action was not met because the plaintiff failed to allege the state and its military personnel's role in the human rights violations committed by Freeport-McMoran, the corporate entity. See id. at 374. In spite of the affiliation between the government and the corporation, the court found that the corporation had neither acted under color of state authority, nor aided and abetted state action. See id. at 374-75. According to the court, the state action requirement could not be met by merely acting in concert with a foreign state. See id. at 375.
80. RESTATEMENT (THIRD), supra note 3, § 207 cmt. c.
were acting under "color of law." Although it is true that these cases involved some level of state action, it is curious that the courts scramble to the safety net of state action in applying the ATCA to the cases before them. Especially in Unocal, where the corporations were only passively involved in human rights violations, the court stretches acceptable bounds by fitting corporate inaction under "color of authority." The validity of their assertions seems questionable when these courts only address the issue of whether state action is mandatory in dicta.

**Unocal's Implications for Corporate Actors**

Unlike earlier cases, Unocal stretches the notion of private liability under international law beyond the bounds of precedent. The plaintiffs in Unocal, farmers in the Tennesarim region of Burma, brought a lawsuit against Unocal corporation. The corporation was engaged in a joint venture to construct a gas pipeline in the region. The plaintiffs sought to hold Unocal and its

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82. Iwanowa, 67 F. Supp. 2d at 445 ("No logical reason exists for allowing ... corporations to escape liability ... merely because they were not acting under color of law. ... However, this Court need not make that determination [because plaintiff] has pled sufficient facts to allege that [defendants acted as agents of the state.]"; Unocal, 176 F.R.D. 329, 348-49 ("Even in the absence of state action, Unocal could conceivably be liable for certain violations of international law ... The Court need not resolve this issue ... however, because the Court has subject matter jurisdiction ... based on plaintiffs' state action theory.").

83. In Unocal, the Burmese military junta was actively involved in human rights violations during the construction of a gas pipeline. See infra notes 85-86 and accompanying text. In Iwanowa, Ford Motor Company was alleged to have conducted its operations in Germany during World War II under the protection of the Nazis. See Iwanowa, 67 F. Supp. 2d at 432-33. Given their collaboration with the military regimes, corporations such as the ones in Unocal and Iwanowa are actors under "color of law."

84. "A private individual acts under color of law ... when he acts together with state officials or with significant state aid." Kadic, 70 F.3d at 245. Unocal became a co-actor in the Burmese junta's perpetration of human rights abuses because the corporation "knowingly accepted" the benefits of forced labor. See Unocal, 176 F.R.D. at 349.

85. See Unocal, 176 F.R.D. at 336.

86. See id. at 335-36. According to Unocal, however, the entity constructing the pipeline was a corporation, not a joint venture. A Unocal subsidiary was a minority shareholder (28.26%), with the remaining shares held by a Total affiliate, a Burmese company owned and operated by the Burmese junta, and the Petroleum Authority of Thailand. See Statement of Unocal for Dep't of Lab. Rep't to Cong., (Feb. 1998) (on file with William and Mary Law Review). This dispute is significant in light of the hierarchy of corporate liability based on the level of involvement in perpetrating human rights abuses. See infra note 101 and
French associate, Total S.A., liable as implied partners of the Burmese military government\(^{87}\) in perpetrating human rights violations.\(^{88}\) These violations included forced labor, torture, and illegal detentions by the State Law and Order Restoration Council (SLORC) in the course of constructing the gas pipeline.\(^{89}\) The plaintiffs alleged that these abuses violated the law of nations.\(^{90}\) Although "state action" was implicated in this case, the court found that even absent state action, a private corporate entity could be held liable for a CIL violation.\(^{91}\) The court claimed that private liability in the absence of state action is not inconsistent with the ATCA.\(^{92}\)

While this proposition reflects the growing trend of holding private individuals liable, Unocal is the first case that realizes fears of potential misuse of the ATCA. The court analogized the use of forced labor in constructing the pipeline to slave trading.\(^{93}\) While conceding that private liability should be confined to *jus cogens* violations,\(^{94}\) the court simultaneously stretched the definition of a *jus cogens* violation—slave trade—to make the conduct at issue—forced labor—fit the definition.\(^{95}\) Forced labor involves involuntary and abusive conduct, however, unlike slavery, it does not involve ownership rights in other human beings. This is not to say that forced labor should be condoned under any standard, but if allowed, this definitional flexibility might lead U.S. courts to

\(^{87}.\) The Burmese junta is better known as the State Law and Order Restoration Council (SLORC). *See Unocal*, 176 F.R.D. at 334.

\(^{88}.\) *See id.* at 336.

\(^{89}.\) *See id.* Unocal, however, denied the allegations and claimed that the alleged abuses occurred on unrelated government projects in the same region. *See Statement of Unocal Corp. for Dep't of Lab. Rep't to Cong.*, supra note 86.

\(^{90}.\) *See Unocal*, 176 F.R.D. at 348 ("Even in the absence of state action, Unocal could conceivably be liable for certain violations of international law . . . .").

\(^{91}.\) *See id.* at 349-49.

\(^{92}.\) *See id.*

\(^{93}.\) *See id.* The Court rejected Unocal's argument that the military junta's requirement that its citizens provide labor for government projects was akin to civil service. *See id.* Even though the government was not physically selling its citizens to Unocal, the allegation that Unocal "knowingly accepted" the benefits of forced labor could be "sufficient to state a claim for participation in slave trading." *Id.*

\(^{94}.\) *See id.* at 345 ("Jurisdiction under the ATCA may be premised on alleged violations of a jus cogens, or [a] peremptory . . . norm.").

\(^{95}.\) *See id.* at 349.
sanction deviant conduct that does not rise to the level of a *jus cogens* violation.

**Unocal’s Impact on U.S. Multinational Corporations**

Even if corporate conduct does not violate a *jus cogens* norm, U.S. courts may still sanction U.S. corporations.\(^{96}\) As stated in *Tel-Oren v. Libyan Arab Republic*,\(^{97}\) however, "ventur[ing] out of the comfortable realm of established international law ... in which states are the actors ... requires an assessment of the extent to which international law imposes not only rights but also *obligations* on individuals."\(^{98}\) Under the standard of international law, the scope of a private entity's obligations is unclear. Given the continually evolving standard of international norms, and the resulting flexibility in interpreting these norms, it is likely that corporate obligations could be determined ex post facto.\(^{99}\)

These are valid concerns, especially where less egregious human rights violations are concerned. Under the murky CIL standard, if other courts follow *Unocal’s* dicta, they would discourage corporate activity, especially in regions with questionable human rights

\(^{96}\) In so far as MNCs are the nationals of the states in which their headquarters are located, federal courts have jurisdiction over U.S.-based MNCs. See RESTATEMENT (THIRD), supra note 3, § 402; Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 Tex. L. Rev. 1533, 1535-36 (1998) (book review); see also Brian Johns, *Chevron Sued Over Nigerian Violence*, The Progressive, Nov. 1999, at 11 ("We give these corporations lots of rights in America ... this case is about what responsibilities they have ... [sic] too." (quoting Cindy Cohn, an attorney for the victims of Chevron sponsored governmental human rights abuses in Nigeria)); cf. Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 Minn. J. Global Trade 153, 168-69 (1997) (discussing Congress' regulation of U.S. corporations in the international trade arena).

\(^{97}\) 726 F.2d 774 (D.C. Cir. 1984).

\(^{98}\) Id. at 792 (emphasis added).

\(^{99}\) Cf. David I. Becker, Note, *A Call for the Codification of the Unocal Doctrine*, 32 Cornell Int'l L.J. 183, 206 (1999) (quoting an attorney's warning that the *Unocal* doctrine merely warns companies very generally that they should not knowingly benefit from a governmental business partner's human rights violations). The degree of knowledge, the amount of benefit received, and the types of abuses for which a corporation may be held liable are not clarified. Under the *Unocal* approach, these questions might be answered only after the corporation has to account for its actions before a court. This after the fact determination prevents corporations from ensuring compliance with a predetermined standard of responsibility.
records. Given the uncertainty regarding the level of corporate action or inaction that constitutes a violation, Unocal would discourage collaborations in regions with bad human rights records because any level of collaboration could make a corporation guilty by association even if it does not actively commit any crimes. In host countries where the government is the only significant economic entity that can join a corporate venture, the Unocal approach discourages corporate activity and has the practical effect of a direct economic sanction.

The courts' regulation of corporations that operate in developing and underdeveloped countries, also regulates the host nations—the countries in which the MNCs conduct their activities. Sanctions against the corporations for human rights abuses also serve as economic sanctions against the host countries which usually affirm, or at the very least, do not object to the business practices of the MNCs as long as they generate economic development. In a clash

100. See, e.g., Petroleum Times Energy Report, Confusion over India-Myanmar Gas Sourcing Project, July 24, 1998, at 6, available at http://www.web7.infotrac.galegroup.com ("Shell is being ultra-cautious about getting involved with any government that has a bad human rights record, such as that of Myanmar.").

101. See generally Cassel, supra note 7, at 1981; Frey, supra note 96, at 180. Under the current regime of international law, corporate responsibility falls into a continuum of legal and moral responsibility that can be divided into four broad categories. First, a corporation has the greatest responsibility to act when it is a direct participant in human rights abuses. See, supra note 96, at 181-82. Next, the corporation has some affirmative responsibility to intervene if it derives some benefit from the abuses, even though it does not directly perpetrate them. See id. at 183-84. At the third level of responsibility, if the corporation's influential economic stature allows it to exert an influence, an affirmative duty to prevent abuse is recommended, but not mandated. See id. at 184-86. The last situation involves a corporation that, although aware of human rights abuses, is neither directly nor indirectly involved in the abusive practices, and these abuses are unrelated to the corporation's activities. In such a scenario, the corporation has no responsibility to prevent the abuses. See id. at 186-87. If interpreted liberally, Unocal could alter these guidelines for corporate responsibility with respect to human rights abuses.

102. See William J. Aceves, International Decisions: Doe v. Unocal, 92 AM. J. INT'L L. 309, 314 (1998) ("The consequences of this decision should be far-reaching... Private companies subject to suit in the United States may be more cautious about entering into agreements with foreign governments that have a poor human rights record."). This was evidenced by Shell's reluctance to be involved in projects in Burma. See supra note 100.

103. See Aceves, supra note 102, at 314 ("To encourage investment, foreign governments must be willing to protect human rights within their own countries."); cf. Peterson, supra note 38, at 296 ("Judicially created secondary sanctions in the form of a finding of joint tort liability against a foreign company... would create the same effect in some cases as congressionally created secondary sanctions.").
between economic growth and human rights, economic development usually trumps in these countries. Judicial sanctions against corporations indirectly regulate the conduct of errant governments by regulating foreign investments.

The fact that the courts are regulating corporations, specifically U.S.-based MNCs, gives this whole endeavor an aura of legitimacy. After all, the courts do have the authority to sanction errant domestic corporations. Further, this is an effective way of enforcing human rights especially in countries where foreign investment is crucial. Nonetheless, these beneficial side effects do not justify the use of the legal system to impose indirect sanctions. That is a role that properly belongs to the political branches, not the courts. This distinction is especially significant in light of the fact that current U.S. policy favors investment by private companies even in countries with the poorest human rights records, with the exception of Libya and some other "rogue" states. U.S. investment is encouraged because "U.S. business can and does play a positive and important role promoting the openness of societies, respect for individual rights, the promotion of free

104. See generally Russel Lawrence Barsh, The Right to Development as a Human Right: Results of the Global Consultation, 13 HUM. RTS. Q. 322 (1991); John O'Manique, Human Rights and Development, 14 HUM. RTS. Q. 78 (1992). The position of these countries is summarized in the "economics first" argument, which asserts that the inalienable right to development must be guaranteed first. But see Li-ann Thio, Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go before I Sleep," 2 YALE HUM. RTS. & DEV. L.J. 1, 22 (1999) (criticizing the "economics first" argument for allowing civil and political rights to be suppressed indefinitely because the threshold of sufficient economic development is not defined and governments cannot be compelled to declare when this threshold has been reached).


107. See generally Bradley & Goldsmith, supra note 48, at 860-70 (emphasizing that the separation of powers forecloses the courts' interference with the President's legislative duties); Arthur M. Weisburd, The Executive Branch and International Law, 41 VAND. L. REV. 1205, 1251-56 (1988); see also Donald J. Kochan, Note, Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act, 31 CORNELL INT'L L.J. 153, 182 (1998) ("Because international law is so closely tied to . . . the political questions of international relations, judicial decisions entrenching principles into binding restrictions on sovereignty necessarily constrain the latitude of the political branches.").

108. See Frey, supra note 96, at 186.
markets and prosperity, environmental protection and the setting of high standards for business practices generally.\textsuperscript{109}

This is not to suggest that U.S. courts should not regulate the conduct of U.S. corporations. Although the murky standard of "international law" poses a problem, the right of U.S. courts to regulate does not, at least as far as MNCs headquartered in the United States are concerned.\textsuperscript{110} In return for the rights and privileges guaranteed to the corporations, the courts may certainly impose obligations on them. A definition of the extent of corporate responsibility, however, is necessary before corporations are sanctioned. It is not enough to state that their conduct should be assessed against the backdrop of CIL, because that is a vague and evolving standard, which defines neither the bounds of acceptable action nor inaction.

Although the broader question of whether indirect sanctions are justified remains unanswered, a clarification of the scope of corporate responsibility would at least serve to notify corporations of the bounds of acceptable conduct, especially when they are involved in countries with shaky human rights records.\textsuperscript{111} To the extent that this standard for liability would be a uniform standard, blindly imposed by the courts, it would validate judicial interference in international policy to a certain extent.

\textit{Implications of Unocal for Foreign Corporations}

Accountability under international law also poses serious problems when alien corporations are thrown into the mix.

\textsuperscript{109} Id. (quoting U.S. DEP'T OF COMMERCE, MODEL BUSINESS PRINCIPLES 2 (1996)). For example, Unocal claims that in the course of constructing the pipeline, it not only paid fair wages, but also initiated health care and education programs in the region. \textit{See Trouble in the Pipeline}, \textsc{The Economist}, Jan. 18, 1997, at 39.

\textsuperscript{110} See supra note 96 and accompanying text.

\textsuperscript{111} In \textsc{Unocal}, for instance, the plaintiffs alleged that Unocal "knew or should have known" of the forced labor practices of SLORC. National Coalition Gov't of Burma v. Unocal, 176 F.R.D. 329, 349 (C.D. Cal. 1997). Given the egregious nature of the human rights violations, the "knew or should have known" standard might be justified in this one instance, but the court failed to establish a bright line rule for corporations seeking to avoid liability. \textit{See Joseph D. Pizzurro & Nancy E. Delaney, New Peril for Companies Doing Business Overseas: Alien Tort Claims Act Interpreted Broadly}, \textsc{N.Y. L.J.}, Nov. 24, 1997, at S5; \textit{Gregory J. Wallace, Fallout From Slave-Labor Case is Troubling}, 150 \textsc{N.J. L.J.} 896, Dec. 8, 1997, at 24, \textit{available in LEXIS}, World Library, Allwild File.
Although curbing human rights abuses is a desirable goal, the shift in emphasis from state to private actors raises another disturbing issue: can U.S. courts, using a broad definition of *jus cogens*, now use the ATCA to impose their own standard of acceptable human rights norms on alien corporations? Under the current rules of interpretation, once a U.S. court deems a violation to be of "universal concern," the lack of such concern on the part of any one state is inconsequential. The violator, deemed an "enemy of all mankind," may be liable wherever he goes, or in the case of corporations, wherever an alien plaintiff chooses to sue the corporate actor. If the concept of universal jurisdiction is applied in the corporate context, alien corporations could find themselves dragged into U.S. courts for their overseas violations. To use the Unocal example, if the court's characterization of private liability had been taken a step further, Total S.A., Unocal's French partner in the joint venture, could have been liable for human rights violations.

Under these circumstances, the lack of French diplomatic or judicial consensus with the Unocal court's characterization of forced labor, or France's failure to sanction Total S.A. and restrict similar activities of other corporations, would be irrelevant in determining whether a violation of international law had occurred. This result is somewhat counterintuitive because the natural, although somewhat naïve, assumption would be that an international norm

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112. ATCA-based tort attacks on alien corporations could be perceived by some countries as an attack on their sovereignty. This is especially true in those countries where the larger corporations represent broad national interests. See Peterson, supra note 38, at 287.

113. See supra note 35 and accompanying text.

114. See supra note 38 and accompanying text.

115. Total S.A. was subsequently dismissed from the litigation for lack of jurisdiction. See Doe I v. Unocal Corp., 27 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998). Although this dismissal temporarily allays fears that U.S. courts will now indiscriminately sanction alien corporations for their human rights abuses, the liberal approach of *Filartiga* and its progeny—cases that have found non-U.S. individuals liable—suggests that it is only a matter of time before non-U.S. corporations are also held accountable. Once alien corporations violate the "law of nations" their nationality will have no effect on the ability of U.S. courts to impose sanctions on these corporations.

116. Interestingly, there is no record of Total S.A. being sanctioned in France or in Europe for its alleged human rights violations in Burma. See Court of Justice, Recent Case Law, at http://curia.eu.int/jurisph/index.htm (last visited Oct. 10, 2000); cf. Peterson, supra note 38, at 287 (indicating France, among other nations, has been most willing to deal with "rogue" nations in the past).
is determined through international consensus. In reality, however, universal consensus plays no role in determining international norms.\textsuperscript{117} On the one hand, the developed world adopts a flexible, overinclusive approach in defining the scope of international law. On the other, the developing world prefers “international obligations” to international law and does not like the other camp’s overinclusive approach.\textsuperscript{118}

A federal court cannot steamroll over these delicate concerns while applying international norms to corporate activity, especially the activities of alien corporations. Of course, several procedural safeguards are available to make these concerns seem inflated.\textsuperscript{119} With increasing global integration, however, the safety net of personal jurisdiction and other procedural safeguards may disappear, leaving alien corporations at the mercy of U.S. courts.\textsuperscript{120}

\textsuperscript{117} For instance, many believe that change in Burma should be generated through gentle persuasion and the “wielding of ‘economic carrots.’” Thio, supra note 104, at 45. Singapore and other ASEAN countries maintain that promoting Burma’s economic development and integration into the world economy will eventually lead to political liberalization. As a result, these countries actively promote bilateral economic cooperation. See id. The Unocal court, proceeding on the assumption that the alleged forced labor practices constituted a \textit{jus cogens} violation, failed to account for alternative views, such as ASEAN’s, as the court’s only concern appeared to be \textit{domestic}, not international, consensus. See National Coalition Gov’t of Burma v. Unocal Inc., 176 F.R.D. 329, 353 (C.D. Cal. 1997) (reiterating the need for international consensus, yet failing to discuss whether SLORC’s forced labor practices had been condemned internationally). This concern with domestic consensus was reinforced when the court sought the opinion of the Department of State regarding the foreign policy implications of the litigation and the impact of this case on U.S. relations with Burma. See id. at 362.

\textsuperscript{118} See UNCTC, supra note 17; see also Thio, supra note 104, at 16 (stating that proponents of “Asian values” argue that human rights norms embody “alien values”). Under Unocal, however, as long as a judicial decision does not directly contradict U.S. foreign policy, the court need not consider any \textit{transnational} policies and concerns. See Unocal, 176 F.R.D. at 354 (stating that sanctions against SLORC would be justified in light of the “limited implications” for U.S. foreign relations with Burma).

\textsuperscript{119} See generally Rosencranz & Campbell, supra note 73 (discussing the substantial hurdles that alien plaintiffs bringing ATCA claims face in federal courts); see also Becker, supra note 99, at 199-200 (discussing the restrictions on an alien plaintiff’s choice of forum and causes of action under the ATCA);

\textsuperscript{120} The concern that procedural safeguards might become insignificant over time is not an imaginary one. In one instance, the Texas Supreme Court forcefully stated that “[t]he doctrine of forum non conveniens is obsolete in a world in which markets are global. . . . The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational.” Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 688-89 (Tex. 1990). As a result, the court rejected Dow’s motion to dismiss based on forum non conveniens and allowed Costa Rican plantation workers to
This increased vulnerability of alien corporations to U.S. courts, however unlikely, would be a strong disincentive for collaboration between U.S. and alien corporations in other countries, again causing a reduction in economic growth.  

Proposal to Mandate Corporate Conduct

Without a doubt, some violations committed by corporations—domestic and alien—are abhorrent and deserve to be addressed, but the Unocal approach is not the answer. If Unocal indicates the new direction, then the future of international law is merely as a catchall used to regulate corporate conduct. Under a Unocal approach, courts are not really applying international law and following the general practice of a substantial number of nations. Ironically, while the judiciary broadens its interpretation of international law to regulate corporate conduct, the remaining branches of government consistently have refused to implement any mechanisms that effectively regulate corporate conduct in an international context.  

For instance, the U.N. Code of Conduct for Transnational Corporations, established in the 1980s, faced strong opposition from the United States. The Code, if adopted, would have imposed upon transnational corporations (TNCs) a duty to respect human rights and the fundamental freedoms of their employees in the countries in which the TNCs operate. The Code, however, was never formally adopted in spite of extensive negotiations.

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121. The economic effects of extending private liability to alien corporations are beyond the scope of this Note. This Note merely raises possible implications of applying Unocal to alien corporations.

122. See Justin Lu, Note, Jurisdiction over Non-State Activity under the Alien Tort Claims Act, 35 Colum. J. Transnat'l L. 531, 540 (1997).

123. See UNCTC, supra note 17.

124. See id.

125. In the Hearings before a subcommittee of the Senate Foreign Relations Committee, a spokesperson for the State Department admitted that U.S. policy (as determined by the
Given the interplay between international law and foreign policy, courts should hesitate before sanctioning corporate conduct under international law without an express mandate from the remaining branches. If the concern is the regulation of deviant corporate conduct, one solution would be to codify Unocal and hold private actors liable regardless of state action. Such a codification would not only enhance the remedies available to alien victims of human rights abuses, but also the rights of corporations. The problem with such a codification is that it is only a local solution. Under the proposed framework, foreign plaintiffs complaining of a U.S. corporation's extraterritorial abuses would be granted an opportunity for redress, but plaintiffs' ability to bring an action against alien corporations in U.S. courts would still be subject to the previously mentioned jurisdictional hurdles. Thus, the proposed codification fails to address the larger concern of sanctioning the human rights abuses of all MNCs regardless of nationality.

Department of Commerce, among others) was that the Code should not move forward. Rather perversely, the State Department's goal was to defeat the adoption of the Code despite a decade of negotiations conducted at the behest of the United States, which had resulted in significant improvements to the Code. See U.N. Code of Conduct on Transnational Corporations: Hearing Before the Subcomm. on Int'l Econ. Policy, Trade, Oceans and Env't of the Senate Comm. on Foreign Relations, 101st Cong. 12-25 (1990) (statement of Jane E. Becker, Deputy Assistant Secretary for International Development and Technical Specialized Agency Affairs, Department of State). This policy in favor of giving U.S. corporations free reign seems directly contradictory to the position adopted by the courts, which seek to regulate the conduct of MNCs. For a discussion of the relation between the judicial and political branches in the context of sources and interpretation of international law, see A. M. Weisburd, State Courts, Federal Courts, and International Cases, 20 YALE J. INT'L L. 1, 38-44 (1995). Congress has expressly and implicitly rejected some of the sources used by the courts to determine international law as "law." See Kochan, supra note 107, at 182; see also Wade Mansell & Joanne Scott, Why Bother About a Right to Development?, 21 J.L. & Soc'y 171, 171 (1994) ("The idea of international law ... distinguish[es] itself from politics only with the greatest difficulty [and] ... has a very different 'feel' from the taught orthodoxies of domestic law.").


127. See Kieserman, supra note 127, at 983 (recommending a legislative modification of the ATCA).

128. But see Becker, supra note 99, at 207 ("A codification of the Unocal doctrine in general ... comports with the emerging perspective of a 'world society' where concern for fundamental human rights transcends national borders.").

129. See sources cited supra note 119.
An alternative solution would be to enact a mandatory code of corporate conduct along the lines of the U.N. Code of Conduct for Transnational Corporations. Although the U.N. Code was voluntary, it was a significant step toward regulating corporate conduct with respect to human rights. The Code contained a provision that imposed on MNCs a duty to respect the human rights and fundamental freedoms in the countries in which they operate. MNCs were also prohibited from discriminating on the basis of race, color, national and ethnic origin, and were required to conform to the host countries' policies designed to extend equality of opportunity and treatment.

While critics argue against a mandatory code of conduct based on concerns about the lack of enforceability, the existence of such a code would clarify at least the grounds for holding a corporation liable, and the threat of harsh judicial sanctions for failure to comply may suffice to regulate corporate conduct. Some would argue that in the absence of a regulatory body that ensures compliance with such a code, enacting another code might serve little purpose; such a code would be similar to the voluntary codes of conduct already adopted by several corporations. While the formidable task of enacting a mandatory code, especially in an

131. See Frey, supra note 96, at 170. Although a corporate code of conduct seems a desirable method of regulating the conduct of corporations, especially in the field of human rights, Congress in recent years has struck down several proposals for meaningful codes of conduct. See id. at 170-71. The Clinton administration's "Model Business Principles," a voluntary and unenforceable set of guidelines issued in May 1995, has been the resulting compromise. See Cassel, supra note 7, at 1974.

132. In recent years, self-imposed codes of conduct have also become increasingly popular. Corporations that have implemented codes of conduct include: The Gap, Timberland, Wal-Mart, and Levi Strauss, among others. See Cassel, supra note 7, at 1973.

133. See UNCTC, supra note 17, at 31.

134. See id.

135. The task of clarifying the scope of international law is a daunting one. For example, one of the issues raised in the initial Code negotiations was the scope of international law. At the time, the developing and socialist countries regarded the content of CIL as being unrepresentative of their own practices. The only relevant international standards that these countries were willing to concede included obligations derived from conventions, agreements, treaties, and other instruments based on the express consent of the states. See UNCTC, supra note 17, at 21. Ironically, the Code called for a flexible evolutionary approach, similar to the approach adopted by the courts in Unocal and Iwanowa. This evolutionary approach, however, was probably acceptable only because of the voluntary nature of the Code. If a similar code is mandated, it seems the scope of international law will have to be better clarified.
international setting, might make judicial determination of the scope of international law seem more attractive, the relative ease of the judicial approach does not legitimize the interpretative flexibility of the Unocal court. By clarifying the scope of international law, a mandatory code would restrain judicial expansion of the categories of CIL violations to include less egregious violations. Finally, such a code would also provide corporations with guidelines for their operations by notifying them of the activities that are subject to sanctions.136

CONCLUSION

International law is an evolving concept that must be interpreted by the courts.137 Although some scholars claim that interpreting the "law of nations" is no different from deriving common law,138 the determination of international norms by federal courts raises several concerns. U.S. courts certainly have the power to determine whether U.S. citizens, including corporations, have committed egregious human rights violations upon foreign nationals in their own countries.139 The regulation of private acts of corporations must arise from a predetermined standard. Problems arise, however, when liability for private actions attaches under the murky standard of international law. Authorities supporting individual liability gloss over the "evolving" nature of international human

136. The spectrum of corporate responsibility could be incorporated in a mandatory code along with specific penalties for different levels of corporate action or inaction in the face of human rights violations. This basic framework would at least provide some bright line rules for corporations seeking to modify their conduct to avoid liability for human rights violations.

137. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ").

138. See Rosencranz & Campbell, supra note 73, at 170 ("There is no question that the federal judiciary has the power to determine what is international law, and . . . what is meant by the law of nations."); see also Klein, supra note 23, at 334 ("Courts applying international law must interpret customary international law principles just as they determine other common law rules, not by examining statutory materials, but by exploring past practices and precedents."). But see Bradley & Goldsmith, supra note 48, at 852-53 (rejecting, post-Erie, the notion of customary international law as federal common law).

139. See supra note 105 and accompanying text.
rights law; moral "gray" areas do not fall within the scope of international law. The determination of new policies adopted by the international community and the sources from which international law is derived—the works of scholars, nonbinding international agreements—raises the specter of sanctions imposed by federal courts based on their notions of what constitutes international law. Cloaking these decisions in legality under "international law" would transform the federal courts into a tool for economic sanctions and a regulator of foreign policy.

The Unocal approach also threatens the private acts of alien corporations. Although some commentators discount the possibility of judicial abuse because of the jurisdictional hurdles preventing alien corporations from being dragged into U.S. courts, expanding global integration and increasing joint ventures may diminish the importance of these jurisdictional barriers. Applying international law to alien corporations raises the same questions surrounding its use against domestic corporations: should this flexible standard be applied without explicit acceptance of the international norms it incorporates? If international law is the standard being used, why are other countries not imposing similar sanctions under the aegis of international law?

If both the scope of international law and the liable parties are unclear, U.S. courts run the risk of sanctioning aliens, including corporations over which they have no jurisdiction under this questionable international law standard. This is not to say that the courts lack the power to sanction certain universally condemned crimes, such as genocide. Other crimes that do not invoke universal jurisdiction, however, should be examined more carefully. In Unocal, the court stretched the scope of slavery to include conscripted labor and concluded that these abuses were universally condemned under international law. Correcting human rights

140. Expropriation of property is one such moral "gray" area. See Sabbatino, 376 U.S. at 413-15; Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990); Guinto v. Marcos, 654 F. Supp. 276, 280 n.1 (S.D. Cal. 1986).

141. Any judicial sanctions that are imposed against private individuals should be imposed with this consideration in mind—is the litigation at hand an indirect attempt to regulate the host country involved?

142. Even those who advocate the Unocal approach in sanctioning alien corporations caution that liability should be imposed only for violations of strict jus cogens norms. See, e.g., Peterson, supra note 38, at 299.
violations is a desirable goal in itself. Policing such violations in the international context, however, is not within the judicial role of the federal courts, absent a clear mandate on what constitutes international law and the responsible actors under international law.

MNCs with global interests face the very real threat of being held accountable for human rights violations that do not amount to *jus cogens* violations. At the same time, because of the unclear scope of their obligations under international law, multinationals could also be liable for their failure to act. The need for checks against the abuse of this grant of discretion to the federal courts seems obvious. Judicial assessment is more appropriate "the greater the degree of *codification or consensus* concerning a particular area of international law." Squeezing certain conduct within prescribed norms, thus distorting the definition and expanding the scope of international law, is unjustified without an express mandate, both congressional and international. The increased judicial focus on human rights violations overseas is a quantum step in the right direction. Before actually regulating corporate conduct, we must answer the unsettled question of what courts are attempting to regulate. The obvious answer—international human rights abuses—is obfuscated when we factor in the nationality of the actors who may be liable.

If the concern is that private actors will not be held accountable, then *Unocal*'s dicta—private liability in the absence of state action—should be codified. Although the codification of *Unocal* might be a solution, it is only a short term, domestic solution. More accurately, it will serve only to regulate the conduct of U.S.-headquartered MNCs with overseas operations. Restricting the activities of U.S. MNCs without imposing similar restraints on alien corporations allows the latter greater access to developing markets. The adverse impact on the competitiveness of U.S

143. At least one advocate of *Unocal* warns that in the future liability imposed on corporations should be direct: "offending corporation[s] should have directly benefited from the alleged violation, and not just participated as a silent partner." *Id.* at 299. Also, plaintiffs alleging human rights abuses must be able to show that the corporation either knew or should have known, or the offenses were so common that a reasonable person would expect the offenses to occur. *See id.*

corporations is certainly an economic, even though not a legal, concern.

If the concern, however, is that human rights violations by all MNCs, regardless of their nationality, will go unregulated, then we should adopt a legally binding code for MNC conduct. As the problem is a corollary of increasing globalization, the solution should be global as well. A mandatory code of conduct, although not a perfect solution, is a positive step in the right direction. The process of formulating such a code will not only bring all interested parties—MNCs, developed, and developing countries—to the table, but also will provide a forum in which to voice their concerns. It will, hopefully, result in a more comprehensive answer to the problem of human rights abuses and justify the time and effort invested in such a solution.

Pia Zara Thadhani