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Human Rights Responsibilities of Private Corporations

Jordan J. Paust*

ABSTRACT

This Article discusses the human rights responsibilities of private corporations. Part I addresses how decisions and activities of multinational corporations impact human rights. Part II examines corporate liability under human rights laws by examining trends in judicial decisions in the United States and foreign states and human rights instruments. Part III explores the types of human rights deprivations that multinational corporations might cause. The Article concludes by predicting that there will be increasing scrutiny of corporate deprivations of human rights at the domestic, regional, and international levels.

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I. DECISIONS AND ACTIVITIES OF MULTINATIONAL CORPORATIONS CAN SIGNIFICANTLY IMPACT HUMAN RIGHTS

Many private economic institutions, such as large multinational corporations, often wield significant power and affect numerous human beings both directly and indirectly in various sectors of public and private life. In fact, many multinational corporations wield more effective power and wealth than many nation-states. In terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states. Additionally, large economic institutions are often capable of doing more harm in violation of international law than private individuals because they often wield more power and wealth than individuals, often engage in activities that transcend state boundaries and effective control, and are often capable of causing more extensive injuries to persons or harm to property, other resources, and the environment, both domestically and transnationally. It is appropriate, therefore, to address human rights responsibilities of private corporations, including relevant trends in judicial decisions, the reach of human rights instruments, and types of potential violations.

II. MULTINATIONAL CORPORATIONS CAN BE LIABLE UNDER HUMAN RIGHTS LAW

A. Cases Recognize Private and Corporate Responsibility for Human Rights Violations

1. Trends in Decisions in the United States

Does human rights law reach private multinational corporations? Despite the lack of widespread early attention to private corporate liability for human rights deprivations, preferences of a few textwriters, and remarkable confusion, human rights law


2. See, e.g., Developments in the Law—International Criminal Law, 114 HABV. L. REV. 2025, 2025-26, 2030-31 (2001) (alleging, without citation, "international law is virtually silent with respect to corporate liability for violations of human rights. International law has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations. Corporations thus remain immune to liability, and victims remain without redress."); Glen Kelley, Note, Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations, 39 COLUM. J. TRANSNAT'L L. 483, 513-15 (2001). Others apparently cling to imagined theoretic distinctions between public and private responsibility while paying little or no
can reach private corporations. More generally, a private corporation as such is simply a juridic person and has no immunity under U.S. domestic or international law. In each nation-state, private corporations, like private individuals, are bound by domestic laws. Similarly, private corporations and entities are bound by international laws applicable to individuals. For example, in the United States and elsewhere, companies and other non-state associations and organizations have been found to have civil and criminal responsibility for various violations of international law, including human rights and related international proscriptions.
the United States, private companies have rights to sue under the Alien Tort Claims Act (ATCA)\(^5\) and it is only logical and policy-serving that they can also be defendants under the ATCA. In fact, there have been express recognitions to that effect in U.S. cases.\(^6\) For

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against Japanese corporations concerning slave labor of former prisoners of war in violation of the 1907 Hague Convention No. IV, 36 Stat. 2277, T.S. No. 539, and thus claims concerning war crimes, had been settled by a 1951 U.S.-Japan Treaty of Peace), addressed in Sean D. Murphy, Contemporary Practice of the United States, 95 AM. J. INT'L L. 132, 159-43 (2001); McDougal et al., supra note 1, at 103-04 (discussing "deprivations and nonfulfillment" of human rights values by corporations); 2 Oppenheim's International Law 211 n.3 (H. Lauterpacht ed. 7th ed. 1952) ("observance of fundamental human rights is not dependent upon the recognition of a specific status"); Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, arts. 9-10, 82 U.N.T.S. 279 (concerning criminal groups and organizations); Control Council Law No. 10, Dec. 20, 1945, art. II(1)(d) (concerning criminal groups and organizations), reprinted in Paust, Bassioumi et al., International Criminal Law Documents Supplement 151, 152 (2000).

5. 28 U.S.C. § 1350. See, e.g., Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), rev'd on other grounds, 488 U.S. 428 (1989); 1 Op. Att'y Gen. 57, 59 (1795) (commenting that "there can be no doubt that the company ... injured by these acts ... [has] a remedy by a civil suit... ") under the ATCA); see also La Abra Silver Mining Co. v. United States, 175 U.S. 423, 458, 461 (1899) (holding that even though claims before a U.S.-Mexican Commission were those of governments, a private company had a claim of right under a "treaty and the award of the commission," and such right is undoubtedly "susceptible of judicial determination" in the United States); Bank of Augusta v. Earle, 38 U.S. 519, 592 (1839) ("We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts... ").

example, in 1997, in Doe v. Unocal Corp., the Central District of California recognized that several human rights and other international law claims made by farmers from Burma against a private corporation and others were viable under the ATCA. These claims included claims of slave or "forced" labor, torture, violence against women, and other human rights violations and crimes against humanity that also occurred in complicity with Burmese military, intelligence groups, and police. Addressing universal

There the court stated that no cause of action under the ATCA existed when no allegation existed in the complaint that private companies were "involved in the taking of the Bigios' property or complicit in the government's alleged violation of international law" and the "sole allegation against Coca-Cola is that it acquired or leased the property that previously had been expropriated on the basis of the owners' religion" and, at most, Coca-Cola had only an "indirect economic benefit from unlawful state action," did not violate international law, and did not act "together with state officials or with significant state aid" in violation of international law, which would have provided "color of law" responsibility in addition to any private responsibility of the companies. Id. at 70-72. In dictum, the opinion also stated that racial or religious discrimination and "discriminatory expropriation of property" are listed in the Restatement as violations "when undertaken by a state action." Id. at 71. This is true with respect to expropriation, but some forms of private discrimination are addressed by international treaties.

Plaintiffs in Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y. Aug. 28, 2000), aff'd in part and vacated in part, 273 F.3d 120 (2d Cir. 2001), raised several human rights claims against Union Carbide under the ATCA, but the district court did not rule on the ATCA claims because plaintiffs lacked standing—which was found to be exclusive in the Government of India—and plaintiffs' claims were barred by a 1989 settlement agreement. In Kasky v. Nike, Inc., 79 Cal. App. 4th 165, 93 Cal. Rptr. 2d 854 (2000), a California Court of Appeal upheld dismissal of a suit under a state law concerning deception of consumers—allegedly because of health, safety, and wage deprivations by Nike in Vietnam and Indonesia and failure to disclose such to consumers—because of the primacy of the First Amendment of the U.S. Constitution over state law.


8. Id. at 889-90.
9. Id. at 891-92. Later, the district court dismissed such claims, finding "no evidence that Unocal 'participated in or influenced' the military's unlawful conduct," that Unocal conspired with the military, or that Unocal's conduct amounted to "participation or cooperation in the forced labor practices" beyond mere knowledge of and benefits from the unlawful military practices. 110 F. Supp. 2d 1294, 1306-07, 1310 (C.D. Cal. 2000). But see Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995), cert.
denied, 518 U.S. 1005 (1996) (finding "color of law" responsibility exists when a private actor acts "together with" or "in concert with" a state or "with significant state aid"); Iwanowa, 67 F. Supp. 2d at 445-46 n.27 (finding liability when defendant was "in close cooperation with" or had "work[ed] closely with" a state). Apparently the district court did not realize that various human rights prohibitions other than those relating to slavery or forced labor, genocide, other crimes against humanity, or war crimes can form the basis for private actor liability in the absence of conspiratorial state involvement, complicity with a state actor, or "color of law," and that U.S. tests for "color of law" or "state action" responsibility are not part of international law and are inappropriate and too limiting with respect to non-state actor liability for various other human rights violations. The court in Doe v. Unocal Corp., 110 F. Supp. 2d at 1304-05, 1307-08, was apparently unaware of judicial recognitions and opinions of Attorneys General not cited therein, the Executive's Amicus brief in Filartiga (quoted infra note 36), and other recognitions of private actor liability noted herein. The district court also seemed to be unaware of the full range of complicity standards under international law. Concerning standards regarding criminal complicity that can include both action and inaction amounting to participation, assistance, aiding, encouragement, reinforcement, or inducement—each with some minimally demonstrated criminal intent—see, e.g., CRIMINAL LAW, supra note 4, at 39-43. However, civil liability should pertain under a lower threshold than criminal intent, e.g., negligence or fault. See, e.g., LAW AND LITIGATION, supra note 4, at 510-12 (addressing the Soering Case, 161 Eur. Ct. H.R. (Ser. A), ¶¶ 80-92 (1989) (conduct by one actor when such involves a foreseeable "real risk" of a human rights violation by another actor leads to an independent violation, an "associated" violation, or a form of complicitious violation of human rights)), 517 (addressing a similar decision in Chahal v. United Kingdom, Eur. Ct. H.R. (15 Nov. 1996)), 557, 561 (Jefferson's recognition), 565-66 (also addressing a 1994 Human Rights Committee decision), 626 (addressing Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998) and complicity of Iran in hostage-taking). Civil liability for fault is normal in international law. Id. at 406-07, 410, 869, 871; RESTATEMENT, supra note 3, § 601.

Clearly, if the military had acted as a de facto agent of Unocal, liability also could have been based on negligence under the customary "knew or should have known" standard. See, e.g., LAW AND LITIGATION, supra note 4, at 17, 21, 288-90, 293, 302, 305-07, 310-11, 329, 332-34, 342 (also addressing application of the standard where persons who commit violations are under one's effective authority or control). Concerning such a standard under international criminal law, see, e.g., PAUST BASSOUNI ET AL., supra note 4, at 29-30, 46-76, 99, passim.

In Doe v. Unocal Corp., plaintiffs had argued that Unocal knew that the Burmese military violated human rights in furtherance and for the benefit of a joint venture with Unocal. Unocal, 110 F. Supp. 2d at 1295-96, 1306. The court should have considered whether Unocal was liable alternatively (1) as a private actor during a joint venture with another actor who, with the knowledge of Unocal, committed violations in furtherance and to the benefit of the joint venture—perhaps implicating vicarious liability; (2) whether Unocal thus acquiesced in and is responsible for such violations; (3) whether, in context, its knowledge and failure to object or its acquiescence amounted to some form of encouragement, reinforcement, influence, or participation; and (4) whether Unocal is otherwise liable under the circumstances instead of shifting to a more limiting test of responsibility developed merely for independent "color of law" or "state action" responsibility or looking merely at criminal complicity under international law. Id. at 1309-10. Cf. Andrew Ridenour, Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act, 9 TUL. J. INT'L & COMP. L. 581, 602-03 (2001). Additionally, the panel in Kadid v. Karadzic did not state that all or any human rights violations other than torture or extra-judicial killing required state actors or "color of law," which would have been incorrect. Kadid v. Karadzic, 70 F.3d 232, 241, 245 (2d Cir. 1995) (finding that no state action requirement
jurisdiction through the ATCA and nonimmunity of corporate actors for cruel, inhumane treatment and slave or forced labor, the district court in Iwanowa v. Ford Motor Co. added: "No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law." In 1907, an Opinion of the U.S. Attorney General recognized that a private U.S. company violated a treaty by diverting the Rio Grande through dredging activities. The Attorney General noted that an International Water Boundary Commission "found . . . [t]hat the . . . Company . . . violated the stipulations of that treaty," and recognized that injuries included "damage to property," including injury to "riparian rights," and "[a]s to indemnity for injuries which may have been caused to citizens of Mexico, I am of the opinion that existing statutes provide a right of action and a forum . . . the statutes [including the ATCA] thus provide a forum and a right of action." In Burger-Fischer v. DeGussa AG & DeGussa Corp., claims were made concerning the seizure of property and slave labor. In Bodner v. Banque Paribas, the court found that claims against banks for looting, conversion, and withholding of assets of victims of the Nazi Holocaust in violation of human rights and other international law were actionable under the ATCA. Alleged corporate involvement with prison labor also led to suits in Ge v. Peng and Doe v. The Gap, Inc. Ge was later dismissed, however, because, "[u]nlike Kadic and its progeny, . . . [the] case involves the use of forced prison labor in

applies to actions under the ATCA, "the state action concept, where applicable for some violations like ‘official’ torture . . . ") (emphasis added). Indeed, the phrase "color of law" is not one used in international law or in the ATCA, and courts should not amend federal statutes by adding words that Congress has not chosen. That phrase appears only in the Torture Victim Protection Act and Congress chose not to amend the ATCA to limit claims to those involving state action or in any other way. Id. at 241, 245.

10. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999). With respect to nonimmunity, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330(a), 1602-05, recognizes immunity merely for foreign states and foreign state entities. Id. § 1603(b). It clearly does not apply to individuals—official or private—or to private juridic entities. See also Amerada Hess, 488 U.S. at 438. Moreover, even when the FSIA reaches foreign state entities, the violation of treaties exception to immunity contained in §§ 1330(a) and 1604 assures that violations of human rights treaties are not entitled to immunity, especially since human rights law requires access to courts and application of the right to an effective remedy. See infra notes 13, 62.

13. Id. at 251-53.
the production of soccer balls . . . [and] forced prison labor [according to the court] is not . . . proscribed by international law.” 18 In Jama v. U.S. I.N.S., 19 the court found that violations of human rights prohibitions of cruel, inhuman, or degrading treatment by a private correctional corporation and its officers and employees acting under contract with the Immigration and Naturalization Services—which made the corporate officers “state actors” 20 —were actionable under the ATCA. 21 In Eastman Kodak Co. v. Kavlin, the district court found that claims of arbitrary detention involving a Brazilian company and an individual owner thereof who allegedly conspired with local Brazilian officials were actionable under the ATCA. 22

In addition to cases involving claims under the ATCA, lawsuits brought against companies under other U.S. statutes or domestic legal provisions have led to recognition of the applicability of relevant human rights precepts in varied contexts. 23 Additionally, a growing number of lawsuits have been brought against companies or corporations under state “human rights” laws that appear to be relevant not merely because of titles of the various state laws and state entities created to enforce such laws, 24 but also because claims typically involve employment discrimination. 25

20. Id. at 365-66.
21. Id. at 362-63.
24. Express use of “human rights” in the state laws presumably demonstrates an intent of state legislatures to implement relevant human rights through such state laws. They typically relate to freedom from discrimination.
discrimination claims could constitute claims under international human rights law, but such claims are expressly based on state human rights laws and decisions of state human rights commissions or boards.  

2. Trends in Decisions Outside the United States

Judicial decisions outside the United States have recognized human rights responsibilities of private persons, companies, and corporations. As noted elsewhere in this essay, Japanese and German cases have recognized such forms of private responsibility, and there has been similar recognition by the European Court of Human Rights. More recently, the British House of Lords recognized that a private corporation's responsibilities under domestic employment law are "[s]ubject to observance of fundamental human rights." In 1998, the Supreme Court of Canada recognized that it is possible "for a non-state actor to perpetuate


26. See supra note 25.
27. See infra note 36.
28. See infra note 36.
29. See infra note 50.
human rights violations on a scale amounting to persecution" within
the reach of the Refugee Convention\(^{31}\) and, more generally, that
private actors can engage in human rights violations.\(^{32}\) Previously,
the Supreme Court of Canada recognized that sexual harassment in
the workplace can involve a corporate violation of human rights
precepts concerning sex-based discrimination actionable under
Canadian human rights legislation.\(^{33}\) An Israeli Supreme Court
Justice recognized that "basic human rights are not directed only
against the authority of the state, they spread also to the mutual
relations between individuals themselves."\(^{34}\)

B. Human Rights Instruments Often Reach Private Perpetrators

Most human rights instruments speak generally of particular
rights of each person or everyone without any mention of or
limitation concerning which persons or entities owe a corresponding
duty. Thus, most duties are generally not limited to state actors and
do reach private persons or entities.\(^{35}\) Moreover, violations of human
rights recognized in particular treaties and customary international
law often reach private perpetrators expressly or by implication.\(^{36}\)

Lexis 512 (Can. 1998), also noting a related practice of Australia. The Court
recognized that private violations of human rights fell within the scope of Article 1 F (c)
of the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, which deals
with denial of refugee protections to persons "guilty of acts contrary to the purposes
and principles of the United Nations." Id. United Nations Charter purposes and
principles include the need to respect and observe human rights. See infra note 37.

32. Id.

265 (Can. 1989). Sex-based discrimination is a violation of human rights law. See U.N.
CHARTER, arts. 1(3), 55(c); International Covenant on Civil and Political Rights, Dec.

34. C.A. 284/93, Hevra Kadisha, Jerusalem Burial Co. v. Kestenbaum, 46(2)
P.D. 464, 550.

35. See Private Duties, supra note 4, at 52-53; LUNG-CHU CHEN, AN
INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 215 (1989) ("Most [human
rights] are documented in terms of the right of persons and not in terms of
participation in or protection from the state. They are, in the words of the
International Court of Justice, obligatio erga omnes (owing by and to all humankind)").

36. See Private Duties, supra note 4, at 51 n.5, cited in Kadic v. Karadzic, 70
F.3d 232, 239 (2d Cir. 1995); THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS
62, 179-80, 235-36 (2d ed. 1995); CHEN, supra note 35, at 78, 205, 215-16; ANDREW
CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 91-104 (1993); MCDUGAL ET AL.,
supra note 1, at 96-107 ("both a depriver and a deprivee of human rights" (96),
multinational corporations' "deprivations and nonfulfillment" of human rights values
(103-04)), 585, 587, 807-10; E. McDOWELL, DIGEST OF UNITED STATES PRACTICE IN
INTERNATIONAL LAW 1975 168, 171 (1976) (Executive recognition that acts of a private
perpetrator constituted an "offense against the human rights of passengers and crew");
LAW AND LITIGATION, supra note 4, at 14-15, 106-07 (discussing 1999 Japanese district
court award for private store discrimination against customer in violation of the
Convention on Elimination of All Forms of Racial Discrimination), 153, 318;
For example, the preamble to the Universal Declaration of Human Rights recognizes that the human rights proclaimed therein are “a common standard of achievement for all peoples . . . [including] every individual and every organ of society.”37 Article 29, paragraph 1, affirms that “Everyone has duties to the community . . . .”38 Article 30

Memorandum for the United States as Amicus Curiae in Filartiga v. Pena-Irala, at 21, 630 F.2d 876 (2d Cir. 1980) (human rights laws “directly create rights and duties of private individuals . . . ; do create such . . . duties,” quoting the “highly respected” Constitutional Court of Germany); G.A. Res. 144, U.N. GAOR, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. Doc. A/RES/53/144, Annex (“Recognizing the right and the responsibility of individuals, groups and associations to promote respect for . . . human rights”), art. 10 (“No one shall participate, by act or by failure to act where required, in violating human rights . . . .”), art. 18 (1) (“Everyone has duties towards and within the community . . . .”) and (2) (“Individuals, groups, institutions and non-governmental organizations have . . . a responsibility in . . . promoting human rights . . . .”) (1999), available at www.un.org/documents/ga/res/53/a53r144.pdf; Amnesty International, Human Rights Principles for Companies, ACT 70/01/98 (1998) (“Multinational companies have a responsibility . . . . Companies and financial institutions are organs of society [within the meaning of the Universal Declaration of Human Rights]. . . . All companies have a direct responsibility to respect human rights in their own operations.”) [hereinafter A.I. H.R. Report]; see also U.N. Secretary-General Kofi A. Annan, A Compact for the New Century (Jan. 31, 1999), available at www.un.org/partnerslbusiness/davos.htm (calling on corporate leaders to “a) support and respect the protection of international human rights within their sphere of influence; and b) make sure their own corporations are not complicit in human rights abuses”—thus, affirming expectations of the link between human rights responsibilities and corporations); Draft Code of Conduct on Transnational Corporations, art. 14, U.N. Doc. E/1990/94 (12 June 1990) (“Transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate . . . .”); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443-45 (D.N.J. 1999); ALISON D. RENTELN, INTERNATIONAL HUMAN RIGHTS 41-44 (1990); infra notes 37-62. Concerning early recognition of duties of humanity, relevant also to crimes against humanity, see, e.g., Henfield's Case, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6360) (“Under all the obligations due to the universal society of the human race, the citizens of the states still continue. . . . On states as well as individuals the duties of humanity are strictly incumbent. . . .”).


38. Universal Declaration, supra note 37, art. 29(1).
recognizes that no right of "any . . . group or person . . . [exists] to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth" in the Universal Declaration. 39 Thus, there are correlative duties of groups and persons not to engage in acts aimed at the destruction of human rights set forth in the Declaration. 40 Indeed, Article 30—like provisions in most major human rights instruments—contains an interpretive command that "[n]othing . . . be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." 41 Because numerous human rights are set forth in the Declaration without any mention of "state" actors or any limitation to state actor duties or "color," the express and unavoidable interpretive command in Article 30 prohibits adding words or implying limitations that the drafters did not choose. Article 30 also should not be read so as to interpret particular human rights articles as if groups or persons can engage in any activity or perform any act aimed at the destruction of such rights, but state actors or those acting under "color"—and only such actors—cannot do so. 42

39. Id. art. 30.
40. See, McDOUGAL ET AL., supra note 1, at 807-10 (also addressing similar provisions and implied private duties in most of the major human rights instruments); RENTELN, supra note 36, at 41-44; Private Duties, supra note 4, at 54; see also infra note 50.
41. See supra note 39.
42. In the United States, another rule of construction requires that treaties be interpreted in a broad manner in favor of rights that may be claimed under them, and thus to protect express and implied rights in a manner not limiting of the reach of private rights or corresponding duties. See Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); United States v. Payne, 264 U.S. 446, 448 (1924) ("Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . . "); Geoffroy v. Riggs, 133 U.S. 258, 271 (1890) ("where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) ("Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.") (citing Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"); Owings v. Norwood's Lessee, 9 U.S. (3 Cranch) 344, 348-49 (1809) (Marshall, C.J.) ("Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever have this right, it is to be protected."). Also, private duties pertain even though there is no express mention of individuals or individual duties in a treaty. See, e.g., Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, J., on circuit); Private Duties, supra note 4, at 52 n.7.
The correlative reach of Article 30 is to "any" group or person. 43.

The preamble to the International Covenant on Civil and Political Rights (ICCPR) 44 expressly affirms "that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." 45 Thus, at a minimum, individuals have duties to not violate human rights. Article 5, like Article 30 of the Universal Declaration, also affirms the lack of a right of "any . . . group or person . . . to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth" in the Covenant "or at their limitation to a greater extent than is provided," 46 and thus impliedly affirms the duty of any group or person to not destroy or limit human rights.

Private duties are also expressly recognized in the preamble to and Articles 27 through 29 of the African Charter on Human and Peoples' Rights. 47 Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a "group or person" provision similar to those in the Universal Declaration and the International Covenant. 48 It affirms the lack of a right of "any . . . group or person . . . to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms set forth . . . [in the European Convention] or at their limitation to a greater extent than is provided for in the Convention." 49 Thus, an implied correlative duty of any group or person exists to not destroy or limit such rights. Indeed, the authoritative European Court of Human Rights has expressly recognized that private "terrorist activities . . . of individuals or groups . . . are in clear disregard of human rights," 50 therefore
affirming that duties of private individuals and groups exist under human rights law.

The preamble to the American Declaration of the Rights and Duties of Man\textsuperscript{51} acknowledges that "the fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated . . . .\textsuperscript{52} Articles XXIX through XXXVIII set forth several express duties of private actors.\textsuperscript{53} Indeed, the very title of the American Declaration is an express affirmation of private human rights duties.\textsuperscript{54} The American Convention on Human Rights\textsuperscript{55} also contains express recognition that "[e]very person has

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53. Id.

54. This express affirmation of private duties was made at the same time that the Universal Declaration was created. Id.

responsibilities to . . . his community, and mankind, "56 and Article 29(a) commands that the treaty not be interpreted to allow "any . . . group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized . . . or to restrict them to a greater extent than is provided for" in the Convention.57 Thus, an implied duty of groups and persons exists to not suppress or restrict human rights. The American Convention also contains express references to responsibilities of private companies.58

The authoritative Human Rights Committee created under the International Covenant on Civil and Political Rights59 has also recognized that states should report "the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment . . . whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetuating prohibited acts, must be held responsible."60 The Human Rights Committee added that states have a duty to afford protection against such acts "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"61 and "States must not deprive individuals of the right to an effective remedy."62

United States signed but has not ratified the American Convention on Human Rights, the United States is obligated to take no action inconsistent with the major purposes of the Convention. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331; Int’l Law As Law, supra note 37, at 286-87, 313, 318 n.5. Clearly, the major purposes of a human rights convention involve the need to respect, protect, and observe human rights contained therein.

56. American Convention, supra note 55, art. 32(1).
57. Id. art. 29(a).
58. Id. arts. 6(3)(a) ("shall not be placed at the disposal of any private party, company, or juridical person") and 14(3) ("company"). See also id. art. 29(a) ("group, or person") and art. 29(d) (incorporating the American Declaration—with its express recognition of private duties—by reference, as does the preamble to the Convention).
61. Id. ¶ 2 (emphasis added).
62. Id. ¶ 15 (emphasis added). Concerning the human right of access to courts and to an effective remedy, see, e.g., CRIMINAL LAW, supra note 4, at 72-73 (Human Rights Committee General Comment No. 24), 266-68 (including Human Rights Committee General Comments Nos. 13 and 15), 273, 344, 459, 726; INT’L LAW AS LAW, supra note 37, at 75 n.97, 198-203, 256-72 nn.468-527, 280 n.566, 292, 362, 375-78; see also infra note 106 (elaborating upon the “denial of justice”).
In the first U.S. Report to the Human Rights Committee, the Executive assured the Committee that the U.S. Violence Against Women Act (VAWA), which reached private perpetrators, was a measure undertaken in part to comply with the International Covenant’s human rights obligations. The Executive has also recognized in other instances that private duties exist under human rights law. In its Memorandum for the United States as Amicus Curiae in Filartiga v. Pena-Irala, the Executive expressly affirmed that human rights under international law “directly create rights and duties of private individuals . . . ‘do create such rights and duties.’”

In 1860, Justice Campbell, in United States v. Haun, emphasized President Jefferson’s far earlier recognition of “violations of human rights” by private “citizens of the United States” in other countries. President Jefferson had made such remarks in his Sixth Annual Message to Congress in 1806 concerning private human

67. See supra note 36.
69. Id. at 231. See also Charge to Grand Jury, 30 F. Cas. 1026, 1030 (1859) (No. 18,269A) (Wayne, J.) (assessing whether the “natural rights” of man were violated by slave trade).
rights duties to not engage in the slave trade. In *The Schooner Amistad*, John Quincy Adams, in argument before the Supreme Court, had also addressed issues concerning private "violations of human right" by those involved in the slave trade. The duties addressed by President Jefferson, John Quincy Adams, and Justice Campbell are mirrored today in most basic human rights instruments.

To summarize, in addition to express and implied recognition of private human rights duties in various human rights instruments, there are recognitions of private human rights duties by the Human Rights Committee, various UN entities, the European Court of Human Rights, several courts in other countries, and, among others, the U.S. Executive, Congress, and the judiciary.

### III. TYPES OF HUMAN RIGHTS DEPRIVATIONS THAT MULTINATIONAL CORPORATIONS MIGHT CAUSE

Human rights that multinational corporations have been accused of violating include human rights to life, including the right to enjoy life; freedom from torture and cruel, inhuman, or degrading treatment; freedom from forced or slave labor; freedom from arbitrary detention or deprivation of security of the person; freedom to enjoy property; freedom from deprivation of or injury to

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70. See *Int'l Law As Law*, supra note 37, at 176. Regarding slavery as a violation of human rights and other private violations of human rights, see also id. at 171, 173-80, 182, 185-86, 200, 215 n.11 (Grotius), 216, 222, 225-28, 232, 276, *passim*.

71. 40 U.S. 518 (15 Pet.) (1841).

72. *Id.*

73. See, e.g., *International Covenant on Civil and Political Rights*, supra note 44, art. 8; *Universal Declaration of Human Rights*, supra note 37, art. 4; *American Convention*, supra note 55, art. 6; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, supra note 48, art. 4.


75. See, e.g., *supra* text accompanying notes 9-10, 19; *Wiwa*, 226 F.3d at 92; *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001). See also *Law and Litigation*, supra note 4, at 106-07 (describing discrimination against foreigners by Japanese store).

76. See, e.g., *supra* text accompanying notes 9-10, 14, 16-17; A.I. H.R. Report, supra note 36; *supra* note 4.


78. See, e.g., *Bano*, 273 F.3d at 120; A.I. H.R. Report, supra note 36.

enjoyment of a clean and healthy environment—the latter also implicating interrelated international law recognizing private responsibility for pollution, and freedom from discrimination.

[A] number of instruments . . . recognize the critical connection between the sustenance of human life and the environment. . . . The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated. The American Declaration . . . recognizes the right to life, liberty and personal security in Article I, and reflects the interrelationship between the rights to life and health in Article XI, which provides for the preservation of the health and well-being of the individual. . . . Severe environmental pollution may pose a threat to human life and health. . . . Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being. . . . Individuals must have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment. . . .


81. See, e.g., Bano, 273 F.3d at 120; Herz, supra note 6, at 580-98. See also Inter-American Comm’n on Human Rights, Report on the Situation of the Inhabitants of the Interior of Ecuador, supra note 51.
One should also consider private corporate deprivations of rights contained, for example, in the International Covenant on Economic, Social, and Cultural Rights (ICESCR),\textsuperscript{84} such as free choice in work;\textsuperscript{85} fair wages, a "decent living," and equal remuneration for work of equal value;\textsuperscript{86} safe and healthy working conditions;\textsuperscript{87} protection of children from economic exploitation;\textsuperscript{88} and protection of mothers.\textsuperscript{89} The preamble to the ICESCR, like that of the ICCPR, contains the express realization that individuals have "duties to other individuals and to the community" and are "under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."\textsuperscript{90} Thus, at a minimum, individuals must not deny or violate the human rights of others. The treaty also contains express recognition, like the ICCPR, that it cannot be interpreted to imply for any "group or person" any right to destroy or limit the rights of others to a greater extent than is provided.\textsuperscript{91}

When identifying and clarifying actionable human rights, one need only identify rights that are "sufficiently determinate."\textsuperscript{92} More
generally, the judiciary has the primary competence and responsibility to identify and clarify rights and duties under customary international law and treaties ratified by the United States. Additionally, when identifying violations of international law and rights, duties, competencies, and nonimmunity under international law, the judiciary must apply international law as it has evolved. Such judicial competencies and responsibilities are consistent with the requirements of customary and treaty-based human rights law that victims have access to courts and an effective remedy. Because these requirements, as international law, are part of the laws of the United States, they also serve to enhance judicial power to address human rights violations.

As noted, suits against companies and corporations in the United States have been brought under the ATCA and various other

93. See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900) (noting that it "must be ascertained and administered by the courts of justice"); Hilton v. Guyot, 159 U.S. 113, 163 (1895) (same); The Nereide, 13 U.S. 388, 422-23 (9 Cranch) (1815); Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995); Hila v. Estate of Marcos, 25 F.3d 1467, 1474-75 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); Filartiga, 630 F.2d at 886-87; Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798-99 (D. Kan. 1980); Senate Rep. No. 102-249, at 5-6 (1991); INT'L LAW AS LAW, supra note 37, at 6-8, 46-47 nn.53-55; RESTATEMENT, supra note 3, §§ 111 (1)-(2), cmts. C-E, 113. These powers are constitutionally based. See, e.g., U.S. CONST. art. III, § 2, art. VI, cl. 2; INT'L LAW AS LAW, supra note 37, at 5-6, 40-43 nn.44-47. Such constitutional bases, coupled with Article I, § 8, cls. 10, 18 of the Constitution, also enhance congressional power to enact legislation incorporating international law—such as the ATCA—and such legislation can involve incorporation of international law by reference—as in the case of the ATCA—and, thus, a well-recognized congressional deference to the judiciary to perform traditional judicial tasks of identification and clarification of the content of international law. See, e.g., Ex parte Quirin, 317 U.S. 1, 27-30 (1942); United States v. Smith, 18 U.S. (5 Wheat) 153, 158-62 (1820).

94. See, e.g., U.S. CONST. art. III, § 2, art. VI, cl. 2; LAW AND LITIGATION, supra note 4, at 110-33, 171-84, 194, 345-60; INT'L LAW AS LAW, supra note 37, at 51-64, 81-101; RESTATEMENT, supra note 3, §§ 111(1)-(2), cmts. C-E, 113.


96. See supra note 62.

97. See supra notes 93-95.

98. See supra notes 5-23.
statutes. More generally, customary international law has been directly incorporable without a statutory base since the beginning of the United States, as fully expected by the Founders. Chief Justice Marshall recognized in 1810 that our judicial tribunals "are established . . . to decide on human rights." Federal courts had been using human right precepts prior to Chief Justice Marshall's affirmation of judicial authority and responsibility and have done so ever since. Additionally, because international law is part of the laws of the United States, 28 U.S.C. § 1331 provides an alternative basis for both general judicial and subject matter jurisdiction.

With respect to suits by alien plaintiffs under the ATCA, it should be noted that it was recognized near the time of formation of

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99. See supra notes 5-6, 14-26.
100. See, e.g., Ex parte Quirin, 317 U.S. 1, 27-28 (1942); The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895); The Nereide, 13 U.S. (9 Cranch) 388, 422-23 (1815); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159-60 (1795); Filartiga, 630 F.2d at 886-87 & n.20; Henfield's Case, 11 F. Cas. 1099, 1101-04 (C.C.D. Pa. 1793) (No. 6360) (Jay, C.J.); 1107-08, 1120 (Wilson, J.); Iwanowa, 67 F. Supp. 2d at 442 n.20; Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 795-800 (D. Kan. 1980); Int'l Law as Law, supra note 37, at 5, 7-8, 29-30 n.32, 34 n.38, 40-42 nn.44-46, 47-48 nn.54-58, 207; Restatement, supra note 3, § 111 (1)-(3), cmts. c, e; Jordan J. Paust, Customary International Law and Human Rights Treaties Are Law of the United States, 20 Mich. J. Int'l L. 301, 301-05 (1999). Such overwhelming trends in judicial decision are not surprising, since constitutional bases for judicial incorporation exist. See, e.g., U.S. Const. arts. III, § 2, VI, cl. 2; Int'l Law as Law, supra note 37, at 5-6, 40-43 nn.44-47.
102. See, e.g., Int'l Law as Law, supra note 37, at 182-98, 228-56; see also Memorandum for the United States as Amicus Curiae at 20, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), reprinted in 19 I.L.M. 585, 602-03 (1980).

It has long been established that in certain situations, individuals may sue to enforce their rights under international law. The international law of human rights ... endows individuals with the right to invoke international law, in a competent forum. ... As a result, in nations like the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. ..."

Id.

103. See, e.g., Abebe-Jira v. Negewo, No. 90-2010 (N.D. Ga. 1993), aff'd, 72 F.3d 844 (11th Cir. 1996); Martinez-Baca v. Suarez-Mason, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538, 1544 (N.D. Cal. 1987); Int'l Law as Law, supra note 37, at 7, 43 n.45; Restatement, supra note 3, § 111, cmt. e and RN 4; Paust, Customary International Law, supra note 100, at 304-05 & n.24; see also Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stating that causes of action under ATCA and TVPA "are statutorily authorized, and, as in Filartiga [630 F.2d at 887 n.22], we need not rule definitely on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction."); Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 9 (D.D.C. 1998) (not deciding, but noting that Kadic recognized such a possibility). But see Xuncax v. Gramajo, 886 F. Supp. 162, 194 (D. Mass. 1995).
the ATCA that the legislation provides both a right of action, or “remedy by a civil suit,” and a forum.\textsuperscript{104} Access to courts by aliens and rights to a remedy for violations of international law were of great importance in order to not “deny justice” to aliens, which would constitute a violation of international law by the United States and exacerbate relations with foreign states.\textsuperscript{105} An original purpose of the ATCA was to avoid a “denial of justice” to aliens in violation of customary international law by providing them access to U.S. courts with respect to injuries received in the United States or abroad at the hands of U.S. nationals or others found within the United States.\textsuperscript{106}

Today, it is also well-recognized that the ATCA provides a cause of action, or right to a remedy, and that the only relevant inquiry is whether suit is brought by an alien, for a tort only, alleging a violation of international law.\textsuperscript{107} Even if the ATCA did not provide a right to a remedy, human rights treaties incorporated through the ATCA provide rights enforceable by private parties, and human rights law requires access to domestic courts and enforcement of the

\textsuperscript{104} See 1 Op. Att’y Gen. 57, 58 (1795).

\textsuperscript{105} Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring).

\textsuperscript{106} Id., quoting THE FEDERALIST NO. 80 (A. Hamilton) (J. Cooke ed. 1961) (and adding “Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory.”). See also RESTATEMENT, supra note 3, § 711, cmts. a, c, e, RN 2 (denial of access to courts, judicial denial of human rights, and denial of remedies for injury inflicted by state actors or private persons); 1 Op. Att’y Gen. 57, 58 (1795); INT’L LAW AS LAW, supra note 37, at 199, 258-61 nn.479, 481; 385 n.87; Anthony D’Amato, The Alien Tort Statute and the Founding of the Constitution, 82 AM. J. INT’L L. 62, 64-65 (1988); Stephens, Federalism, supra note 6, at 522.

right to an effective remedy.\textsuperscript{108}

It should also be noted that the ATCA is congressional legislation that executes, implements, or incorporates by reference, treaties of the United States.\textsuperscript{109} The ATCA performs the very role that implementing legislation plays with respect to non-self-executing treaties, and it also provides a cause of action and a remedy.\textsuperscript{110} Thus, treaties that are not self-executing for the purpose of creating a private cause of action are executed or implemented by the ATCA.\textsuperscript{111}
More generally, the ATCA expressly incorporates all treaties of the United States by reference, and it is the ATCA that provides the direct basis for a lawsuit or private action, not the treaties as such. Further, it is not the prerogative of courts to rewrite a long-standing statute to apply merely to some treaties but not to others.

With respect to suits against companies for violations of customary international law and the reach of the ATCA, two errors in Doe v. Unocal Corp. are worth attention. First, dictum that customary international law rests upon "consent" of "states" and that "states that refuse to agree . . . are not bound" is in serious error.112 Second, the statement that only jus cogens violations are actionable under the ATCA is also in serious error.113 The ATCA contains no list or limitations of applicable customary international law or treaties of the United States and expressly applies to "any" civil action for a tort in violation of such international law. To add limits

Peace, 3 Sept. 1783, 8 Stat. 80, T.S. 104, was the ("a") treaty violated, and the ATCA provides a right of action. The Treaty of Peace did not mention a relevant "right of action"; cf Treaty of Amity, Commerce and Navigation, 19 Nov. 1794, arts. 19, 21, 8 Stat. 116, not mentioning any "right of action" or "private action," but re: injuries by Men of War or Privateers, individuals "shall be bound in their persons and Estates to make satisfaction and reparation for all Damages, and the interest thereof, of whatever nature the said Damages may be." Injuries addressed in the Opinion occurred September 28, 1794, before ratification of the Treaty of Amity. The Opinion also emphasizes a warning to U.S. citizens by the President issued April 22, 1793—when only the Treaty of Peace was operative).


that Congress has not chosen would be to rewrite the clear language of a long-standing federal statute and to violate the separation of powers. Further, at the time of formation of the ATCA, the notion of a complete enumeration or short list of human rights would have been anathema to the Founders.114 The same would have been true more generally with respect to the law of nations.115 Still today, the general statute incorporating the laws of war by reference as offenses against the law of the United States does not attempt to list such crimes or to provide limits concerning the numerous war crimes proscribed by international law.116

IV. CONCLUSION

From the above, a corporation can recognizably become involved in violations of human rights law either directly as a private actor; as an actor colored by a connection with a state, state entity, or other public actor; or as a participant in a joint venture or complicitous relation with another human rights violator. Decisions and activities of multinational corporations can significantly impact human rights, and one can predict that there will be increasing scrutiny of corporate deprivations of human rights at the international and regional levels and in domestic fora.

Although not discussed, multinational corporations also have significant opportunities to promote greater realization of many types of human rights. Greater attention by corporate lawyers and relevant international economic institutions to what types of human rights might be at stake in certain circumstances and to possible strategies to enhance human rights and to avoid deprivations and concomitant liability will more greatly assure responsible participation in efforts to ensure respect for and observance of human rights for all persons.117

114. See, e.g., INT'L LAW AS LAW, supra note 37, at 174-75, 221 n.90, 330-32, 349-50 nn.45, 50.
115. Id. at 8, 48-50 nn.60-88; Resolution of the Continental Congress (1781), 21 J. CONT'L CONG. 1136-37, reprinted in LAW AND LITIGATION, supra note 4, at 23-24.