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Human Rights Responsibilities of Private Corporations

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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.[1] 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,[2] human rights law

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1. *See, e.g.*, MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 103-04 (1980).

2. *See, e.g., Developments in the Law—International Criminal Law*, 114 HARV. 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.[3] 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.[4] In

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attention to actual trends in decision or to the international human rights instruments. Confusion and error might rest on nothing more than anti- or non-Realist jurisprudential preference.

3. This widespread pattern of legal responsibility and nonimmunity of private corporations under domestic law is itself a general principle of law relevant to international legal decision making. Concerning the relevance of general principles of law, see, e.g., I.C.J. Statute, art. 38(1)(c); Barcelona Traction Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 34-35, 38 (Feb. 5) (corporate entities are recognized institutions in domestic legal processes and "have an important and extensive role in the international field"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(c), reporter's note 7 (1987) [hereinafter RESTATEMENT]; INTERNATIONAL LAW ANTHOLOGY 101-02 (Anthony D'Amato ed., 1994).

4. *See, e.g.*, cases cited *infra* notes 6-23, 30-34; Weisshaus v. Swiss Bankers Ass'n (*In re* Holocaust Victim Assets Litigation), 225 F.3d 191 (2d Cir. 2000) (involving the participation of Swiss banks in war crimes, crimes against humanity, and genocide); Linder v. Portocarrero, 963 F.2d 332, 336-37 (11th Cir. 1992) (finding the Contras could be civilly liable for torture and unlawful killing); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (finding the PLO and various organizations could be civilly liable for murder); *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429 (D.N.J. 2000); *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000); *In re* Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164 (S.D.N.Y. 2000); Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998); Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854, 858, 860 (S.D.N.Y. 1990); JORDAN J. PAUST, JOAN M. FITZPATRICK, JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 16, 106-07 (2000) (discussing Japanese court that found Japanese store liable for discrimination against foreigners in violation of the International Convention on Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195) [hereinafter LAW AND LITIGATION]; JORDAN J. PAUST, M. CHERIF BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW 43-44, 617 (2d ed. 2000) [hereinafter CRIMINAL LAW]; RESTATEMENT, *supra* note 3, § 213, reporters' note 7 (claiming "Multinational enterprises have been under increasing scrutiny by international bodies"); 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 21, 104, 230 (M.C. Bassiouni ed., 1987); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 59 (1992) (addressing the duty to criminally proscribe certain "organizations" in the International Convention on the Elimination of All Forms of Racial Discrimination, article 4) [hereinafter *Private Duties*]; Beth Stephens, *Human Rights Accountability: Congress, Federalism and International Law*, 6 ILSA J. INT'L & COMP. L. 277, 284-85 (2000) ("[C]orporations can be held liable for human rights abuses when they are responsible for violations of international human rights norms that apply to private actors; or when they act in complicity with government officials to commit other human rights violations.") [hereinafter Stephens, *Accountability*]. *See also In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000) (American nationals' claims

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, 139-43 (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, BASSIOUNI 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 . . .").

6. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (involving human rights claims about imprisonment, torture, and killing); Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997); Doe v. Unocal Corp., 963 F. Supp. 880, 891-92 (C.D. Cal. 1997); Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 348 (C.D. Cal. 1997) (noting that a private company utilizing slave labor may be subject to liability under the ATCA); 26 Op. Att'y Gen. 250, 251-53 (1907); *see also* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (suggesting private adoption agencies were joint tortfeasors under the ATCA, but there was no briefing on such and they were not joined in the complaint); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999); Ge v. Peng, 1999 U.S. Dist. LEXIS 10834, at *6-7, *dismissed*, 2000 U.S. Dist LEXIS 12711 (Aug. 28, 2000); Doe v. The Gap, Inc., No. CV99-717 (D. Haw.) (settled–see CALIFORNIA LAWYER 17 (Jan. 2000)); Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139 (1999); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act*, 40 VA. J. INT'L L. 545 (2000); Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 167 (1997); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 347 n.37, 391-95 (1997); Kenneth C. Randall, *Further Inquiries Into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 501-03 (1986); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 521-22 (2000); Stephens, *Accountability*, *supra* note 4, at 284-85. *But see* Bigio v. The Coca-Cola Co., 235 F.3d 63 (2d Cir. 2000).

example, in 1997, in *Doe v. Unocal Corp.*,[7] 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.[8] 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.[9] Addressing universal

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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.

There are a number of other ATCA cases and opinions addressing private actor duties under international law. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); Jama v. I.N.S., 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998); Mushikiwabo v. Barayagwiza, 1996 WL 164496 (S.D.N.Y. 1996); Adra v. Clift, 195 F. Supp. 857, 864 (D. Md. 1961); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795); *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) ("The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states."); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) ("The Alien Tort Statute . . . may conceivably have been meant to cover only private, nongovernmental acts. . . ."); M'Grath v. Candalero, 16 F. Cas. 128 (D.S.C. 1794) (No. 8810).

7. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

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 complicitous 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 *Kadic 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. Kadic 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.*[10] 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."[11] 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.[12] 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."[13]

In *Burger-Fischer v. DeGussa AG. & DeGussa Corp.*, claims were made concerning the seizure of property and slave labor.[14] 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.[15] Alleged corporate involvement with prison labor also led to suits in *Ge v. Peng*[16] and *Doe v. The Gap, Inc.*[17] *Ge* was later dismissed, however, because, "[u]nlike Kadic and its progeny, . . . [the] case involves the use of forced prison labor in

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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.

11. *Iwanowa*, 67 F. Supp. 2d at 445.

12. 26 Op. Att'y Gen. 250, 251-54 (1907).

13. *Id.* at 251-53.

14. Burger-Fischer v. DeGussa Ag. & DeGussa Corp., 65 F. Supp. 2d 248, 272-73 (D.N.J. 1999).

15. Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). *See also supra* note 4.

16. Ge v. Peng, 1999 U.S. Dist. LEXIS 10834, at *6-7, *dismissed*, 2000 U.S. Dist. LEXIS 12711 (Aug. 28, 2000).

17. Doe v. Gap, Inc., No. CV99-77 (D. Haw. 1999).

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] Employment

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18. Ge v. Peng, 2000 U.S. Dist. LEXIS 12711, at 18 (Aug. 28, 2000).

19. Jama v. I.N.S., 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998).

20. *Id.* at 365-66.

21. *Id.* at 362-63.

22. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997).

23. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 155 (1989) (recognizing a "fundamental human right, that of privacy"); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 483, 487 (1974) (same); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1248, 1254, 1261 (3d Cir. 1978) (discussing "human right" of equal opportunity for female employees and the 1964 Civil Rights Act); *In re* Nazi Era Cases, 198 F.R.D. 429 (D.N.J. 2000) (claiming the voluntary dismissal of human right and other claims occurred because of agreement pertaining to redress through an available fund); Cont'l Data Sys., Inc. v. Exxon Corp., 1986 U.S. Dist. LEXIS 23490, at 9 (E.D. Pa. 1986) (quoting *Kewanee Oil Co.*); Premier-Pabst Corp. v. Elm City Brewing Co., 9 F. Supp. 754, 758 (D. Conn. 1935); Behrens v. Ill. Cent. Ry. Co., 192 F. 581, 582 (E.D. La. 1911) (finding that the act of Congress reaching a private company provides "betterment of human rights"); *infra* notes 92-95. *See also* Trotter v. Jack Anderson Enter., Inc., 818 F.2d 431 (5th Cir. 1987) (discussing indirect attention to alleged Coca-Cola plant involvement in human rights violations in Guatemala); Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir. 1977) (recognizing "basic civil rights of man" in the employment arena); U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1011 (S.D.N.Y. 1915) (not recognizing "the right of mankind" to contract out of all courts); Jones v. Great S. Fireproof Hotel Co., 86 F. 370, 375-76 (6th Cir. 1898) (stating liberty of contract is one of the "inalienable rights of man" and a "right of man"); Kyriazi v. W. Elec. Co., 461 F. Supp. 894, 942 (D.N.J. 1978) (involving sex-based discrimination claims in the employment arena).

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.

25. *See* Newman v. Fed. Express Corp., 266 F.3d 401 (6th Cir. 2001) (involving a claim of race discrimination under the Tennessee Human Rights Act); Farias v.

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.[26]

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[27] and German[28] cases have recognized such forms of private responsibility, and there has been similar recognition by the European Court of Human Rights.[29] 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. . . ."[30] In 1998, the Supreme Court of Canada recognized that it is possible "for a non-state actor to perpetuate

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Instructional Sys. Inc., 259 F.3d 91 (2d Cir. 2001) (alleging claims of national origin and race discrimination under the New York State Human Rights Law); Thiessen v. G.E. Capital Corp., 255 F.3d 1221 (10th Cir. 2001) (regarding claim of age discrimination filed with the Kansas Human Rights Commission); Harris v. Niagara Mohawk Power Corp., 252 F.3d 595 (2d Cir. 2001) (involving claims of race, sex, and age discrimination filed with the New York State Division of Human Rights); Cifra v. G.E. Co., 252 F.3d 205 (2d Cir. 2001) (concerning a claim of gender discrimination made before the New York State Division of Human Rights); Heinemeier v. Chemetco, Inc., 246 F.3d 1078 (7th Cir. 2001) (discussing claims of sexual harassment and age discrimination filed with the Illinois Department of Human Rights); Medina v. Ramsey Steel Co., 238 F.3d 674 (5th Cir. 2001) (making a claim of age discrimination asserted before the Texas Commission on Human Rights); Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67 (1st Cir. 2001) (alleging claims of sexual harassment and age discrimination filed with the Rhode Island Commission for Human Rights); Black v. Target Stores, 2001 U.S. App. LEXIS 22746 (8th Cir. 2001) (concerning claim of race discrimination under the Minnesota Human Rights Act); Solomon v. Giorgio Armani Corp., 2001 U.S. App. LEXIS 21469 (2d Cir. 2001) (regarding claims of sexual harassment and discrimination under the New York State Human Rights Law and New York City Human Rights Law); Interdonato v. Bae Sys., 2001 U.S. App. LEXIS 12105 (2d Cir. 2001) (involving claim of age discrimination under the New York Human Rights Law); Romano v. U-Haul Int'l, 233 F.3d 655 (1st Cir. 2000) (involving claim of sex discrimination under the Maine Human Rights Act); Levin v. Yeshiva Univ., 754 N.E.2d 1099 (Ct. App. N.Y. 2001) (regarding sexual orientation discrimination in the area of married couples and housing priority); Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 43-45 (Alaska 2000) (involving "her human rights complaint" under the Alaska Human Rights Act).

26. *See supra* note 25.

27. *See supra* note 4 and *infra* note 36.

28. *See infra* note 36.

29. *See infra* note 50.

30. Johnson v. Unisys, Ltd., UKHL/13, ¶ 37 (22 March 2001) (Lord Hoffmann). *See also* Fitzpatrick v. Sterling Housing Assoc., Ltd., 1999 WL 852150 (House of Lords 1999) (rent and housing legislative use of word "family" interpreted with reference to human right precepts in case involving succession to a tenancy with private charity landlord).

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]

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31. Pushpanathan v. Canada, [1998] 160 D.L.R. (4th) 193, 231, 1998 D.L.R. 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.*

33. Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252, 1989 S.C.R. Lexis 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. 19, 1966, arts. 2(1), 26, 999 U.N.T.S. 171.

34. C.A. 294/93, 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); MCDOUGAL 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/partners/business/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. . . . ").

37. G.A. Res. 217A, 3 U.N. GAOR, at 71, U.N. Doc. A/810 (1948). The Universal Declaration is now an authoritative human rights instrument identifying and evidencing the content of human rights protected through the UN Charter as well as many rights under customary international law. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (human rights "guaranteed to all by the [United Nations] Charter" are "evidenced and defined by the Universal Declaration of Human Rights" and "Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.'"), *also quoting* G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 796-97 (D. Kan. 1980) (use of Universal Declaration as authoritative indicia of rights); MCDOUGAL ET AL., *supra* note 1, at 272-74, 302, 325-30; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 181, 191, 198-200, 228 n.182, 245 n.372, 256 n.468, 286 n.595, 436 n.48 (1996) [hereinafter INT'L LAW AS LAW]; Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995/96).

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] The

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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 . . . ."); Geofroy 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. (5 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.

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

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43. Universal Declaration of Human Rights, *supra* note 37, art. 30.

44. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

45. *Id.* pmbl. (emphasis added).

46. *Id.* art. 5, ¶ 1.

47. O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981). *See also supra* note 36 (commenting on private duties in major human rights instruments).

48. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, art. 17 (1950).

49. *Id.*

50. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 149 (1977). For similar recognitions by the U.N. Commission on Human Rights, see, e.g., U.N. Comm. H.R., Res. 2000/30 (2000), *in* The Report of the Commission on Human Rights on its Fifty-sixth Session, U.N. ESCOR 2000, Supp. No. 3, U.N. Doc. E/CN.4/2000/167; U.N. Comm. H.R., Res. 1999/27 (1999); U.N. Comm. H.R., Res. 1998/47 (1998), U.N. Doc. E/CN.4/1998/177; U.N. Comm. H.R., Res. 1997/42 (1997). *See also* U.N. Comm. H.R., Res. 1998/73 (1998) (hostage-taking is aimed at the destruction of human rights); MCDOWELL, *supra* note 36. The link between private acts of terrorism and private violations of human rights has additional recognition. *See, e.g.*, G.A. Res. 46/51, pmbl., ¶ 9 (1991), U.N. Doc. A/46/654 (1991), *reprinted in* PAUST, BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 293 (2000); U.N. G.A. Res.

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

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3034, 27 U.N. GAOR, U.N. Doc. A/RES/3034 (1971); International Convention Against the Taking of Hostages, pmbl., 1316 U.N.T.S. 205 (1979); O.A.U. Grand Bay (Mauritius) Declaration and Plan of Action, ¶ 12, CONF/HRA/DECL(I) (1999) (condemnation of terrorism as a violation of human rights); 1973 Siracuse, Italy Conference on Terrorism and Political Crimes, Final Document: Conclusions and Recommendations, pt. I 1-2, *printed in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES xi (M. Cherif Bassiouni ed. 1975); Michael J. Bazyler, *Capturing Terrorists in the 'Wild Blue Yonder': International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685, 688 (1986); Robert A. Friedlander, *Terrorism and International Law: What Is Being Done?*, 8 RUT.-CAM. L.J. 383, 387-88 (1977); Jordan J. Paust, *The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility*, 11 HAST. INT'L & COMP. L. REV. 41 (1987). *See also* U.N.S.C. Res. 579, pmbl., ¶ 5, U.N. Doc. S/RES/579 (1985) (taking of hostages and abductions have severe consequences for the rights of victims and are manifestations of terrorism), *reprinted in* 25 I.L.M. 243 (1986); U.N. G.A. Res. 40/61, pmbl., ¶¶ 1-2 (1985), U.N. Doc. A/RES/40/61 (1986) (terrorism violates human dignity and loss of innocent lives, and mindful of relevant human rights instruments, all acts of terrorism, "by whomever committed," are unequivocally condemned), *reprinted in* 25 I.L.M. 239 (1986).

51. O.A.S. Res. XX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965). The United States, and all states in the Americas, are bound by the American Declaration of the Rights and Duties of Man, which is now a legally authoritative indicia of human rights protected through Article 3 (k) of the O.A.S. Charter, Apr. 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No. 2631, *amended by* the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. *See also* Advisory Opinion OC-10/89, I-A, Inter-Am. C. H.R., Ser. A: Judgments and Opinions, No. 10, ¶ 45 (1989); Inter-American Comm. on Human Rights, Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VII (1996), O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10, rev. 1 (Apr. 24, 1997) ("The American Declaration . . . continues to serve as a source of international obligation for all member states. . . . "); BUERGENTHAL, *supra* note 36, at 175, 180-81; RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 802-03 (3d ed. 1995); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 261-62, 269 (1990); MCDOUGAL ET AL., *supra* note 1, at 198, 316; INT'L LAW AS LAW, *supra* note 37, at 287 n.595; *Private Duties*, *supra* note 4, at 54 n.17. *See also* American Convention on Human Rights, No. 36, 1969, pmbl., art. 29(d), (American Declaration is an authoritative human rights instrument and is not limited by the Convention).

52. O.A.S. Res. XX (1948), pmbl., O.A.S. Off. Rec. OEA/Ser. L./I.4 Rev. (1965).

53. *Id.*

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

55. American Convention on Human Rights, opened for signature Nov. 22, 1969, 144 U.N.T.S. 123 (1970) [hereinafter American Convention]. Although the

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 Rights[59] 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).

59. *See, e.g.*, Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999); United States v. Bakeas, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997); CRIMINAL LAW, *supra* note 4, at 77-78; Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, ¶ 50 ("General comments . . . are intended . . . [among other purposes] to clarify the requirements of the Covenant. . . ."); *see also* United States v. Duarte-Acero, 208 F.3d 1282, 1285 n.12, 1287-88 (11th Cir. 2000); LILLICH & HANNUM, *supra* note 51, at 224 ("the gloss").

60. General Comment No. 20 [concerning violations of Article 7 of the Covenant on Civil and Political Rights] (1992), ¶ 13, *in* International Human Rights Instruments at 29-32, U.N. Doc. HRI/GEN/1 (1992) (emphasis added).

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.556, 292, 362, 375-76; *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),[63] which reached private perpetrators, was a measure undertaken in part to comply with the International Covenant's human rights obligations.[64] There has been additional Executive recognition of the human right of women to freedom from private violence.[65] The Executive has also recognized in other instances that private duties exist under human rights law.[66] 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.'"[67]

In 1860, Justice Campbell, in *United States v. Haun*,[68] emphasized President Jefferson's far earlier recognition of "violations of human rights" by private "citizens of the United States" in other countries.[69] President Jefferson had made such remarks in his Sixth Annual Message to Congress in 1806 concerning private human

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63. 42 U.S.C. § 13981 (1999).

64. *See* Summary Record of the 1401st Meeting: United States of America, ¶ 29, CCPR/C/SR.140 (1995). Concerning congressional recognition of the human rights served by the VAWA, see, e.g., Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209 (2000); Hearing of the Senate Judiciary Committee, Federal News Service, July 21, 1993 (remarks of then Judge Ruth Bader Ginsburg and Senator Biden); Pam Maples, *Bringing Fear Home: U.S. Women Face Pervasive Threat of Violence, Often at the Hands of Husbands, Boyfriends*, DALLAS MORNING NEWS, June 6, 1993, at 1A (Senator Biden's remarks that VAWA has a human rights purpose and private domestic violence is "a human rights issue").

65. *See, e.g.*, Alexander F. Watson, Ass't Sec'y of State for Inter-American Aff., Remarks to Inter-American Dialogue and International Center for Research on Women, Washington, D.C., Oct. 6, 1994, *in Summit of the Americas: The Impact on Women*, 5 DEP'T OF STATE DISPATCH no. 42 (Oct. 17, 1994) (stressing the human right of women "to live free from all forms of violence and discrimination in both public and private spheres"); Bonnie J. Campbell, Director of the Violence Against Women Office of the U.S. Dep't of Justice, On the Record Briefing, Sept. 12, 1995, *addressed in* Paust, *Human Rights Purposes*, *supra* note 64, at 213.

66. *See, e.g.*, Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 617-18, 623-24 n.502 (also quoting President Washington and MCDOWELL, DIGEST, *supra* note 36, at 171), 630-31 (1989), *revised in* INT'L LAW AS LAW, *supra* note 37, *at* 199-201, 204-05, 269 n.504; *infra* text accompanying notes 67, 70.

67. *See supra* note 36.

68. United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J., on circuit).

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.[70] In *The Schooner Amistad*,[71] 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.[72] The duties addressed by President Jefferson, John Quincy Adams, and Justice Campbell are mirrored today in most basic human rights instruments.[73]

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;[74] freedom from torture and cruel, inhuman, or degrading treatment;[75] freedom from forced or slave labor;[76] freedom from arbitrary detention[77] or deprivation of security of the person;[78] freedom to enjoy property;[79] 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.

74. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); Herz, *supra* note 6, at 574-80; A.I. H.R. Report, *supra* note 36. For additional cases recognizing the human right to life, see, e.g., INT'L LAW AS LAW, *supra* note 37, at 195, 250-51 n.421.

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.

77. *See, e.g., Wiwa*, 226 F.3d at 92; Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997); Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

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

79. *See, e.g., supra* text accompanying notes 13-15; Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Doe*, 963 F. Supp. at 884 ("conversion"); *supra* note 4.

health;[80] enjoyment of a clean and healthy environment[81]—the latter also implicating interrelated international law recognizing private responsibility for pollution;[82]—and freedom from discrimination.[83]

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80. *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

> [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. . . .

Id.; Case 7615 (Brazil), INTER-AM. C.H.R., 1984-1985 ANNUAL REPORT 24, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985) (the "Yanomami Indians" case), *reprinted in* 1985 INTER-AM. Y.B. ON HUM. RTS. 264; *infra* notes 87-89.

81. *See, e.g., Bano*, 273 F.3d at 120; Herz, *supra* note 6, at 580-98; *supra* note 12-13; African Charter on Human and Peoples' Rights, *supra* note 47, arts. 21(2), 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, O.A.S. T.S. No. 69; U.N. Review of Further Developments in Fields with which the Sub-Commission has been concerned: Human Rights and Environment, Final Report by the Special Rapporteur, Mrs. Fatma Zohra Ksentini, U.N. ESC, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9, ¶¶ 242, 248, *passim* (1994); Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 114 (Weeramantry, J., sep. op.), *reprinted in* 37 I.L.M. 204, 206 (1998); Grand Bay (Mauritius) Declaration and Plan of Action, *supra* note 50, ¶¶ 2, 8 (n), *addressed in* Gino J. Naldi, *The OAU's Grand Bay Declaration on Human Rights in Africa in Light of the Practice of the African Commission on Human and Peoples' Rights*, 60 HEIDELBERG J. INT'L L. 715, 717, 719, 724 (2000); *cf.* Gunther Handl, *Human Rights and Protection of the Environment, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 303 (A. Eide, C. Krause, A. Rosas eds., 2001).

82. *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, arts. 6-7, *reprinted in* 32 I.L.M. 1228, 1233-34 (1993) (operator of polluting facilities or waste dumps can be liable); Hazardous Wastes Within Africa, Jan. 30, 1990, art. 4(3)(b), *reprinted in* 30 I.L.M. 773 (1991) (strict liability for hazardous waste); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, 973 U.N.T.S. 4, 5; World Charter for Nature, G.A. Res. 37/7, 37 U.N. GAOR, 37th Sess., Supp. No. 51, Principles 1 and 24, U.N. Doc. A/37/51 (1982); African Charter on Human and Peoples' Rights, *supra* note 45, arts. 21 (2), 24. Also relevant are the Stockholm Declaration, Declaration of the United Nations Conference on the Human Environment, June 16, 1972, pmbl ¶¶ 6-7, Principle 1, *reprinted in* 11 I.L.M. 1416, 1417-18 (1972), and the Rio Declaration on

One should also consider private corporate deprivations of rights contained, for example, in the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[84] such as free choice in work;[85] fair wages, a "decent living," and equal remuneration for work of equal value;[86] safe and healthy working conditions;[87] protection of children from economic exploitation;[88] and protection of mothers.[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."[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.[91]

When identifying and clarifying actionable human rights, one need only identify rights that are "sufficiently determinate."[92] More

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Environment and Development, June 13, 1992, Principles 13, 27, *reprinted in* 31 I.L.M. 874, 878, 880 (1992).

83. *See supra* notes 23-25 and 33; *see also infra* note 86.

84. International Covenant on Economic, Social and Cultural Rights, 1966, 993 U.N.T.S. 3.

85. *Id.* art. 6. *See also* INT'L LAW AS LAW, *supra* note 37, at 195, 249 n.11 (noting U.S. cases concerning human right to freedom of association in the work environment); Johnson v. Unisys, Ltd., [2001] UKHL/13 (2001) (discussing freedom from unfair dismissal, employee "individual dignity and worth," and company's liability under domestic employment law as also "[s]ubject to observance of fundamental human rights"); Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, art. 2, 96 U.N.T.S. 258; *supra* note 76.

86. *See supra* note 82, art. 7(a); *see also* A.I. H.R. Report, *supra* note 36 ("fair working conditions"); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1248, 1261 (3d Cir. 1978) (equal opportunity for female employees); *supra* note 25.

87. *See supra* note 82, art. 7(b); *see also* Lipari v. Maritime Overseas Corp., 493 F.2d 207, 215 (3d Cir. 1974) (human rights are at stake in the case of claims of seamen in admiralty); Sobosle v. United States Steel Corp., 359 F.2d 7, 9 (3d Cir. 1966); ILO Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, June 27, 1978, art. 9, 1218 U.N.T.S. 87.

88. *See supra* note 84, art. 10(3).

89. *Id.* art. 10(2).

90. *Id.* pmbl.

91. *Id.* art. 5(1). *See also supra* note 40.

92. *See, e.g.*, Alvarez-Machain v. United States, 266 F.3d 1045, 1051-52 (9th Cir. 2001) (norm need not be specific in human rights instruments); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) ("definable"); Filartiga v. Pena-Irala, 630 F.2d 876, 880-82 (2d Cir. 1980) ("sufficiently determinate" and, importantly, customary human rights are also guaranteed to all persons under the U.N. Charter and these are "evidenced and defined by the Universal Declaration of Human Rights"); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540-42 (N.D. Cal. 1987).

generally, the judiciary has the primary competence and responsibility to identify and clarify rights and duties under customary international law[93] and treaties ratified by the United States.[94] 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.[95] 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.[96] Because these requirements, as international law, are part of the laws of the United States,[97] 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[98] and various other

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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); Hilao 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.

95. *See, e.g.*, *Kadic*, 70 F.3d at 238, 241; Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984); *Filartiga*, 630 F.2d at 881 (also addressing The Paquete Habana, 175 U.S. 677, 694 (1900) and Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796)); Maria v. McElroy, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999); Jama v. I.N.S., 22 F. Supp. 2d 353, 362 (D.N.J. 1998); Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 179 n.18 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987); INT'L LAW AS LAW, *supra* note 37, at 206, 281-82 n.562; H.R. Rep. No. 102-367, at 3-4 (1991), *reprinted in* 4 U.S.C.C.A.N. 86 (1992) (commenting that "norms . . . may ripen in the future into rules of customary international law"). Such a judicial power and responsibility is based in the U.S. Constitution and federal statutes, since international law is part of the laws of the United States within the meaning of Articles III, § 2, and VI, cl. 2 of the Constitution and 28 U.S.C. § 1331. *See supra* notes 93-94.

96. *See supra* note 62.

97. *See supra* notes 93-95.

98. *See supra* notes 5-23.

statutes.[99] 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.[100] Chief Justice Marshall recognized in 1810 that our judicial tribunals "are established . . . to decide on human rights."[101] 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.[102] 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.[103]

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.

101. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810).

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.48; 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.[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.[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.[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.[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

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104. *See* 1 Op. Att'y Gen. 57, 58 (1795).

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

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.

107. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic*, 70 F.3d at 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Hilao v. Estate of Marcos, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 424-25 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989); Tel-Oren v. Libyan Arab Republic, 726 F.2d at 777, 779-80 (Edwards, J., concurring); *Filartiga*, 630 F.2d at 880-82, 884-85, 887; Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1349 (S.D. Fla. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 441-43 (D.N.J. 1999); Jama v. I.N.S., 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); *Xuncax*, 886 F. Supp. at 179; Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987); Guinto v. Marcos, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986); Jaffe v. Boyles, 616 F. Supp. 1371, 1379 (W.D.N.Y. 1985) (court can fashion remedies); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795); INT'L LAW AS LAW, *supra* note 37, at 203, 206-08, 212, 281 nn.560-61, 282 nn.570-71. *See also* Filartiga v. Pena-Irala, 577 F. Supp. 860, 862-63 (E.D.N.Y. 1984) (international law provides "substantive principles" and "tort" means wrong under or in violation of international law). *But see Tel-Oren*, 726 F.2d at 798 (Bork, J., concurring). Judge Bork's views were in error, were opposed by Judge Edwards in *Tel-Oren*, and have not been followed. *See, e.g.*, *Iwanowa*, 67 F. Supp. 2d at 442 n.20 (Bork's "highly criticized opinion," "reasoning is flawed"); *Kadic*, 70 F.3d at 238; *Forti*, 672 F. Supp. at 1539.

right to an effective remedy.[108]

It should also be noted that the ATCA is congressional legislation that executes, implements, or incorporates by reference, treaties of the United States.[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.[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.[111]

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108. *See, e.g.*, INT'L LAW AS LAW, *supra* note 37 at 75 n.97, 198-203, 256-72 nn.468-527, 280 n.556, 292, 362, 375-76, *passim*; LAW AND LITIGATION, *supra* note 4, at 72-73 (Human Rights Committee General Comment No. 24), 266-68, 273, 344, 459, 726; Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant [ICCPR] not only guarantees foreign citizens equal treatment in the signatorie's courts, but also guarantees them equal access to these courts.").

109. *See, e.g.*, LAW AND LITIGATION, *supra* note 4, at 194; INT'L LAW AS LAW, *supra* note 37, at 207, 282 n.571, 371-72; Paust, *Customary International Law, supra* note 100, at 327 & n.126; Jordan J. Paust, *Suing Karadzic*, 10 LEIDEN J. INT'L L. 91, 92 (1997); *infra* note 111.

110. *See supra* notes 107-08.

111. *Estate of Cabello*, 157 F. Supp. 2d at 1359-60; Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380-81 (S.D. Ga. 2000) ("because the ICCPR is not self-executing, Ralk can advance no private right of action under the ICCPR," but "could bring a claim under the Alien Tort Claims Act for violations of the ICCPR"). *But see Iwanowa*, 67 F. Supp. 2d at 439 n.16 (missing this point when suggesting in false dictum that two law of war treaties (1) do not "confer rights enforceable by private parties." *But see Kadic*, 70 F.3d at 242-43; *supra* note 4; Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 360-69 (1991) and (2) are entirely non-self-executing—and then falsely concluding, in terse, unreasoned, and unsupported dictum beyond what plaintiff had argued or briefed, *see id.* at 439, that "[s]ince neither . . . provide a private action, they cannot provide a basis for suit under the ATCA." Even under *Iwanowa*'s false dictum, human rights treaties are clearly distinguishable because they provide a private action.). Additionally, the treaty addressed in 26 Op. Att'y Gen. 250 (1907) did not mention any "right of action" or "private action," individuals, or private rights, but the Attorney General correctly found that a violation of the treaty by the U.S. company was actionable in view of the fact that the ATCA provides a right of action. *See* Convention between the United States of America and the United States of Mexico touching the international boundary line where it follows the bed of the Rio Grande and the Rio Colorado, Nov. 12, 1884, 24 Stat. 1011. Article III of the treaty stated in pertinent part: "No artificial change in the navigable course of the river . . . or by dredging to deepen . . . shall be permitted to affect or alter the dividing line. . . ." *Id.* art. III. This was also the approach regarding treaty violations at the time of formation of the ATCA. *See, e.g.*, Bolchos v. Darrel, 3 F. Cas. 810, 811 (D.S.C. 1795) (No. 1607) (Article 14 of the U.S.-France Treaty of Amity and Commerce, 17 July 1778, 8 Stat. 12, T.S. 83, required forfeiture of the property interest of Darrel's principal, treaty did not mention any "right of action" or "private action," but claimant Bolchos had an actionable claim under the ATCA to restitution of "property" (slaves) wrongfully seized by Darrel); M'Grath v. Candalero, 16 F. Cas. 128 (D.C.D. S.C. 1794) (No. 6810) (1778 U.S.-French Treaty of Amity and Commerce, *supra* re: treaty, see *id.*, 16 F. Cas. at 127, did not mention any "right of action" or "private action," but was used as the U.S. plaintiff's "tort" remedy; ATCA addressed by analogy and per dictum; *cf* arts. 17, 22 of the treaty, recognizing that some individuals shall be "bound to make Satisfaction for all Matter of Damage, and the Interest thereof, by reparation, under the Pain and obligation of their Person and Goods," "full Satisfaction shall be made"); 1 Op. Att'y Gen. 57 (1795) (apparently the U.S.-British Treaty of

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

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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).

112. *Compare* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) *and* Beanal v. Freeport McMoRan, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997) (dictum) *with* The Paquete Habana, 175 U.S. 677, 694, 700-01, 707-08 (1900); The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871) ("generally accepted"); The Antelope, 23 U.S. (10 Wheat) 66, 115, 119, 121 (1825); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796); *Filartiga*, 630 F.2d at 881 ("general" assent); *Estate of Cabello*, 157 F. Supp. 2d at 1359 ("by a 'generality' of states"); *Xuncax*, 886 F. Supp. at 187 ("It is not necessary that every aspect of what might comprise a standard [under customary international law] be fully defined and universally agreed upon before a given action . . . is clearly proscribed under international law. . . ."); Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988) ("To meet this burden, plaintiffs need not establish unanimity among nations. Rather, they must show a general recognition among states that a specific practice is prohibited."); LAW AND LITIGATION, *supra* note 4, at 25, 28-29, 35-36, 83-84, 92-94, 96-98, 131; INT'L LAW AS LAW, *supra* note 37, at 1-3, 10-11 nn.2-4, 15-18 n.14, and cases cited.

113. *Compare Doe*, 110 F. Supp. 2d at 1304 *with* Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir. 2001) ("This court has . . . never held that a *jus cogens* violation is required"); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (imprisonment, among other violations); Weisshaus v. Swiss Bankers Ass'n, 225 F.3d 191 (2d Cir. 2000) (concerning war crimes, among other violations); Kadic v. Karadzic, 70 F.3d 232, 242-43 (2d Cir. 1995) (war crimes); Nguyen da Yen v. Kissinger, 528 F.2d 1194, 1201-02 n.13 (9th Cir. 1975); Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 5, 7-8 (D.D.C. 1998) (claims regarding war crimes, hijacking, mutilation, among others); Adra v. Clift, 195 F. Supp. 857, 864 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795); 26 Op. Att'y Gen. 250 (1907); 1 Op. Att'y Gen. 57 (1795). *See also M'Grath*, 16 F. Cas. at 128 (dictum addressing any violation).

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]

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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.

116. *See* 10 U.S.C. §§ 818, 821; LAW AND LITIGATION, *supra* note 4, at 147; CRIMINAL LAW, *supra* note 4, at 243, 254-55.

117. Concerning state responsibility to engage in such efforts, see, e.g., U.N. CHARTER, pmbl., arts. 1(3), 55(c), 56.

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