1-1-1998

Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v. Unocal and the Alien Tort Claims Act

Robert J. Peterson

Follow this and additional works at: http://chicagounbound.uchicago.edu/roundtable

Recommended Citation

Available at: http://chicagounbound.uchicago.edu/roundtable/vol5/iss1/10
Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v Unocal and the Alien Tort Claims Act

ROBERT J. PETERSON†

Introduction

On March 25, 1997, U.S. District Court Judge Richard A. Paez of the Central District of California in John Doe I v Unocal Corp. ruled that American and foreign companies doing business abroad can be held liable in U.S. courts for human rights violations committed solely by a foreign partner, even when that foreign partner is a sovereign state, thus enabling plaintiffs to seek a verdict on the merits in their suit against Unocal. Although the law under which this suit was brought—the 1789 Alien Tort Claims Act ("ATCA")—putatively grants foreigners relief in U.S. courts for harms in violation of international law, the conditions of Unocal leave open a much broader use of the ATCA than a limited application to human rights cases. Because one of the defendants named in the suit is a French company with limited U.S. contacts, Judge Paez may plunge the judiciary into a foreign policy debate over the secondary sanctions that his holding seems to permit. By establishing American jurisdiction over these types of activities, the ATCA and

†. Robert J. Peterson is a J.D. candidate at the University of Chicago. He received his B.A. from Trinity University in 1990 and his M.A. in International Relations from the University of Chicago in 1992. He would like to thank the Honorable Diane P. Wood, U.S. Court of Appeals, Seventh Circuit, and Senior Lecturer at the University of Chicago Law School for her suggestions on an earlier draft, Rajeev Malik and Robert Blumel for their ideas and comments and, most especially, Kuang-chi Chang for her comments and support.

1. 963 F Supp 880 (C D Cal 1997).
the application of joint and vicarious tort liability may provide human rights activists, American labor organizations, and, conceivably, the U.S. government with a powerful tool against foreign "rogue" states.

Secondary sanctions have recently come into vogue among American congressional leaders as a coercive economic foreign policy weapon against foreign governments perceived to be hostile to American strategic or humanitarian interests. In terms of the degree of coercion, sanctions in general fall somewhere between diplomatic protests on one end of the spectrum, and military force on the other. Yet unlike traditional economic sanctions that forbid domestic firms from conducting business with the "rogue" state, secondary sanctions such as the Helms-Burton Act, the Iran-Libya Sanctions Act and various recent state and municipal procurement restrictions impose penalties on foreign companies conducting business with that state as well. As such, secondary sanctions are more aggressive than traditional economic sanctions.

This Comment investigates the use of the ATCA as a potential form of secondary sanction in pursuit of broader foreign policy goals. Using the ATCA and common law principles of joint tortfeasor liability as a foreign policy tool inevitably raises international jurisdictional issues as well as domestic legal and jurisdictional questions. Already, substantial research has been conducted on the legality of secondary sanctions in the Helms-Burton Act. However, that issue remains unresolved. Yet, are secondary sanctions sound from a policy (as opposed to a strictly international legal) perspective? More interesting, perhaps, is the question of why secondary sanctions of this nature have


5. See Act of June 25, 1996, ch 130 § 1, 1996 Mass Acts 210. Cities with procurement restrictions include Santa Monica, San Francisco, and Oakland, CA; Takoma Park, MD; Ann Arbor, MI; Carborro, NC; Madison, WI. These laws are cited in David Schmahmann and James Finch, The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar), 30 Vand J Transnatl L 175, 176 n 1-2 (1997).

Judicially Imposed International Sanctions

suddenly increased in popularity among the executive, legislative, and (possibly) judicial branches of the U.S. government, and what impact they may have on the international economic and political system.\(^7\)

Part I of this Comment describes the background of *Unocal* and discusses its implications for U.S. foreign policy and foreign investment in so-called "rogue" nations. Part II discusses the theory behind *Unocal*'s expansion of the ATCA to include vicarious and joint tort liability, including the possible international jurisdictional and domestic separation of powers problems inherent in the issue. Part III reviews the concept of secondary sanctions or boycotts and the reasons behind their sudden popularity as a foreign policy tool.\(^8\) This Part discusses the concept of secondary sanctions using a political realist/neorealist perspective, arguing that such sanctions can be anticipated as a response to the growing fears of "system free-riding" and "relative gains" strategies by a precariously placed global hegemon. Part IV of this Comment, in turn, suggests that *Unocal* itself is a direct result of the concerns voiced in Part III and that the use of such lawsuits will likely increase, despite tenuous foundations in customary and treaty-based international law.\(^9\) Finally, this Comment argues that, despite the political questions such lawsuits will necessarily pose for the courts, an expanded joint tort liability for human rights abuses using the ATCA will likely complement, rather than conflict with, executive branch diplomatic efforts (whatever they may be).

### Part I: The ATCA Before and After *Unocal*

According to the *Unocal* complaint, in 1994 and 1995 the Burmese military junta (known by the acronym "SLORC," the State Law and Order

---

7. One problem that seems to plague academic discussions of the legality of secondary sanctions is their focus on the technical legality of an action or policy. The reasons behind the international consensus forming the basis of these customary laws are looked at almost as an afterthought. Realist theorists are quick to point out that, because they lack any real enforcement mechanism, international laws are not binding in any strict sense. Nations adhere to them because they are self-enforcing in that it is in the individual best interest of each state to do so. As Thomas Hobbes wrote, "covenants without swords are but words," and treaties derive their strength "not from their own nature, for nothing is more easily broken than a man's word, but from fear of some evil consequence upon the rupture." Thomas Hobbes, *Leviathan* at 105 (Collier 1962). It is the threat of these underlying "evil consequences," and not secondary sanctions' adherence to the precepts of the Third Restatement of Foreign Relations Law of the United States, that will determine whether such domestic laws will stand.

8. The term "foreign policy" in this sense is used broadly to mean any government policy relating to foreign (state) actors. As will become apparent, one problem arising from this issue is that such "foreign policies" involve not just the federal executive branch, but also the legislative and executive branches at the state and local levels, and, this Comment will argue, potentially the federal judicial branch as well.

Restoration Council) engaged in wholesale expropriation, enslavement, rape, and murder of local Burmese villagers as part of the construction of the Yadana gas pipeline. This joint venture has brought together SLORC and the Burmese state-owned Myanmar Oil and Gas Enterprise ("MOGE") with the American Unocal Corporation and the French oil company Total, S.A. ("Total") in a massive project stretching through much of Burma and Thailand. It is expected that, once operational, this project, which represents the largest single foreign investment in Burma, will bring vital hard currency and economic benefits to the cash-strapped country.\(^\text{10}\) Equally importantly, the $1.2 billion project is also intended to lend a certain degree of international credibility to the SLORC regime. SLORC has been subject to considerable international opprobrium following its brutal seizure of power in 1990, the jailing of dissident Nobel Prize laureate Aung Sang Suu Kyi, and the subsequent divestiture of prominent foreign companies such as Apple Computer, Macy's, Levi-Strauss, and Heineken.\(^\text{11}\) For their part, Unocal and Total view Burma's vast gas reserves as a vital part of a long-term strategy to compete with archrivals Exxon (with gas operations in Indonesia) and Royal Dutch Shell (with similar operations in Nigeria).

Although neither Unocal nor Total directly participated in these heinous human rights violations, the plaintiffs have accused the two companies of both benefiting from, and paying for, SLORC's activities. Alleging that both companies knew or should have known about SLORC's reputation (including its predilection for using murder, torture, and rape as political tools), the plaintiffs seek to hold the companies jointly liable for these offenses (along with MOGE and SLORC) under the 1789 Alien Tort Claims Act.

Unocal represents a logical, progressive expansion of the human rights application of the ATCA. Passed under the First Judiciary Act, the ATCA states simply:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.\(^\text{12}\)

The ATCA largely lay dormant for the country's first two hundred years, until its resurrection in the 1980s in a human rights case, *Filartiga v Pena-Irala*.\(^\text{13}\) This case established jurisdiction over a Paraguayan policeman in his official capacity for the alleged torture and murder of the son of a political

---

13. 630 F2d 876 (2d Cir 1980).
dissident. Following Filartiga, the Second Circuit in Kadid v Karadzic extended this liability to private individuals, finding Bosnian Serb leader Radovan Karadzic subject to suit under the ATCA for his “ethnic cleansing” policies in Bosnia. Unocal takes the final step—it creates joint liability for international law violations.

Perhaps an even more far-reaching aspect of the holding is the fact that Unocal's co-defendant in this case is not an American corporation at all, but a French company with relatively limited contacts with the United States (though not so limited as to be less than the “minimum contacts” requirement of personal jurisdiction laid out in International Shoe Co. v Washington and Helicopteros Nacionales de Colombia, S.A. v Hall). As such, Unocal could conceivably extend vicarious liability to foreign companies with dealings in countries with which, for a number of possible reasons, American companies are banned from working. As shall be discussed, a letter from the State Department's legal adviser to Judge Paez indicates that not only does the State Department not oppose this possibility, but also it may in the future support it.

Part II: The ATCA and New Concepts of Joint Liability for Human Rights Abuses

A. JOINT AND SEVERAL ENEMIES OF HUMANITY

The theory underlying the plaintiffs' case in Unocal is reasonably straightforward: given that the Second Circuit determined in Kadid v Karadzic that a U.S. district court may assert jurisdiction over a non-state actor accused of committing a tort in violation of “the law of nations,” it follows that such jurisdiction can be exercised over non-state actors who, under statute or at common law, could be jointly liable for such a tort in a domestic context. At least in this particular situation, Unocal, Total, MOGE, and SLORC were joint venture partners subject, at least in the United States, to partnership-like liability.

14. 70 F3d 232 (2d Cir 1995).
15. 326 US 310, 316 (1945).
17. A similar, though unrelated, case in New York against Royal Dutch Shell for its operations in Nigeria could also establish such jurisdiction. See Hari M. Osofsky, Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations, 20 Suffolk Transnatl L Rev 335, 396 n 13 (1997), citing Wiwa v Royal Dutch Petroleum Co., No 96-CV-8386 (S D NY, filed Nov 8, 1996). Nigeria is another country against which the United States has imposed export bans following the executions of several prominent dissidents, including Ken Saro-Wiwa.
19. See, among others, Harrell and Sumner Contracting Company, Inc. v Peabody Peterson Co., 546 F2d 1227, 1229 (5th Cir 1977) (noting that “the rights, duties, and
However, in practice, and in an international context, the theory underlying *Unocal* quickly grows complicated. Previous uses of the ATCA in human rights cases involved defendants who directly perpetrated human rights abuses. These cases did not involve a partnership relationship in which the defendant acted, arguably, a moral "grey area." Moreover, in each previous case the defendants were either individuals or governments, not corporations. In these past situations, the ATCA provided foreign plaintiffs with standing and a cause of action in U.S. courts against individuals who undoubtedly committed criminal offenses—not simply torts—under international law. Furthermore, they were "simple" cases, where the actual question facing the court was one of jurisdiction in the strict, legal sense. That is, while separation of powers concerns entered into the decisions of *Filartiga*, *Kadic*, and *Tel-Oren v Libyan Arab Republic*, in each case the violations alleged and the violators themselves were of the type unlikely to provoke jurisdictional challenges by either the White House or a foreign power. Thus, the separation of powers fears were mostly hypothetical.

Such is not the case in *Unocal*. While under American statute and at common law, partners of a business enterprise are jointly and severally responsible for the actions of other partners in the course of business activities, such joint liability is far more circumspect when the allegation is of a criminal nature. Granted, a crime may also be a tort, but torts are perceived as private wrongs, while crimes typically entail moral condemnation and a community response.

While this distinction has its own ramifications in a U.S. court, where the focus liabilities of ... [a] joint venture are governed, in general, by principles of partnership law); *Woolard v Mobil Pipe Line Co.*, 479 F2d 557, 562 (5th Cir 1973) ("The doctrine of joint venture, however, is one of imputed, not actual, negligence; if one or two joint venturers is negligent, then the negligence of the other is immaterial to the imposition of vicarious liability upon him."); *Russell v Thielen*, 82 S2d 143, 145 (Fla 1955) ("The [joint venture] relationship is quite similar to that of partnership and is governed by the principles which constitute and control the law of partnership.").

20. The issue of whether the ATCA creates a cause of action for foreign plaintiffs is contested. Judge Bork, concurring in *Tel-Oren v Libyan Arab Republic*, 726 F2d 774, 811 (DC Cir 1984) asserts that the ATCA grants jurisdiction to U.S. courts, but does not provide a cause of action for foreign plaintiffs suffering a tort in violation of international law. Under this view, a foreign plaintiff must still show that some U.S. statute or treaty grants individuals a right to sue in American courts for the alleged human rights violation. The ATCA merely permits U.S. courts to hear such cases once a plaintiff can establish such a cause of action.


22. 726 F2d 774 (DC Cir 1984) (cited in note 20).

23. Robert Charles Clark, *Corporate Law* § 1.2.1 at 6 (Little, Brown 1986).

24. Consider *State v Gumanga*, 395 NW2d 344, 346-47 n 3 (Minn 1986) (discussing the due process problems inherent in attaching criminal penalties to instances of vicarious liability, particularly when the defendant lacks knowledge of the wrongdoing or when there is little moral culpability).

is more remedial in nature, in an international setting the distinction is of a potentially jurisdictional nature.

International crimes committed by individuals, with some very important exceptions, are often tried by international tribunals such as those established under the Charter of the International Military Tribunal (the Nuremberg Trials) or under United Nations Resolution 827 (Yugoslavia). The accusation of "crimes against humanity" implies that the court overseeing the charges should represent all of humanity, at least in theory. Under most other circumstances, a state's jurisdiction vis-à-vis violations of its own laws are limited to what has been called the "Protective Principle" and the "Passive Personality Principle" as described by Section 402 of the Third Restatement of Foreign Relations Law. Section 402 essentially confines a state's extraterritorial jurisdiction to its own citizens, issues directly affecting its own citizens, and other issues of compelling national interest. However, Section 404 of the Third Restatement also describes the long-standing international law concept of "universal jurisdiction," by which certain crimes brand the criminal hostis humani generis, an enemy of the human race subject to prosecution by whomever finds him.

It is upon this concept of universal jurisdiction that the courts in Filartiga and Kadic based international jurisdiction under the ATCA. Indeed, Judge Paez was very careful in Unocal to describe the plaintiffs' complaint as one involving slavery, and not simply torture, murder, or state-sponsored rape, because of previous judicial disagreements over the scope of such universal jurisdiction. While it is generally agreed that universal jurisdiction may be

---

28. The Third Restatement § 402 (cited in note 9) states, in part:
   Subject to §403, a state has jurisdiction to prescribe law with respect to:
   (1)(a) conduct that, wholly or in substantial part, takes place within its territory;
   (b) the status of persons, or interests in things, present within its territory;
   (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
   ...
   (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.
29. The Third Restatement § 404 (cited in note 9) states:
   A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in §402 is present.
30. Filartiga, 630 F2d at 880; Kadic, 70 F3d at 239.
31. "[Torture] and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law." Kadic, 70 F3d at 243. Yet piracy, some war crimes, and participation in the slave trade "violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." Id at 239.

Why piracy and slave-trading are considered individual (as opposed to government)
imposed for torts as well as for crimes, the imposition of universal jurisdiction for joint tortfeasor liability may expand the concept beyond what its historic underpinnings warrant. It is one thing to declare an individual torturer hostis humani generis, but quite another to assert jurisdiction over a foreign company as an “enemy of the human race” for human rights violations of its joint venture partner.

Unocal does not itself address this problem, as it rests its jurisdictional determination on U.S. law. Both Unocal and Total are incorporated in the U.S. and have the minimum contacts with California and the U.S. to establish jurisdiction under both International Shoe and Section 402 of the Third Restatement. Under the jurisdictional limits of both International Shoe and the Restatement, the U.S. can assert jurisdiction against both its corporate citizens and the extraterritorial conduct of foreign citizens having substantial effects within U.S. territory. Although the activities alleged in Unocal took place abroad, Total’s links with the U.S. are substantial enough to make it subject to U.S. court jurisdiction.

Furthermore, the plaintiffs in Unocal allege that both Unocal and Total directly benefited from these human rights abuses, subsidized them, and either knew or should have known that these abuses were happening or were likely to

---

32. The Third Restatement § 404 comm b (cited in note 9) states: Universal jurisdiction not limited to criminal law. In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.


happen. Under this theory, Unocal and Total were not mere silent partners perhaps jointly liable under partnership law, but otherwise morally blameless. By authorizing and paying for the government's "clearing activities and security protection" for the Yadana project after it had been widely reported in the world press that SLORC typically engaged in widespread human rights abuses, the plaintiffs posit, Unocal and Total directly benefited from these abuses. Rather than being simple passive investors, the two companies allowed SLORC to act as an agent, with results that effectively blur the distinctions between vicarious and joint liability. As such, according to Judge Paez, Unocal and Total essentially stand accused of engaging in slavery:

Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, the private defendants have paid and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor.

B. JOINT HUMAN RIGHTS LIABILITY AGAINST FOREIGNERS: JUS COGENS AND THE POLITICAL QUESTION DOCTRINE

Despite this logical and seemingly reasonable application of the ATCA and concepts of universal jurisdiction, Unocal presents two fundamental conflicts that are unlikely to be addressed by sound legal arguments and revolve instead around political issues and separation of powers concerns. For a series of reasons explained below, however, neither foreign concerns over extraterritorial jurisdiction nor conflicts with the executive branch over foreign policy issues are necessarily fatal to the use of Unocal-type sanctions against foreign companies.

35. Unocal, 963 F Supp at 885 (cited in note 1).
36. In 1989 and 1990, it was widely reported in the western press that the SLORC regime engaged in a host of human rights abuses, including the jailing and torture of dissidents. See, for example, Michael Bociurkiw, Military Regime Turns Screws on Fearful Burmese; Myanmar: A Demoralized Nation With a New Name Lives in Terror Despite the Regime's Promise of Elections Next Year, LA Times M3 (Oct 15, 1989); Charles P. Wallace, Myanmar Crackdown Intensifies: Military Authorities Crush Monks' Protest and Arrest Opposition Politicians, LA Times A5 (Nov 9, 1990).

By 1992, the Western media had also begun reporting cases of the widespread use of slave labor in Burma. See, for example, Peter Goodspeed, Horror Tales Spill From Myanmar, Toronto Star A2 (Mar 9, 1992); Scorpion Regime: All Necessary Pressure to End Persecution in Burma, Houston Chroniclal B10 (Editorial) (Mar 21, 1992); Jane Stevens, Student-Soldiers Wage War for a Myanmar Democracy, LA Times A1 (Feb 23, 1993); John N. Maclean, Abuses in Burma Stir Questions of Conscience, Chi Trib 3 (Oct 25, 1993).
37. Unocal, 963 F Supp at 892.
1. Indirect Liability, Universal Jurisdiction, and Jus Cogens Norms

The distinction between direct and indirect liability becomes important when contemplating what effect an expanded use of the ATCA could have on American foreign policy. Although there may not be any legal reasons why "indirect" joint and vicarious liability approaches may not be as valid under the ATCA as they are under other tort cases, in practice substantial hurdles exist. First, despite the civil remedies being sought, the charge against the defendants is essentially criminal in nature. In each of the progressively advancing ATCA cases, the defendants are accused of consciously violating jus cogens norms. As such, it is impossible not to separate the defendant's intentions from the alleged activities. Whereas tort law traditionally focuses on remedies, and not necessarily on reasons, for an offense, criminal law emphasizes the intent of the perpetrator and society's moral condemnation of these actions. Since universal jurisdiction historically has been invoked against only the most heinous offenders (in essence, individuals violating international jus cogens norms), it is unlikely that the international community will accept its invocation for anything less than a criminally negligent violation of such a norm.

Theoretically, at least, the jurisdiction granted under the ATCA is not limited to violations of jus cogens. The statute itself grants federal jurisdiction over any tort violation of the "law of nations," which has since been interpreted to mean international law, including customary international law. Customary international law is not limited to jus cogens, and there appears to be no statutory reason why an alien could not use the ATCA to sue for other types of violations such as uncompensated expropriation of property. Indeed, the courts in Filartiga and Kadic, as well as Judge Edwards's concurring opinion in Tel-Oren, suggest that ATCA jurisdiction can encompass far more than jus cogens violations.

38. Jus cogens is a "peremptory norm of general international law" that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on Treaties, Art. 53. Statesponsored torture might easily be considered violations of jus cogens because, as the Ninth Circuit noted in Siderman de Blake v Republic of Argentina, 965 F2d 699, 717 (9th Cir 1992), "That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens."


40. Filartiga, 630 F2d at 881 (cited in note 13) (writing that, in considering ATCA jurisdiction, courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"); Kadic, 70 F3d at 241 (cited in note 14) ("[C]laims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Claims Act]."); Tel-Oren, 726 F2d at 789 (cited in note 20) ("[V]iolations of the "law of nations" under section 1350 are not limited to Blackstone's enumerated offenses."). But see Tel-Oren, 726 F2d at 813 (Bork concurring) (stating that the "law of nations," as construed in the ATCA, is limited to piracy, violation of safe-conducts, and infringement of the rights of ambassadors).
The application of the ATCA in Unocal-type cases against foreign companies will undoubtedly spark foreign jurisdictional challenges. Unlike previous ATCA cases, foreign corporations—even foreign corporations directly involved in human rights abuses—will not be without defenders. Although such corporations will not be able to invoke sovereign immunity under the Foreign Sovereign Immunities Act, even when such a company is state-owned, due to the commercial activities exception, many countries consider their largest corporations "national champions" not just imbued with legal personhood but representing broader national interests as well. This is especially true of those countries, such as France, that have been most willing to deal with rogue nations in the past. As has been demonstrated by reaction to the Helms-Burton Act, some countries may perceive ATCA-based tort attacks on their companies as attacks on their sovereignty.

Using the ATCA against foreign companies dealing with rogue nations will doubtlessly draw the United States into deep jurisdictional conflicts with other states because of the secondary sanctions embedded within such suits. Perhaps instinctively realizing this, the Filartiga, Kadic, and Unocal courts each appeared to sense that limiting the ATCA's use to jus cogens violations is perhaps the best way to prevent the courts from becoming embroiled in either a separation of powers dispute with the executive branch or jurisdictional debates with other countries.44

---

42. Verlinden B. V. v Central Bank of Nigeria, 461 US 480, 488 (1983) (holding that the Foreign Sovereign Immunities Act does not apply to "actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States").
44. For a taste of this ambiguity, see Filartiga, 630 F2d at 881-82 ("The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." Yet, "although there is no universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed to all by the [U.N. Human Rights] Charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture."); Kadic, 70 F3d at 250 ("Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry [on the torture case] reinforces our view that adjudication may properly proceed."); and Unocal, 963 F Supp at 894 ("[W]here jurisdiction is available for jus cogens violations, it is less likely that judicial pronouncements on a foreign sovereign's actions will undermine the policies behind the act of state doctrine.").
288 Roundtable

Using the ATCA in this manner—even in cases of *jus cogens* violations—would, at one time, probably have run afoul of the "act of state" doctrine. In its simplest form, the act of state doctrine holds that U.S. courts will not sit in judgment of sovereign acts by foreign states.\(^45\) Traditionally, this limit rested on notions of "sovereignty and comity" so that rulings by American courts would neither unduly infringe on the rights of other nations nor bring the United States into conflict with them.\(^46\) However, perhaps recognizing that 1) the "rights" national sovereignty entails are often hazy, and 2) avoiding "stepping on the toes" of other nations is not necessarily a laudable goal in itself when other issues are at stake, the U.S. Supreme Court has since shifted the focus of the act of state doctrine away "from the notions of sovereignty and the dignity of independent nations ... to concerns for preserving the 'basic relationships between branches of government in a system of separation of powers,' and not hindering the executive's conduct of foreign policy by judicial review or oversight of foreign acts."\(^47\)

*Unocal* itself is a response to the changing emphasis of the act of state doctrine. Restricting itself, as it does, to *jus cogens* violations, the court appears to want to limit the jurisdictional challenges the United States will face abroad, and not just through its legal ability to invoke universal jurisdiction. Crimes such as piracy, slavery, genocide, and, almost definitely, torture are so universally reviled that foreign states will have difficulty challenging the United States’s right to prosecute them, regardless of the soundness of the legal theory backing their objections. As the international debates surrounding the Helms-Burton Act have shown, the lack of a single controlling authority on international law means disputes over legal interpretation are often fought and won in the political and public relations arenas. Narrowly construing joint liability for *jus cogens* violations by foreign companies will make this international jurisdictional battle far easier to win.

2. The ATCA and the Political Question Doctrine

While international jurisdictional disputes may be assuaged or countered by a narrow construction of *jus cogens* joint liability, this technique does not ameliorate potential conflicts between the courts and the executive branch. Stated differently, the exercise of extraterritorial jurisdiction under the ATCA raises serious separation of powers concerns. In each of the above cases, from *Filartiga* and *Tel-Oren* through *Kadic* and *Unocal*, the courts felt compelled to address the

---

45. *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.")


possibility that its decisions might encroach on foreign policy areas best left to
the executive branch.\footnote{Filartiga, 630 F2d at 890; Tel-Oren, 726 F2d at 803-04 (Bork concurring), 823-26
(Robb concurring); Kadic, 70 F3d at 248-49; Unocal, 936 F Supp at 894.}

As can be seen by the opinions in Filartiga, Tel-Oren, and Kadic, the
“political question” doctrine has in many respects merged with the act of state
doctrine,\footnote{See Tel-Oren, 726 F2d at 803.} and, despite its “‘constitutional’ underpinnings,”\footnote{Sabbatino, 376 US at 423 (discussing origins of act of state doctrine).} has little con-
crete statutory or judicial explication. Rather than focusing on issues of comity
or foreign sovereignty, the political question doctrine asserts that the judicial
branch will not decide issues best addressed by Congress or the executive
branch.\footnote{For the modern explication of the political question doctrine, see Baker v Carr,
369 US 186, 211-26 (1962).} As Judge Bork noted in Tel-Oren, questions touching on foreign rela-
tions likely make up the largest class of issues to which the political question
doctrine has been applied.\footnote{Tel-Oren, 726 F2d at 803 (Bork concurring).} Yet as the Supreme Court asserted in Baker v Carr,
not “every case or controversy which touches foreign relations lies beyond ju-
dicial cognizance,” nor is it likely that the executive branch would want it so.\footnote{Baker, 396 US at 211.}
The fact that what constitutes a “political question” is itself so clouded indicates,
to some extent, why the doctrine remains an \textit{ad hoc} self-imposed judicial re-
straint, and not a firm jurisdictional boundary.

The Supreme Court in \textit{Baker v Carr} laid out a series of elements that
indicate that the court may be treading on a political question:

Prominent on the surface of any case held to involve a political question is
found a textually demonstrable constitutional commitment of the issue to
a coordinate political department; or a lack of judicially discoverable and
manageable standards for resolving it; or the impossibility of deciding
without an initial policy determination of a kind clearly for nonjudicial
discretion; or the impossibility of a court’s undertaking independent
resolution without expressing lack of the respect due coordinate branches
of government; or an unusual need for unquestioning adherence to a
political decision already made; or the potentiality of embarrassment from
multifarious pronouncements by various departments on one question.\footnote{Id at 217.}

These guidelines, however, give the courts considerable latitude, as can be
seen from the cases. In fact, these guidelines are apparently meant to be applied
on an \textit{ad hoc} basis, as opposed to being applied as a set of questions that are \textit{a}
priori off-limits to judicial consideration. This, at least, was the conclusion drawn by the Second Circuit in Kadic, in which Judge Newman stated:

[.]Judges should not reflexively invoke these [political question and act of state] doctrines to avoid difficult and somewhat sensitive decisions .... We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

At the heart of the political question doctrine is the concern that judicial pronouncements on an issue will directly interfere with larger diplomatic pursuits. As Justice Harlan noted while refusing to rule on the legality of communist Cuba's expropriation of foreign citizens' property, "[p]iecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch." Since diplomacy is a very time-sensitive affair and even federal judicial doctrinal disagreements among the circuit courts are resolved by the Supreme Court very slowly (if at all), one might anticipate that the State Department would take a keen interest in defending its sole authority on such matters. Yet in three of the four ATCA cases noted above (Filartiga, Kadic, and Unocal), the State Department stated an interest in, but no opposition to, the litigation and the courts' use of Section 1350.

Given the political and diplomatic stakes involved, it is interesting that the State Department has not opposed the expanded use of the ATCA. It appears to be the courts, rather than the executive branch, that have voiced the most concern about blurring the line of the political question doctrine. For example, shortly after his initial decision to permit the case against Unocal and Total to proceed, Judge Paez asked the State Department for "its views concerning the ramifications this litigation may have on the foreign policy of the United States as established by Congress and the Executive." State Department Acting Legal

55. See Tel-Oren, 726 F2d at 803 n 8 (Bork concurring) ("It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack on consensus about its meaning among the members of the Supreme Court.")
56. Kadic, 70 F3d at 249.
57. Sabbatino, 376 US at 432.
59. Letter from the Honorable Richard A. Paez to Michael J. Matheson, Acting Legal
Adviser Michael Matheson responded that, despite the preliminary nature of the case, "the Department can state that at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma." 60

Given the nature of the Unocal case, the broad concern among large American corporations over the status of this case, and the vociferous foreign opposition to the growing American use of extraterritorial legislation, it is puzzling that the State Department in this case gave Judge Paez something as close to a ringing endorsement as its hedged position would allow. To no small degree, the reasons therefor may stem from the very egregious nature of the torts involved (jus cogens violations) and the application of universal jurisdiction. Yet even more than that is probably at issue.

In his dissent in First National City Bank v Banco Nacional de Cuba, Justice Brennan argued that not even the executive branch’s declaration that adjudication will not interfere with foreign relations is conclusive on the issue of whether or not an issue is fit for judicial resolution. 61 However, this view ignores the possibility that a judicial resolution to a specific issue may advance the foreign policy goals of the executive branch in ways that complement a particular administration’s own efforts. As the Supreme Court stated in Sabbatino, “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.” 62 In other words, a statement that, taken from the judiciary’s point of view, reaffirms the court’s ability to resolve a case without infringing on the domain of the executive branch, might be interpreted by the State Department as sanctioning a view of the courts as an active ally in advancing a “consensus” approach to foreign policy.

A review of ATCA cases and the diplomatic context surrounding them may illuminate what forms such “consensus” might take. Filartiga coincided with a stated Carter Administration concern over international human rights; 63 Kadı proceeded at a time when the Clinton Administration was considering increasing diplomatic and military pressure against the Bosnian Serbs in an effort to end the Balkan civil war. 64 Similarly, the State Department issued its reply to Judge Paez only a few weeks after the Clinton Administration imposed a blanket ban on new U.S. investment in Burma (despite virulent opposition from Unocal). 65

---

63. See, for example, Nine Who Helped Shape Carter's Policy, US News & World Rpt 23 (Jan 28, 1980).
64. See Inter Press Service, Bosnia: Sarajevo Pleads for Renewed Sanctions Against Belgrade, 1995 WL 2257888 (Jan 10, 1995); U.S. Still Opposed to Relief for Serbia, The Orange County Register A13 (Aug 4, 1995).
each case, judicial actions strengthened, rather than conflicted with, executive branch diplomacy.

Whether or not these judicial actions were meant to support these executive branch goals is not as important as the fact that the court's rulings roughly lined up with foreign policies concurrently advanced by the State Department and the White House. More likely, perhaps, is the possibility that the political question doctrine in each case worked to eliminate those cases which would have contradicted executive branch foreign policy goals, while advancing those that supported those goals through the ad hoc process described by Judge Newman. If so, Unocal may represent a stronger, more unified, and judicially focused approach to secondary sanctions and problems of "systemic cheating" than would be possible through the executive branch and Congress alone.


Over the past two years the United States has become entangled with a number of its trading partners over the issue of secondary sanctions. These sanctions may be used to influence a particular country's internal or foreign policies by punishing other countries' companies that deal with it (and thereby theoretically persuading them to effect a boycott of their own). Secondary sanctions all attempt to close a growing flaw in American economic diplomacy: the fact that unilateral coercive sanctions prohibiting U.S. companies from doing business with rogue nations are increasingly ineffective as the world economy becomes increasingly "global." Whereas throughout the post-World War II period the United States either dominated the world economy through sheer mass or else dominated the political environment through its undisputed leadership of the West, today's international economic environment, despite the existence of a single "superpower," is far less conducive to unilateral American policy-setting. Unilateral export sanctions imposed by the U.S. now frequently result in little more than economic harm to American companies, as foreign companies quickly and competently fill the gap.

This globalization of political power may have dire consequences for international trade itself. According to the theory of hegemonic stability initially laid out  

---

66. Kadic, 70 F3d at 249.
67. Secondary sanctions, or secondary boycotts, as they are sometimes called, are not uncommon in domestic legal settings, especially in the area of labor disputes. Such sanctions have been defined as "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A." Ralph M. Dereshinsky, Alan D. Berkowitz, and Philip A. Miscimarra, The NLRB And Secondary Boycotts 1 (Pennsylvania revised ed 1981), citing Felix Frankfurter and Nathan Greene, The Labor Injunction 43 (Macmillan 1930).
by Charles Kindleberger, liberal international economic regimes require a "stabilizer"—a single country economically and militarily powerful enough to define "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area." Threats to this system take many forms, from trade protectionism and monopolies to terrorism and military threats, and the hegemon incurs costs by maintaining this system. Such a system is particularly threatened by the "free rider" problem, whereby cheaters benefit from the open economic order yet avoid paying any of the costs of maintaining the system (say, by opening their own markets, by refusing to contribute to collective defense arrangements, or by trading with "rogue" states).

During the Cold War, the United States provided the hegemonic stability needed to maintain the global economic system. Multilateral sanctions against "rogue" states of all sorts were comparatively easy to maintain. "Multilateral" policy was set by Washington, and where allies did not agree, or where "cheating" occurred on economic issues, it hardly mattered—in 1953, for example, the United States alone accounted for nearly 45 percent of the total world manufacturing output. The benefits an open economic regime provided were great enough (both in economic and military terms) that the United States was willing to bear the cost alone, where necessary.

The end of the Cold War and the growth of the world economy have made American systemic hegemony increasingly difficult to maintain, despite American preeminence as the world’s only remaining superpower. The American economy itself accounted for approximately 25 percent of the total world economy in 1992, and the absence of a single unifying "threat" to the system has made systemic "cheating" far more of a problem.

What constitutes a "rogue" state or "cheating," of course, is not always clear. Some activities and actors are obvious—the Soviet Union was an obvious military threat to the free market economic order of the West, and engaging in neo-mercantilist trade policies and predatory pricing strategies are obvious free rider problems. However, issues involving human rights may also involve threats to this economic order. The use of slave and child labor, apart from its ideological concerns, can arguably pose an economic threat to the dominant economic

---


order, as demonstrated by the emphasis the issue has received in Europe and the United States. Moreover, human rights abuses as ideological issues themselves can pose a threat to this economic order, albeit indirectly. Rampant flouting of what the industrialized world considers basic human rights can create political instability within countries that in turn threatens the overall stability of the economic regime. Arguably, this is the type of threat South Africa’s apartheid system posed to the West, which perhaps explains why opposition to the system was so widespread.

This situation presents the United States with a game theory problem that combines a free-rider issue with a fear of “relative gains.” As the neo-realist scholar Joseph Grieco has noted, nations often fear that trading relationships or other agreements disproportionately benefit others in the relationship and thereby pose a threat to the balance of power (economic or otherwise) among the participants. Under such circumstances, the potential is high that the United States pays the cost of maintaining the system, while its allies not only reap its benefits, but also take advantage of market opportunities that open as a result of American cost-bearing actions. Secondary sanctions such as the Helms-Burton Act, the Iran-Libya Sanctions Act, and various municipal and state procurement bans on companies doing business in Burma, Indonesia, and elsewhere can be viewed as a response to the changing nature of American economic and political systemic hegemony.

Part IV: Unocal and the Possibility ofJudicially Imposed SecondarySanctions

Although several nations have criticized secondary sanctions as nothing more than a reflection of American parochial interests, these criticisms fail to recognize that such interests have always driven U.S. sanctions policies. What has


77. Under such a scenario, the United States, for example, acts to maintain systemic stability by opposing the proliferation of nuclear weapons generally and, more pointedly, by imposing an export ban on countries such as Iran and Libya. In doing so, however, it foregoes certain market opportunities in these countries. If other countries’ companies step in to fill this void, the United States not only does not reap any systemic benefits from its actions (neither, for that matter, does anyone else), but its companies are placed at a competitive disadvantage vis-à-vis foreign companies due to this lost market share.

78. It is also important to note that past American use of its political power to maintain the stability of the Western economic system was not always based on consensus and cooperation among allies. In some cases, as with the American blockade of Cuba during the Cuban Missile Crisis, the “legality” of American actions were upheld under customary international law only after the U.S. coerced or cajoled a substantial number of allies into agreeing with it. See Louis Henkin, How Nations Behave: Law and Foreign Policy 279-302 (Columbia 2d ed 1979). In other cases, as with the Suez Crisis in 1956, the United States was willing to use direct unilateral economic and political pressure on even its closest allies in order to forestall a threat to the stability of the international
changed is that in the past such parochial interests were effectively pursued under an institutional setting through which the United States could cajole and coerce recalcitrant allies into following “rules” that were at least theoretically in the best interest of all. As the cost of such leadership has increased and the corresponding benefits decreased, the temptation to act unilaterally, and not necessarily in the best interest of the system, has increased as well. Secondary sanctions in these cases represent a last-ditch attempt to maintain the stability of the economic system by forcing other states to internalize the cost of this maintenance.

Secondary sanctions shift the cost of the “American-led” international economic regime. For example, assuming a state such as Saddam Hussein’s Iraq poses a threat to the world economic order by creating instability in the Middle East, the United States might try to contain this threat through broad-based multilateral economic sanctions. Regardless of the efficacy of such sanctions, however, the temptation for certain nations to “cheat” and covertly (or even overtly) trade with Iraq will exist. Iraq, under pressure from the world community, will likely offer better trading terms for a non-hegemon state such as Jordan, France, or Russia than would otherwise be available on the world market. Furthermore, a state may engage in what might be called a “Coca-Cola strategy,” whereby it seeks to establish stronger relationships with a rogue state in order to “lock up” market share and exclusive trading relationships in anticipation of a time when sanctions are lifted. Finally, a regime member-state may simply disagree with the policy reasons for such sanctions, perhaps viewing the sanctions as disproportionately benefiting the hegemon or other member-states or disproportionately burdening themselves.

When a system hegemon is dominant, the hegemon may choose to ignore such cheating and rely on its own preponderance of economic, military, and political power to ensure that the sanctions are effective (or as effective as possible). Alternatively, the hegemon may encourage Pareto-efficient behavior by

---

80. Id at 78.
81. I use this term to describe the situation that has developed in South Africa. During the 1970s, Pepsi-Cola left the South African market to protest apartheid, while Coca-Cola stayed (albeit in Swaziland), arguing that “pressure from the inside” was more effective. Since the end of apartheid, Pepsi-Cola has had a great deal of difficulty reentering the South African market, which is now dominated by archrival Coke. See Alva Edwards, Fizz Gone Out of Pepsi in South Africa, 56 The Weekly Journal 18 (Oct 17, 1997); Drusilla Menaker, Doing Well by Doing Good? Not in South Africa, 3428 Business Week 24 (June 12, 1995).
“bribing” the cheating state into compliance. Under this scenario, the hegemon pays the cheating state (through foreign economic and military aid, preferential trade arrangements, etc.) more than it can gain through cheating, up to the point at which the cost of the “bribe” outweighs the benefits gained to the hegemon by maintaining the efficacy of the system.

However, when the cost of the bribe outweighs the benefits to be accrued through a stable system, secondary sanctions appear as an increasingly appealing alternative. Whereas the bribe is a “carrot,” secondary sanctions are a “stick.” In essence, the hegemon attempts to discourage cheating by imposing a cost on cheaters that is greater than the benefits gained through cheating. They work because even a declining hegemon is nonetheless sufficiently economically powerful that exclusion from its market is a substantial penalty.

As with any coercive diplomatic behavior, however, secondary sanctions are not without cost and are most emphatically of questionable legal standing under international law. They appear vindictive and capricious, and they seem blatantly to disregard other states’ sovereignty. Furthermore, insofar as the imposing state is not a predominant hegemon, it opens the sanctioner to counter-sanctions and the creation of “balancing” coalitions by other states that are themselves threats to the economic order.

Judicially created secondary sanctions in the form of a finding of joint tort liability against a foreign company for violation of jus cogens norms would create the same effect in some cases as congressionally created secondary sanctions. However, judicially created secondary sanctions avoid many of the legal and diplomatic problems inherent in such overt penalties. The effects would be the same because Unocal-inspired judgements could substantially penalize foreign companies involved in a select group of countries where American companies cannot operate because of direct U.S. sanctions. They would essentially impose a cost on externalities to the international economic system that now encourages free-riding behavior and a “prisoners’ dilemma” type “race to the bottom,” insofar as nations currently have little private incentive to penalize rogue nations.

82. In secondary sanctions imposed by both Congress and the courts, the real threatened penalty against foreign companies is exclusion from the U.S. market. If a tort penalty is imposed against a foreign company either under the Helms-Burton Act or as a tort liability in a lawsuit such as Unocal, the company has little choice (barring foreign state intervention or a diplomatic solution) but to either pay or protest the penalty by leaving the U.S. market (and removing itself from the reach of U.S. courts). The alternative to these choices is to subject U.S. property and earnings to court seizure.


85. Such countries would include Burma (as of 1997), Iran (under most circumstances), Cuba, North Korea, and a few others. “Incomplete” U.S. sanctions against other nations (where some, but not all, trade is restricted) are too numerous to mention here.
Judicially Imposed International Sanctions

Such judicially imposed sanctions would also hold many advantages over the more overt, congressionally mandated versions. First, based on *jus cogens* violations and universal jurisdiction, they may well be legally easier to defend in the international arena. More importantly, however, they will probably be easier to defend on public relations grounds. Emanating from a federal district judge, rather than from a politically charged Congress, such rulings might appear less biased and less under the influence of special interest groups such as protectionist labor unions or competing American firms. Likewise, the fact that a trial and discovery would ensue would putatively allow defendant corporations to answer publicly the charges against them, and make the application of sanctions a case-by-case procedure rather than a blanket ban as is currently the case. This approach might either appear more fair or more daunting from a corporate public relations point of view, depending on the circumstances. That such cases would be raised by the alleged victims of these human rights violations (and not by competitors or other economically interested groups) would also enhance the perceived impartiality of the process.

Similarly, the fact that such cases would be limited to *jus cogens* violations would greatly reduce the support these corporations might be able to garner from their own governments and from other countries, while potentially raising the likelihood of an out-of-court settlement that involves the company either removing itself from the rogue state or imposing strict accountability standards with international oversight (either of which will incidentally advance American foreign policy objectives). The fact that U.S. corporations will also be liable for such violations will make the judicial sanctioning approach appear more neutral than congressional sanctions such as the Helms-Burton Act.

Finally, by increasing the cost of doing business in obvious rogue states, albeit on an *ad hoc* basis, a Unocal-inspired application of the ATCA might increase U.S. corporate support for (or at least weaken their opposition to) U.S. economic and diplomatic sanctions against these countries. One current objection to direct, unilateral U.S. sanctions is that they merely allow competing non-American companies to gain market share at American expense. The threat of a potentially debilitating lawsuit against such competitors (or, for that matter, against themselves) might change the cost-benefit calculus they make when politically opposing these sanctions.

Such Unocal-inspired suits are not without problems. As mentioned earlier, unless tightly constrained by the political question doctrine, district courts imposing such sanctions against foreign and U.S. corporations run the very real risk of infringing on the diplomatic prerogatives of the executive branch. Cases involving Burma and Nigeria, for example, are unlikely to work against the diplomatic goals of the State Department and may, in fact, work to the government's benefit. However, Burma and Nigeria are not the only countries in which U.S. and foreign companies work closely with governments routinely accused of human rights violations. China, for example, is widely accused of using slave labor in factories supplying parts for large U.S., Japanese, and European companies, and Indonesia, Turkey, and even Mexico have been accused of torturing
political dissidents and using less-than-gentle means in “clearing” politically unstable regions.

The political question doctrine, if combined with close consultation with the State Department as Judge Paez has done, can easily keep the judiciary from complicating American diplomatic processes. However, in doing so, it may lose the appearance of objectivity that is one of its strengths. Although this would not weaken its access to universal jurisdiction under international law, international law itself—even international law involving *jus cogens* violations—is not a clearly codified process but involves a great deal of international consensus and, failing that, good public relations. Anything that weakens its standing in this manner will complicate its international legal position.

**Conclusion**

Hegemonic stability theory predicts that a declining hegemon will simultaneously attempt to strengthen the international economic system through multilateral structures, while trying to shift the cost of maintaining the system to a broader base.6 These two goals are not mutually compatible and often lead to greater conflict and potentially speed the system’s decline. However, the theory is generally quiet about how these attempts at system-strengthening and cost-shifting occur at the domestic level.

Secondary sanctions may represent an attempt by the United States to shift the costs of maintaining “its” economic regime onto other members of the system. Despite this, however, unilaterally imposed secondary sanctions such as those contained in the Helms-Burton and Iran-Libya Sanctions Acts remain of questionable legality under customary international law.

Given the recent history of ATCA cases, the latest application of joint tortfeasor liability against an American company and a French company for human rights abuses may be an implicit manifestation of a new approach to secondary sanctions. Rather than opening the floodgates on judicial intervention in foreign policy decisions, the case law history of the ATCA indicates that the courts are intensely aware that they are potentially infringing on the executive branch in a way that could be detrimental to the nation as a whole. Nonetheless, in each case the executive branch has tentatively supported the wider application of the ATCA.

The changing nature of the international economic environment may make an expanded use of ATCA liability preferable to the current American use of unilateral direct and secondary sanctions. Although such lawsuits may risk crowding the dockets of our federal courts, judicial sanctions stemming from such suits have the advantage of appearing less capricious, more fair, and more publicly accessible than similar sanctions imposed by Congress or the White House. They also likely rest on stronger international law grounds.

---

Rather than a disadvantage, this case-by-case approach, combined with the deterrent effect created by adverse judgments, will shift the "burden of defense" of these sanctions away from the United States and onto the defendant corporations and their parent countries. The fact that current secondary sanctions such as the Helms-Burton Act can be assailed as violations of international law by other countries shifts the focus away from those foreign corporations that, in the Helms-Burton case, are dealing in expropriated property. Under a Unocal approach, however, it would be harder to shift the public focus away from the human rights violations alleged because specific accusations would need to be made for the suit to continue to go forward.

Given these factors, the Unocal case presents an excellent opportunity for an American federal court to set a precedent outlining the shape extraterritorial joint tort liability for human rights abuses should take. First, such liability should only be imposed on corporations that are accused of violating strict jus cogens norms—prohibitions on slavery, piracy, genocide, hijacking, and the like. Torture and terrorism probably should also be added to this list. Second, such liability should be direct, in addition to being vicarious or joint and several—the offending corporation should have directly benefited from the alleged violation, and not just participated as a silent partner. Third, the mens rea of the offense should be at least criminally negligent in nature—the plaintiff has to argue successfully that the offending company either knew or should have known about the alleged offenses. Alternatively, it would suffice if the company dealt with a country where such offenses are so common that a reasonable person would expect the offenses to occur. If each of these three elements is observed, it is unlikely that the court will encounter either a political question challenge or substantial objections on international jurisdictional grounds that cannot be countered in the court of world public opinion.